ARTICLES

"HOSTAGE DIPLOMACY"—A CONTEMPORARY STATE PRACTICE OUTSIDE THE REACH OF INTERNATIONAL LAW?

BEATRICE LAU*

ABSTRACT

"Hostage diplomacy" loosely describes a phenomenon where states detain foreign nationals under the guise of national law as a means to coerce the foreign policy of another state. The practice violates the human rights of the individual victim and the right of sovereign states to decide their affairs free from any coercive interference. However, "hostage diplomacy" currently seems to be operating in a legal lacuna for two reasons. First, the practice is mischaracterized as if it was a form of "diplomacy," which distracts stakeholders from recognizing its true nature: an act of state-to-state hostage-taking. Second, the convoluted design of the operation renders such determination difficult: the human pawn may have the function of a hostage; however, he or she is officially a "prisoner" convicted and sentenced according to the domestic legal system of the detaining state. Without a proper framework to "pierce the veil" and qualify the situation as state-to-state hostage-taking, states may have limited legal avenues to sanction the issue without being perceived as, ironically, trespassing on the sovereign matter of the perpetrating state. Legal rights that are based on nationality, such as consular assistance and diplomatic protection, are also perceived to be limited for victims who have dual or multiple nationalities, including that of the perpetrating states, due to the doctrine of non-responsibility. This Article aims to identify the contours of "hostage diplomacy" and search for possible legal avenues in international law to address and sanction the practice.

* Beatrice Lau is a humanitarian professional and an international lawyer from Hong Kong. She has worked in Niger, Haiti, Tajikistan, Malaysia, Libya, Tunisia, and Belarus, specialising in humanitarian actions for refugees and migrants in detention facilities. She holds an LL.M in Advanced Studies in Public International Law from Leiden University, and an LL.B in England and Wales. The views expressed in this article are those of the author and do not necessarily reflect those of any institution with which the author was or is affiliated.

I. Introduction

"Hostage diplomacy" is a problematic term. It is problematic because the oxymoron is a composite of "diplomacy"—an instrument of foreign policy governed by well-established legal norms, rules and principles through international law, and "hostage"—whereby the conduct of hostage-taking has been outlawed since the middle of 20th century.

"Hostage diplomacy" loosely describes a phenomenon where states detain foreign nationals as a means to coerce the foreign policy of another state. Unfortunately, this mischaracterization as a form of "diplomacy" distracts the responses of stakeholders: the detained individual may be recognized as an unfortunate victim, but not more than a "bargaining chip" in international relations; states have been addressing the issue only through political means. This approach too conveniently overlooks the fact that a person who is detained in order to compel a third party to do or not do any act as a condition for release is, in fact, a hostage.[1] The phenomenon of

1. *See* International Convention Against the Taking of Hostages art. 1, Dec. 18, 1979, 1316 U.N.T.S. 205.

"hostage diplomacy" warrants a response not only in politics, but also in international law.

This Article aims to identify the contours of "hostage diplomacy" for the purpose of identifying possible legal avenues to address the phenomenon, or to highlight the gaps in existing law where further development is needed to sufficiently sanction the practice. Section II surveys the historical development, the evolution of the use of hostages in inter-state relations from the medieval era to the contemporary period, and the emergence of the corpus of law criminalizing the act of hostage-taking in wars and armed conflicts. The use of hostages in inter-state relations during peace time, however, continued throughout the Cold War era, and there are signs that states have been increasingly engaging in "hostage diplomacy" since the past decade. Section III reviews selected case studies of contemporary state practices, academic literature and national legislation with the aim of extracting the defining features of "hostage diplomacy." Section IV of discusses the existing legal frameworks that may be engaged to address the practice and their respective limitations, particularly around the operation and applicability to victims of dual or multiple nationalities who are also a national of the perpetrating state. Section V identifies the opportunity created by Canada's non-binding Declaration, and then proposes some recommendations based on the framework of diplomatic protection to develop the law to make it effective in addressing state-to-state hostage-taking.

II. Hostageship—A Historical View: From Diplomatic Gifts to Crime in Warfare

The usage of hostages in ancient history was starkly different from that in contemporary practices. Historians find that in ancient China, Greece, and Rome, hostages were primarily not *taken*, but *given* as "vectors of peace."[2] Hostages were given or voluntarily exchanged[3] by states and rulers as "a surety for a pledge"[4] or good-faith "guarantees for [an] observation of the terms of the agreement"[5] during negotiations for

2. Ariel Colonomos, *Hostageship: What Can We Learn From Mauss?*, 14 J. Int'l Pol. Theory 240, 248 (2018).

3. Ancient Greece is an exception to the practice of exchanges of hostages. Amit notes that in contrast to other periods and countries in antiquity, there is "not a single occurrence in Ancient Greece of the exchange of hostages." M. Amit, *Hostages in Ancient Greece*, 98 Riv. Filol. Istr. Classica 129, 132 (1970) (It.).

4. Colonomos, *supra* note 2, at 241.

5. A.D. Lee, *The Role of Hostages in Roman Diplomacy with Sasanian Persia*, 40 Historia: Zeitschrift für Alte Geschichte 366, 366 (1991) (Ger.).

peace. In medieval politics, hostages were also given as inter-state "gifts" as an "act of generosity" in fostering "alliances and mutual assistance."[6]

A. *Usage of Hostages in Ancient History*

1. Surety for Peace Negotiation and Implementation

Across all these ancient civilizations, hostages were often voluntarily offered or unilaterally exchanged as a gesture to express the common interest in "the quest for peaceful relations"[7] between the two entities, as an act of conciliation, and as a search of new rapprochement.[8] During the Spring and Autumn and Warring States period in ancient China (770-221 BC), vassals would exchange hostages in order to gain mutual trust.[9] However, as war is a "complete breakdown of relations and absolute mistrust," the agreement for a truce and the passage to peace required a certain exceptional security of mutual confidence.[10] Records of hostages being used as a guarantee against deception are found in ancient Greece, Rome, and Anglo-Saxon history: the offering of hostages was to signify an assurance that the truce was not a pretext to win time for regrouping and reconsolidation to renew the hostilities again.[11]

In that regard, the choice of the hostage is crucial—only those who were "emotionally and politically . . . most valuable" to the state or the tribe would be deemed worthy to provide such a guarantee.[12] These ancient civilizations considered heralds and ambassadors as inviolable and therefore they could not be sent as "securities"[13]—an indication of expectations that the "security" could be purged in the event the promise would be broken. Princes or sons of noble families were often

6. MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETY 59 (Ian Cunnison trans., Cohen & West 1966) (1925).

7. Colonomos, *supra* note 2, at 243.

8. *Id.* at 244; STEFAN OLSSON, THE HOSTAGES OF THE NORTHMEN: FROM VIKING AGE TO THE MIDDLE AGE 9 (2019); JOEL ALLEN, HOSTAGES AND HOSTAGE-TAKING IN THE ROMAN EMPIRE 71 (2006).

9. *What Does Hostage Mean in the Spring and Autumn Period?* (春秋時期的質子是什麼意思), CLASSIC POETRY AND LITERATURE PORTAL (古詩詞庫), https://www.gushiciku.cn/dl/1foeS/zh-tw.

10. Amit, *supra* note 3, at 130.

11. *Id.* at 133; Colonomos, *supra* note 2, at 245; Lee, *supra* note 5, at 370; OLSSON, *supra* note 8, at 127.

12. Colonomos, *supra* note 2, at 244.

13. Amit, *supra* note 3, at 130.

chosen to be sent as hostages instead.[14] All parties reckoned that a promise of ceasefire could be expected to be better observed if pledged against the lives of someone of such important status and pedigree.[15] Once the terms of the peace settlement were negotiated and properly implemented, hostages were to be returned.[16]

2. Mode of Communication of Trust and Goodwill

In ancient Greek tradition, it was a custom to propose oneself as a pledge for "truth;" more importantly, the underlying virtue of accepting the consequences in case of perjury was the key to prove the sincerity of such an offer.[17] Nevertheless, Colonomos noted that cases of hostage killing due to a breach of the truce or a broken promise of ceasefire were rare.[18] He cited the example of the 12th century Anglo-Norman nobleman John Marshal, who had given his son to King Stephen of England as a hostage to establish a truce. Marshal actually took advantage of the truce to reinforce his forces and later refused to surrender.[19] King Stephen, however, did not kill the young Marshall and even released him. In ancient Roman diplomacy, it is also said that there are "no known instances of hostages suffering retribution" when the terms of agreement were broken.[20] These are examples showing that the sending and receiving of hostages was understood in these ancient civilizations as a mode of communication of "trust and good will," aiming to "reinforc[e] ties of cooperation between polities."[21] Despite the entitlement to purge security given the breaches, the hostage's life was preserved so that the "relationship of trust [could be] maintained," which in turn also preserved inter-entity relations.[22]

By the same token, as a hostage was a symbol of trust, an act to refuse the gift of hostages as pledges, such as when William, the duke of Normandy, turned down an offer from the German King, was regarded as an honorable behavior signifying "trust without the pledge."[23]

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14. Colonomos, *supra* note 2, at 244; Lien-Sheng Yang, *Hostages in Chinese History*, 15 HARV. J. ASIATIC STUD., 507, 509 (1952).

15. *See* Yang, *supra* note 14, at 509.

16. Lee, *supra* note 5, at 369.

17. Amit, *supra* note 3, at 134.

18. Colonomos, *supra* note 2, at 245.

19. *Id.*

20. Lee, *supra* note 5, at 366.

21. Colonomos, *supra* note 2, at 245.

22. *Id.*

23. ADAM J. KOSTO, HOSTAGES IN THE MIDDLE AGES 207 (2012).

3. Pledge of Allegiance and Friendly Relations

Hostages were also given to hegemonic powers as a sign of allegiance. Colonomos described how hostages were accepted by the center from the periphery of the Roman Empire as a gesture of submission.[24] Indeed, the Roman Empire saw the acceptance of hostages as a benevolent act, a kinder alternative in its subjugation tactics in lieu of kinetic wars, a "happ[y] alternative to … plundering or mass murder," an "'unarmed' dimension of international conflicts played out as 'soft wars.'"[25] The offering of hostages was a political statement from the leader of an entity to ask his citizens to submit to another ruler; it was to signify the submission of the whole community to the hegemon.[26] In the Han dynasty of ancient China, ethnic groups or countries that had established vassal relations with the central government paid tribute to the central government on a regular basis; pledges from various peripheral countries, including hostages, were sent to Han in exchange for peaceful relations with this great power.[27] Precisely because of the symbolism as a structure of alliance, the emphasis is also placed on the willingness of the hegemonic power to *accept* the hostage. For meaningful protection of the vassal states, the powerful Han dynasty at one point considered it "inappropriate to accept any more hostages from other nations."[28]

Friendly relations between empires and rulers were also fostered by the exchange of hostages. The famous exchange of hostages between Zhou and Zheng in 720 BC in the Spring and Autumn periods in China, noted by a number of historians and scholars as the earliest traceable record of inter-state hostage use in history,[29] was administered precisely for the purpose of such "friendly bonding."[30] Hostages have been seen as a prerequisite for friendship during the Viking Age or the early Middle Ages in Scandinavia.[31]

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24. Colonomos, *supra* note 2, at 243.
25. *Id.* at 243–44.
26. *Id.* at 244.
27. Armin Selbitschka, *Early Chinese Diplomacy: "Realpolitik" versus the So-called Tributary System*, 28 ASIA MAJOR 61, 66, 106 (2015).
28. Colonomos, *supra* note 2, at 244.
29. Selbitschka, *supra* note 27, at 72 n.36; Yang, *supra* note 14, at 507.
30. Yang, *supra* note 14, at 507.
31. OLSSON, *supra* note 8, at 7.

4. "Neutralization" for Sustainable Control

Hegemons also made use of the treatment of hostages to ensure sustainable submission. Princes and sons of noblemen serving as hostages were usually "lodged in the capital and treated kindly."[32] A more important purpose was to secure the loyalty of their fathers and to strengthen the alliance between the entities.[33] In both the Roman and Chinese empires, many of these sons of foreign dignitaries received the best education in the host state while being kept as hostages.[34] Such effort was made mainly for the benefit of the host state as a longer-term neutralization strategy: these princes and sons of noblemen would potentially be the future leaders, ambassadors or important officials of these neighboring political entities. To expose them to Roman culture and values over a significant and formative period would inevitably indoctrinate these future leaders aligned interests in favor of Rome.[35] They would more likely be strong allies when they returned home, providing convenient access to influence policies and development beneficial for the two entities which in turn also reduced the need to resort to war.[36]

In summary, the usage of hostages across these pre-modern societies seemed to be built on the values of an "ethos of honor or chivalry."[37] It is remarkable how, despite the diversity in geography, politics, culture, and religion in these premodern societies, the symbolic meaning, the significance, and the ethics of virtue behind the ritual of hostageship were so commonly understood.

B. *Public Utility and Collective Responsibility—Formalization in the 12th Century*

By the twelfth century, international treaties that governed the legal arrangements concerning hostages started to emerge. The first such treaty is believed to be the "Treaty of Dover" of 1101.[38] While hostages continued to play the role of warrants in peace, these formal treaties began to stipulate the responsibilities of hostages if the agreement would be violated, including the duty to "persuade their lord to make amends" within a specified period of time, and in case of the failure of

32. Yang, *supra* note 14, at 509.

33. Amit, *supra* note 3, at 143.

34. *See* Yang, *supra* note 14, at 509; Colonomos, *supra* note 2, at 244.

35. Lee, *supra* note 5, at 366.

36. *What Does Hostage Mean in the Spring and Autumn Period?*, *supra* note 9; Colonomos, *supra* note 2, at 244.

37. Colonomos, *supra* note 2, at 245.

38. KOSTO, *supra* note 23, at 148.

that, even an obligation to pay fines. Some clauses also bound the hostages "not to flee a summons" to fulfil their responsibilities and a duty to "protect the summoners . . . from harm."[39]

Colonomos notes that the emergence of these "conditional hostages" signifies a transition in the regulation of political relations from relying upon the "ethos of honor or chivalry" to the "rational world of legal arrangements."[40] Underlying is the notion of the public function of hostageship that existed since the medieval time, which explained the people's acceptance of the right of their kings or rulers to "decide over the lives and liberty of their sons."[41] This public function of hostageship still existed in the sixteenth century, as evidenced by the writing of Pierino Belli in his *De Re Militari et Bello Tractatus* in 1563, which supported the granting of hostages by kings or popes for public reasons.[42]

Two strands drove the general acceptance of such public function: first, there was a general custom of submission to authoritative power, which people believed would always act for the sake of public good. Second, there was the notion of collective responsibility, which was prevalent in these pre-modern societies. One of the clearest manifestations can be found in the Greek customs of ἀνδροληψία (referred to as "man kidnapping") in Athenian criminal law.[43] When someone has been killed in a foreign polis, the doctrine provided the means to bring the murderer to trial where the crime has been committed, or to ensure his extradition and surrender to the polis of the victim.[44] The Athenians did not see such remedy as a breach of their justice or morals, but rather a "solidary responsibility between the members of a political community."[45] The Greeks took "personal liability for the state . . . as a matter of fact."[46] This notion of collective responsibility is premised on an assumed solidarity of the community from which the hostage is taken, and would in theory influence or deter the community's activities vis-à-vis the hostage custodian.[47] It formed the foundation for subsequent laws of reprisal, which continued to govern the conduct of

39. *Id.* at 151.

40. Colonomos, *supra* note 2, at 245.

41. *Id.* at 246.

42. *Id.*

43. Amit, *supra* note 3, at 130.

44. *Id.*

45. *Id.* at 131 n.1.

46. *Id.* at 131.

47. SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 82–83 (2007).

warfare until it was outlawed after the Second World War, as to be seen in the following section.

C. *From Gifts to Means of Warfare—Emerging Laws of War in 17th Century*

The usage of hostages was radically transformed in the seventeenth century due to two driving forces. First, the fall of the Roman Empire gave way to a new political dynamic: states or state-like entities were put on an equal footing to conduct inter-state affairs as peers, with mutual respect for each entity's sovereignty. This new international order was crystallized in the 1648 Treaty of Westphalia.[48] Codified and institutionalized normative regimes on the basis of reciprocity began to emerge to regulate the conduct of states in their pursuit of state interest, including their conduct in wars.[49] This stood in stark contrast from the former period where international dynamics were primarily guided by communal values and the ethos of chivalry of the kings and rulers.[50]

The second strand that drastically changed the acceptable limits of hostageship was the development of the notion of just war and the corpus of laws of war. The principle distinction between combatants and civilians, together with the "right to immunity in warfare" of the latter, effectively restricted the possible candidates as hostages to be confined within the class of combatants.[51] Another determining factor introduced governing the permissible treatment of hostages in a just war was the concept of innocence.[52] International lawyers at that time, such as Hugo Grotius and Emer de Vattel, supported the usage of hostages in inter-state affairs though they opposed their killing if the hostages were innocent of any crime. De Vattel, writing on interstate agreements on the exchange of hostages, states that "the liberty of the hostages is the only thing pledged: and if he who has given them breaks his promise, they may be detained in captivity,"[53] signaling a disapproval of the killing of innocent hostages due to the act of a third party. Similarly, Grotius wrote that "[h]ostages should not be put to death unless they

48. Colonomos, *supra* note 2, at 246.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 247.

53. DE VATTEL, THE LAW OF NATIONS, quoted in DARCY, *supra* note 47, at 81–82 n.3 (quoting EMER DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE 238, 243 (London, S. Sweet, Stevens & Sons, and A. Maxwell eds., Joseph Chitty trans. 1834)).

have themselves done wrong" and that "there is a fault on the part of the hostage meriting such punishment."[54]

1. Legality of the Practice of Hostage-Taking Continued—1863 Lieber Code

Despite the pronounced disapproval of "innocent deaths," the legality of the practice of hostage-taking continued to be sustained by the principle of collective responsibility until at least the mid-20th century. Articles 54 and 55 of the 1863 Lieber Code regulate the usage and treatment of hostages between belligerent parties:

> Art. 54: A hostage is a person accepted as a pledge for the fulfilment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.
>
> Art. 55: If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.[55]

Clearly, the Lieber code did not prohibit the use of hostages as an "exigency of war." Darcy observes that: i) the emphasis of hostages to be "accepted" indicates that unilateral seizures of hostages might not be tolerated; ii) hostages continued to function as a "pledge" for the fulfilment of a consensual agreement between belligerents; iii) hostages were to be accorded with the same treatment as prisoners of war; though by virtue of Article 59, the killing of hostages might not have been precluded as retaliatory measures, contemplated in Articles 27 and 28, in the event of a breach of the agreement.[56] Of note, given the context against which the Lieber Code was drafted, which was for the conduct of belligerent parties in the American Civil War, it is unclear whether that rather out-of-place comment regarding the rarity of hostages in Article 54 could be used to infer a decline in the inter-state practice of hostages. On the other hand, it is noted that the 1748 Treaty of Aix la Chapelle was the last recorded occasion in which hostages were used in an inter-state agreement.[57]

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54. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, quoted in DARCY, *supra* note 47, at 81 n.3.

55. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863).

56. DARCY, *supra* note 47, at 83–84.

57. J. Kenneth Smail, *The Giving of Hostages*, 16 POL. & LIFE SCI. 77, 82 (1997).

2. The Silence in the Hague Regulations and the First World War

The 1899 and 1907 Hague Regulations[58] and their *travaux préparatoires* give a "completely silent" treatment to the issue of hostages.[59] It is otherwise suggested that the omission could be covered by the protection under Article 50, which provides that "[n]o general penalty, pecuniary or otherwise, can be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as *jointly and severally responsible*" (emphasis added). However, if that was indeed the drafters' intention, it is argued that Article 50 has little effect on the prohibition of hostage-taking. The provision qualifies, on the basis of collective responsibility, the criteria for treatment of a punitive nature that can be lawfully inflicted on an individual; it does not, however, prohibit the taking of prophylactic hostages to deter potential hostile conduct, nor the exchange of hostages between belligerents to guarantee the performance of an agreement.[60] The "jointly and severally responsible" criteria in Article 50 also clearly supports the belligerent's right to reprisals,[61] which had not been outlawed at that time. The killing of hostages would be permissible despite the protection of civilian lives under Article 46.[62]

The ambiguity on the issue of the taking, and the treatment, of hostages persisted through the First World War. Divergent views at the eve of WWI include, on the one hand, the Institute of International Law pronouncing in 1913 the taking of "nationals of the Enemy state" who fall into the power of a belligerent as hostages is forbidden,[63] while a different view could be found in the 1914 US Rules of Land Warfare,[64] which supported the taking of hostages as legitimate conduct of war by belligerents "recognized in international law."[65] Darcy remarks that the latter view was followed by Germany in its conduct during the war,

58. Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

59. DARCY, *supra* note 47, at 86.

60. *Id.* at 87.

61. *Id.* at 88.

62. *Id.* (Article 46 reads: "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.").

63. Manual of the Laws of Naval War art. 69, (Aug. 9, 1913) https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument.

64. DONALD ARTHUR WELLS, THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS (Greenwood Press 1992).

65. *Id.* at 161.

giving the "little hesitancy shown towards executing persons once taken."[66]

By the interwar period, the practice of exchanging hostages to guarantee the implementation of bilateral agreements between belligerent parties had effectively disappeared,[67] though the legality of hostage-taking continued to be unsettled, with the prevailing view that an occupying power was entitled to employ necessary measures, including the taking or killing of hostages, to secure compliance on one end, contradicted on the other by the humanitarian imperatives due to the cruelty of the practice against civilians.

D. *Criminalization of Hostage-taking in Warfare—Post Second World War*

The lack of express provision governing the issue of hostages in international law left the various post-war criminal tribunals with an immense challenge in grappling with the atrocities committed by Germany during the Second World War. Particularly relevant was the practice of Germany of keeping an "inventory" of hostages for the deterrent and punitive tactics of executing these hostages at a certain ratio per German life or object attacked.[68]

1. International Military Tribunal

The London Charter and Control Council Law No. 10, which served as the basis for the Nuremberg trials, stipulated the killing of hostages as a punishable war crime.[69] This *ex post facto* assertion created quite some difficulties for the International Military Tribunal ("IMT") with respect to the principle of *nullum crimen sine lege* ("no crime without law"), but the Tribunal addressed the issue by claiming that rules relating to the treatment of hostages, such as Articles 46 and 50 of the 1907 Hague Regulations discussed above,[70] were "recognised by all civilised nations and thus Article 6(b) of the Nuremberg Charter was merely a crystallisation of

66. DARCY, *supra* note 47, at 89.

67. *Id.* at 90.

68. *See id.* at 93, 95.

69. Charter of the International Military Tribunal art. 6(b), Aug. 18, 1945, 82 U.N.T.S. 279; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, ¶ 1(b), Dec. 20, 1945, 3 Official Gazette Control Council for Germany at 50–55.

70. The Tribunal also alluded to Articles 2, 3, 4, 46, and 51 of the 1929 Prisoners of War Convention. Geneva Convention relative to the Treatment of Prisoners of War, July 27, 1929, 75 U.N.T.S. 135.

'customs of war.'"[71] Unfortunately, the IMT did not address the legality of hostage-taking in warfare, particularly in relation to reprisals.[72]

2. US Military Tribunal—Hostages Trial and High Command Case

The US Military Tribunal at Nuremberg adjudicated the "*Hostages Trial*"[73] pursuant to the Control Council Law No. 10, and took a rather different direction. It was with the explicit view that belligerent states had the right to take hostages to compel the armed forces of an enemy nation to refrain from hostilities or of occupied populations to ensure peaceful conduct. Hostages might also be killed as a last resort. The Tribunal found that the killing of hostages within the remit of reprisal might not be a war crime and might be tolerated. This stood in contrast to the express prohibition in Article II 1(b) of the Control Council Law No. 10.[74] In relation to this latter point, the Tribunal remarked that "it was not in a position to write new international law as it would like it" but to apply the lawful right of reprisal regardless of "[t]he idea that an innocent person may be killed . . . is abhorrent to every natural law."[75] It was, however, the fact that Germany's conduct exceeded "the most elementary notions of humanity and justice"[76] that rendered their measures of reprisal unlawful.[77] The Tribunal claimed that international law has provided a "protective mantle" against such abuse of rights and went on to lay down the determining requirements, including the duty to inform the taking of hostages and to warn of the potential consequences of execution as reprisal, the link of collective responsibility (albeit that link could merely be geographical), principle of proportionality (that is, the number of hostages killed must not exceed the severity of the offenses it is designed to deter), and that the execution is subject to military judicial oversight.[78]

It is interesting to note that the Tribunal made a specific attempt to distinguish hostages from reprisal prisoners and that when "a violation

71. DARCY, *supra* note 47, at 94 (quoting *International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946*, 41 AJIL 172, 248-49 (1947)).

72. DARCY, *supra* note 47, at 94–95.

73. United States v. Wilhelm List, Judgment, United States Military Tribunal at Nuremberg, VIII Law Reports of Trials of War Criminals 34–76 (U.N. War Crimes Comm'n 1949) [hereinafter *Hostage Trials*].

74. DARCY, *supra* note 47, at 96–97, 106–07.

75. *Hostage Trials*, *supra* note 73, at 61; DARCY, *supra* note 47, at 97.

76. *Hostage Trials*, *supra* note 73, at 63.

77. DARCY, *supra* note 47, at 99.

78. *Id.*

of the laws of war" has occurred, there is "no question of hostages" involved.[79] According to the Tribunal, hostages are to guarantee good and peaceful conduct (deterrent in nature) while "reprisal prisoners" are taken "to be killed in retaliation for offences committed by unknown persons within the occupied area" (punitive in nature).[80] However, unless the law on hostages was developed with the mental element of intent, the Tribunal's acknowledgement that hostages could be executed as a last resort meant that the distinction between the two categories was immaterial in practice.[81]

In the *High Command* case, the US Military Tribunal took a more subtle position. The Tribunal commented in dicta that "if killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder."[82] It was spared from needing to disapprove the conclusions in the *Hostages Trial* as given the facts of the case at hand, the safeguards and preconditions "were not even attempted to be met or suggested as necessary."[83]

3. Other Post-War Tribunals

An inclination towards giving more importance to the humanitarian imperative in the issue of hostage could be observed in the other post-war tribunals. The Court of Cassation, for example, leaned close to the IMT position and found that "the execution of hostages is implicitly regarded by Articles 46 and 50 of [the Hague Regulations] as a violation of the laws and customs of war."[84] The Court in *In re Burghoff* affirmed that killing of civilian hostages was a violation of the laws of war and did not agree that reprisal could justify it as an exception to international law expounded in the Charter of Nuremberg.[85] Similarly, the British Military Court at Hamburg in the *von Manstein* case considered the "weight of authority is heavily in favour" of the IMT's reasoning, based on the Hague Regulations, the allusion to the Martens Clause and the foundation laid by Grotius, that "the killing of hostages

79. *Hostage Trials*, *supra* note 73, at 14; DARCY, *supra* note 47, at 97.

80. *Hostage Trials*, *supra* note 73, at 14; DARCY, *supra* note 47, at 97.

81. DARCY, *supra* note 47, at 105–06.

82. *Hostage Trials*, *supra* note 73, at 80; DARCY, *supra* note 47, at 103.

83. *Id.*

84. Auditeur-Général près la Cour Militaire v. Müller, 16 Ann. Dig. 401 (Ct. of Cass. 1949) (Belg.), at 400; DARCY, *supra* note 47, at 103–04.

85. *In re* Burghoff, 16 Ann. Dig. 551 (Special Ct. of Cass. 1949) (Neth.); DARCY, *supra* note 47, at 104.

or reprisal prisoners is a violation of the rules and usages of war and is murder."[86]

While most of the discussions in these post-war tribunals were about the killing of hostages and little was said about the legality of hostage-taking, Darcy argues that the emerging normative standard towards the prohibition of the killing of hostages had an inherent effect on the taking of hostages, considering the two are, in practice, "two sides of the same coin."[87] The rationale of the usage of hostages operates on the existence of a threat of ill-treatment or death in the event of non-compliance. The prohibition in materializing the threat inevitably removes the utility of the taking of hostages.[88] To argue on the other side, the taking of hostages should be prohibited as it is intrinsically linked to the likelihood of innocent deaths.

4. Watershed Moment—Geneva Conventions and the Additional Protocols

Having lived through the horrors of the two wars, the attitudes on the issue of hostages amongst nations were quite unanimous by 1948 and indeed reflected the analysis above. First of all, reprisals are explicitly prohibited in Article 33 of the Fourth Geneva Convention ("GC IV").[89] The GC IV indeed takes a step further; it unequivocally prohibits the taking of hostages in Article 34.[90]

The six-word provision, as Claude Pilloud astutely observed, is the "shortest of all the articles in the Convention" and yet combined with Article 33, crystallized a "remarkable advance in [i]nternational [l]aw" on the subject of hostages.[91] The prohibition of the taking of hostages is also included in Article 3 common to all four Geneva Conventions, which is applicable to non-interstate armed conflicts. The same commitments were repeated later as Fundamental Guarantees in the two

86. *In re* von Lesinski (called von Manstein), 16 Ann. Dig. 520 (British Military Ct. at Hamburg 1949) (Ger.); DARCY, *supra* note 47, at 104.

87. DARCY, *supra* note 47, at 88.

88. *Id.* at 91–92.

89. Geneva Convention IV Relative to the Protection of Civilian Person in Time of War art. 33, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV].

90. GC IV, *supra* note 89, art. 34.

91. Claude Pilloud, *The Question of Hostages and the Geneva Conventions*, REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INT'L DES SOCIÉTÉS DE LA CROIX-ROUGE (SUPP.) 187 (Oct. 1951); DARCY, *supra* note 47, art 111.

1977 Additional Protocols.[92] Article 147 of GC IV qualifies the taking of hostages as "grave breaches", thus confirming the classification in the Nuremberg Charter and Control Council No. 10 that is a war crime.[93] With the 1949 Geneva Conventions and the 1977 Protocols, the taking of hostages by military agents or non-state actors[94] is to be sanctioned by domestic law and is even elevated to the status of an international crime punishable under universal jurisdiction and subject to the principle of *aut dedere aut judicare* ("either extradite or prosecute").[95]

These normative rules have certainly addressed the issue of hostages in the context of wars and armed conflicts. However, as the next chapter will examine, hostage-taking has perhaps taken a new form in peacetime and is employed, once again, by states as a political means in international relations.

III. "Hostage Diplomacy"—Contemporary State Practices of Hostageship

Many would consider the Iran Hostage Crisis as the most prominent inter-state hostage crisis in contemporary history. The incident involved the holding of fifty-two Americans as hostages inside the US Embassy in Tehran for 444 days.[96] While this hostage crisis was initially carried out by non-state actors,[97] subsequent official government approval qualified this incident as an inter-state hostage crisis.[98] Effectively, the decree by Ayatollah Kohmeini, the endorsement by the Ministry of Foreign Affairs, and the compliance by the other Iranian authorities in maintaining the occupation of the Embassy and the detention of the

92. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I];

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

93. Hostage-taking as a war crime is also reflected in the statutes of the two ad-hoc international criminal tribunals. *See* Statute of the Int'l Trib. for the Former Yugoslavia art. 2(h), *adopted* May 25, 1993; Statute of the Int'l Crim, Trib. for Rwanda art. 4(c), *adopted* Nov. 8, 1994; *see also* Rome Statute of the Int'l Crim. Ct. art. 8(2)(a)(viii), (c)(iii), *adopted* July 17, 1998, 2198 U.N.T.S. 3.

94. Additional Protocol I, *supra* note 92, art. 75(2)(c).

95. Darcy, *supra* note 47, at 114.

96. Office of the Historian, *The Iranian Hostage Crisis*, U.S. Dep't of State, https://history.state.gov/departmenthistory/short-history/iraniancrises.

97. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 59–61 (May 24).

98. *Id.* ¶ 73.

hostages "for the purpose of exerting pressure on the United States Government"[99] to comply to their request of "hand[ing] over the former Shah for trial and return[ing] his property to Iran"[100] translated the hostage-taking as an act by Iran.[101]

As the incident involved diplomatic premises and their personnel, both deemed inviolable under international law, this case is less relevant to the study of this Article. The avenues for legal recourse and the respective state responsibility under diplomatic law are much more clearly defined and available. The case was brought before the International Court of Justice on the basis of diplomatic law.[102] The Court held that Iran breached its obligation under the 1961 Vienna Convention on Diplomatic Relations, and that Iran was obliged to redress the hostage situation and make reparations to the U.S. for the injury caused by the internationally wrongful act.[103]

The practice of hostageship by states in contemporary international politics takes a more convoluted form. It is a phenomenon where states detain foreign nationals (including those with dual nationalities) as a means to coerce the foreign policy of another state, sometimes loosely referred to as "hostage diplomacy."

A. *State Practices in Cold War Era*

1. Soviet Union and the United States

The more well-known case during the Cold War was the one concerning Nicholas Daniloff, the American bureau chief for U.S. News and World Report based in Moscow. He was arrested by the KGB and charged with possessing "national top secret"[104]—apparently, a long-time source had requested to meet him and had given him an envelope just moments before the KGB arrived. Inside the envelope were photos

99. *Id.* ¶ 74.

100. *Id.* ¶ 73.

101. *Id.* ¶ 73–74.

102. *Id.* ¶ 22 (noting at least 48 persons detained had the status recognized by the Government of Iran as "member of the diplomatic staff" or "member of the administrative and technical staff" within the meaning of the 1961 Vienna Convention on Diplomatic Relations (VCDR)); *see, e.g.*, Vienna Convention on Diplomatic Relations art. 22, 24, 29, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session: Draft Article on the Responsibility of States for Internationally Wrongful Acts, art. 10, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA]. It is noted that the event discussed here pre-dates ARSIWA.

103. U.S. v. Iran, 1980 I.J.C. ¶ 95.

104. Matt Purple, *The Truth About Reagan's Prisoner Swap*, THE NATIONAL INTEREST (Jan. 23, 2016), https://nationalinterest.org/feature/the-truth-about-reagans-prisoner-swap-14994.

showing Soviet troops in Afghanistan and Soviet military maps marked "secret."[105] The New York Times reported that the Soviet Union had sought a "straight trade" with the United States for the release of Gennadi Zahkarov,[106] who had been arrested a week earlier for spying. The United States refused the "swap," claiming it would "lend credibility" to the suggestion that Daniloff was a spy, equal to Zakharov.[107] Instead, the Secretary of State called out the Soviets as "guilty of 'hostage-taking.'"[108] Notwithstanding the rhetoric, Daniloff was allowed to leave Russia without standing trial, on 12 September 1986, the same day as Zakharov was sent back to the Soviet Union.[109] The Soviet spokesman, Karymov, called the "swap" "part of the accord" where a "possible modification of the United States order expelling 25 members of the Soviet Mission to the United Nations" was expected.[110]

2. China and Britain

Similarly in the 1960s, another high-profile example of "hostage-taking" unfolded between China and Britain. In the midst of the 1967 "territory-wide anti-colonial" campaigns in Hong Kong—a radical leftist movement "characterised by demonstrations, strikes and bombing campaigns,"[111] Xue Ping, a news worker of the Xinhua News Agency was arrested for "illegal assembly and inflammatory propaganda." His sentencing and the arrest of some other left-wing journalists by the then colonial authorities were responded by Beijing with a house arrest of Anthony Grey, the British correspondent of Reuters in China.[112] Grey was held in "solitary confinement in a twelve-foot square room" of his house.[113] He was "made incommunicado"[114] and "denied consular

105. Ian Thomsen, '*I Would Assume That He's Going Through Hell,*', NEWS@NORTHEASTERN (Jan. 8, 2019), https://news.northeastern.edu/2019/01/08/the-russian-government-arrested-an-american-businessman-on-spying-charges-heres-why-that-feels-familiar-to-this-former-northeastern-professor/; see NICHOLAS DANILOFF, OF SPIES AND SPOKESMEN: MY LIFE AS A COLD WAR CORRESPONDENT (2008) for a detailed account of the event as remembered by Daniloff.

106. Bernard Gwertzman, *Russians Set Daniloff Free and He Flies to Frankfurt; Not A Trade, President Says*, N.Y. TIMES (Sept. 30, 1986), https://www.nytimes.com/1986/09/30/world/russians-set-daniloff-free-and-he-flies-to-frankfurt-not-a-trade-president-says.html.

107. *Id.*

108. Purple, *supra* note 104.

109. Gwertzman, *supra* note 106.

110. *Id.*

111. Chi-Kwan Mark, *Hostage Diplomacy: Britain, China, and the Politics of Negotiation, 1967–1969*, 20 DIPLOMACY & STATECRAFT 473, 473–74 (2009).

112. *Id.* at 474.

113. *Id.* at 488.

114. *Id.* at 480.

access" for nine months.[115] China made it clear that Grey's detention was linked to the imprisonment of Xue Ping and the other "patriotic journalists."[116] As a gesture to de-escalate the tension, the Hong Kong government reduced the sentence of all prisoners convicted for offences committed during the 1967 unrest.[117] Grey was finally released one day after the last of all the "patriotic journalists" had completed their sentence.[118] He was held in China for a total of 777 days.[119]

B. *Contemporary Practices*

The act of state-sponsored hostage-taking as a means to coerce the policy or foreign affairs of another state has continued to be practiced by certain states after the Cold War period, in some ostensibly overt or otherwise more subtle forms.

1. China and Canada

Meng Wanzhou, the Chief Financial Officer of Huawei and the daughter of its founder, was arrested in Vancouver on 1 December 2018. The arrest was made at the request of U.S. authorities, who accused the "Princess of Huawei" of having committed bank fraud that risked violating the sanctions against Iran.[120] The Deputy Foreign Minister summoned the Ambassador of Canada in Beijing on 8 December to lodge a "strong protest" and demanded the release of Meng or face "grave consequences that the Canadian side should be held accountable for."[121] A week later, China arrested and detained around the same time two Canadians: former diplomat Michael Kovrig

115. *Id.* at 480, 485.

116. *Id.* at 487.

117. *Id.*

118. *Id.* at 488–89.

119. d Baker, *Anthony Grey: 777 Days in Peking*, OBSERVER (Aug. 23, 1970), https://www.theguardian.com/lifeandstyle/2019/oct/13/from-the-archive-1967-western-journalist-under-arrest-in-china-for-777-days.

120. Indictment (redacted), United States v. Huawei Tech. Co., No. 18-457(S-2)(AMD), 2018 WL 7350494 (E.D.N.Y. Dec. 3, 2019); Press Release, U.S. Dep't. of Just., Chinese Telecommunications. Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Finanical Fraud (Jan. 28, 2019), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial.

121. *The Ministry of Foreign Affairs summoned the Canadian ambassador to China to make solemn representations about Canada's unreasonable detention of the head of Huawei (*中國外交部召見加拿大駐華大使就加方無理拘押華爲公司負責人提出嚴正交涉*)*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (中华人民共和国外交部) (Dec. 8, 2018), www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/bmdyzs_673629/xwlb_673631/201812/t20181208_7643323.shtml.

and business consultant Michael Spavor. On 27 May 2020, the Supreme Court of British Colombia in Canada concluded the preliminary hearing for the extradition of Meng and held that the "requirement for extradition is capable of being met."[122] Shortly after, on 19 June 2020, the Chinese Government announced that Kovrig and Spavor were indicted in Beijing and Dandong respectively on similar charges of espionage.[123] The indictments only came 557 days into their detention.[124]

As Meng's defense team returned to the Court to present their final argument in the second phase of the extradition hearing in August 2021, Spavor was convicted of espionage and illegal provision of state secrets during a closed-door proceeding[125] and was sentenced to 11 years of imprisonment.[126] Kovrig's trial had been concluded earlier in March, but the verdict was "to be announced at an unspecified later date."[127]

On 24 September 2021, the U.S. Department of Justice announced a deferred prosecution agreement with Meng upon her admission of having made misrepresentations to the bank.[128] With the agreement, all the charges against Meng would be dismissed when the deferral period ends on 21 December 2022; the extradition proceedings in Canada

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122. United States v. Meng, [2020] BCSC 785, ¶ 88 (Can.).

123. *Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on June 19, 2020*, EMBASSY OF CHINA IN THE KINGDOM OF THE NETH. (June 19, 2020), http://nl.china-embassy.org/eng/wjbfyrth/202006/t20200619_2665636.htm.

124. Javier C. Hernández & Catherine Porter, *China Indicts 2 Canadians on Spying Charges, Escalating Dispute*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/world/asia/china-canada-kovrig-spavor.html.

125. *See* Criminal Procedure Law of the People's Republic of China (adopted at the Second Session of the Fifth Nat'l People's Congr. on July 1, 1979, and revised in accordance with the Decision on Revising the Crim.Proc.Law of the People's Republic of China adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996), art. 111, http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384067.htm.

126. *Michael Spavor publicly sentenced in the case of spying abroad and illegally providing state secrets (*迈克尔•斯帕弗为境外刺探、非法提供国家秘密一案公开宣判*)*, LIAONING DANDONG INTERMEDIATE PEOPLE'S COURT (辽宁省丹东市中级人民法院版) (Aug. 11, 2021), https://web.archive.org/web/20210811024611/http://ddzy.chinacourt.gov.cn/article/detail/2021/08/id/6200660.shtml; *Chinese court jails Canadian for 11 years on spying charges*, ALJAZEERA (Aug. 11, 2021), https://www.aljazeera.com/news/2021/8/11/canadian-jailed-for-11-years-on-spying-charges-in-china.

127. Yew Lun Tian, *Canadian ex-diplomat's Espionage Trial in China Ends, Verdict Due Later*, REUTERS (Mar. 22 2021), https://www.reuters.com/article/us-canada-china-idUSKBN2BD0UQ; Thomson Reuters, *Trial of Michael Kovrig Concludes with Verdict to Come Later, Chinese Court Says*, CBC NEWS (Mar. 21, 2021), https://www.cbc.ca/news/world/trial-michael-kovrig-china-1.5958648.

128. Press Release, U.S. Dep't of Just., Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), www.justice.gov/usao-edny/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution.

were no longer necessary.[129] Meng left Canada for China on that day and the two Michaels were also released in China just hours after the deal had been announced.[130]

Observers noticed that arrests of Su Bin and Julia and Kevin Garratt in 2014 had many similarities to the case of Meng and the two Michaels.[131] Su Bin is a Chinese national and permanent resident in Canada who ran an aviation technology firm. On 27 June 2014, the FBI filed a criminal complaint[132] and the State Attorney subsequently issued indictments[133] charging Su Bin for spying on Boeing trade secrets; the target was allegedly the secrets of the development of the C-17, one of the most expensive military planes ever developed by the US Air Force. The Canadian authorities thus acted upon the request of the US Department of Justice and arrested Su Bin in British Colombia.[134] A few weeks later, Kevin and Julia Garratt, a Canadian couple who ran a coffee shop in the northern part of China, were arrested for "suspected theft of state secrets involving military and national defense research"—almost a carbon copy of the United States' allegations against Su Bin.[135]

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129. *See* Deferred Prosecution Agreement, United States v. Wanzhou Meng, No. 18-457, ¶ 1 (E. D.N.Y. 2017), https://www.justice.gov/usao-edny/press-release/file/1436221/download; James McCarten, *Four Years After Meng Wanzhou's Arrest, U.S. Drops Last Remaining Indictment*, CTV NEWS, https://www.ctvnews.ca/business/four-years-after-meng-wanzhou-s-arrest-u-s-drops-last-remaining-indictment-1.6178105 (last updated Dec. 2, 2022).

130. Dan Bilefsky, *2 Canadians Held by China are Freed, Hours After Huawei Deal is Reached*, N. Y. TIMES (Sept. 24, 2021), www.nytimes.com/live/2021/09/24/world/meng-wanzhou-huawei-trial; *Huawei Executive Meng Wanzhou Freed by Canada Returns to China as Diplomatic Spat Ends*, FRANCE 24 (Sept. 25, 2021), https://www.france24.com/en/diplomacy/20210925-huawei-executive-freed-in-canada-two-canadians-released-by-china.

131. Jeff Semple, *China Rising, Episode 1: Hostage Diplomacy*, GLOBAL NEWS (May 13, 2021), https://globalnews.ca/news/7854897/china-rising-episode-1-hostage-diplomacy/.

132. Criminal Complaint, United States v. Bin, (C.D. Cal. June 27, 2014) (No. 14-1318M).

133. Press Release, U.S. Att'ys' Office, U.S. Dep't of Just., Los Angeles Grand Jury Indicts Chinese National In Computer Hacking Scheme Allegedly Involving Theft Of Trade Secrets (Aug. 15, 2014), www.justice.gov/usao-cdca/pr/los-angeles-grand-jury-indicts-chinese-national-computer-hacking-scheme-allegedly.

134. Su Bin, *Chinese Man Accused by FBI of Hacking, in Custody in B.C.*, CBC NEWS (July 12, 2014, 11:11 AM), www.cbc.ca/news/canada/british-columbia/su-bin-chinese-man-accused-by-fbi-of-hacking-in-custody-in-b-c-1.2705169.

135. Brin Spegele & Rita Trichur, *China Detains Canadians Kevin and Julia Garratt on Suspicion of Spying*, WALL ST. J. (Aug. 5, 2014, 7:17 PM), www.wsj.com/articles/china-detains-canadians-kevin-and-julia-garratt-on-suspicion-of-spying-1407224565; *China 'investigating Canada Couple Over State Secrets'*, BBC NEWS (Aug. 5, 2014), www.bbc.com/news/world-asia-china-28654125; *China Investigates Canadian Couple for Spying*, ALJAZEERA (Aug. 5, 2014), https://www.aljazeera.com/news/2014/8/5/china-investigates-canadian-couple-for-spying.

Guy Saint-Jacques, Canada's ambassador in Beijing at the time, was reported to have said that "while Chinese officials publicly denied [that] the two cases were connected," they were "unequivocal" in bilateral meetings that the Garratts were to be kept until the return of Su Bin.[136] The situation took a dramatic turn when Su Bin waived the extradition in February 2016, consented to be conveyed to the US, and later pleaded guilty.[137] Shortly after, in May 2016, Julia Garratt was able to leave China and Kevin was subsequently released in September that year, after having spent 775 days in detention.[138]

2. Iran and the U.K.

The British-Iranian dual national, Nazanin Zaghari-Ratcliffe, was arrested on 3 April 2016 at the Imam Khomeini airport on her way back to the U.K. after a family visit with her 22-month-old daughter. Accused of "plotting to topple the Iranian regime," Zaghari-Ratcliffe was given five years of imprisonment.[139] On 7 March 2019, the U.K. Foreign Secretary decided to "exercise diplomatic protection" in the detention case of Zaghari-Ratcliffe,[140] thus raising her case to a dispute between the U.K. and Iran. Nevertheless, Iran rejected this claim, stating that as Iran does not recognizes dual nationality,[141] Zaghari-Ratcliffe is an Iranian subject and that U.K.'s extension of diplomatic protection to her "contravene[s] international law."[142] Zaghari-Ratcliffe's sentence was completed in March 2021 but was sentenced to another year in

136. Semple, *supra* note 131.

137. Plea Agreement for Defendant, United States v. Su Bin, at 7 (C.D. Cal. Mar. 22, 2016) (No. 14-131); Press Release, U.S. Att'ys' Office, U.S. Dep't of Just., Chinese National Pleads Guilty to Conspiring to Hack into U.S. Defence Contractors' Systems to Steal Sensitive Military Information (Mar. 23, 2016), https://www.justice.gov/opa/pr/chinese-national-pleads-guilty-conspiring-hack-us-defense-contractors-systems-steal-sensitive.

138. Semple, *supra* note 131.

139. Patrick Wintour, *British Woman Jailed for Five Years in Iran*, THE GUARDIAN (Sept. 9, 2016), https://www.theguardian.com/world/2016/sep/09/british-iranian-woman-jailed-five-years-in-iran-nazanin-zaghari-ratcliffe.

140. Press Release, U.K. Foreign & Commonwealth Office, Foreign Secretary Affords Nazanin Zaghari Ratcliffe Diplomatic Protection (Mar. 7, 2019), https://www.gov.uk/government/news/foreign-secretary-affords-nazanin-zaghari-ratcliffe-diplomatic-protection.

141. QANUNI MADANI [CIVIL CODE] 1314 [1935], art. 989 (Iran).

142. Josie Ensor, *Iran Says UK's Diplomatic Protection for Nazanin Zaghari-Ratcliffe 'against international law'*, TELEGRAPH (Mar. 8, 2019, 11:07 AM), https://www.telegraph.co.uk/news/2019/03/08/iran-says-uks-diplomatic-protection-nazanin-zaghari-ratcliffe/; Hamid Baeidinejad (@baeidinejad), TWITTER (Mar. 7, 2019, 5:51 PM), https://twitter.com/baeidinejad/status/1103790207114063872.

prison for "spreading propaganda against the system" by "participating in a protest in front of the Iranian embassy in London in 2009."[143]

Zaghari-Ratcliffe have allegedly been told repeatedly that her case is "linked to the payment of a £400 million debt the U.K. owes to Iran due to an uncompleted sales contract of defence equipment in the 1970s."[144] Iranian state TV has also been reported to have quoted an unidentified government official claiming that Zaghari-Ratcliffe would be released "once Britain had paid off a debt on military equipment owed to Tehran."[145] However, the U.K.[146] and Iran[147] both denied the detention of Zaghari-Ratcliffe and that the debts were linked. The concerned contractual dispute between the United Kingdom's state-owned International Military Services and the Iranian Ministry of Defence & Support for Armed Forces (MoDSAF) was settled in arbitration in favor of Iran at the International Chamber of Commerce in 2001.[148] The Court of Appeal in The Hague also upheld the decision in 2006.[149] While waiting for the leave for an appeal, the MoDSAF was added onto sanction list against Iran by the European Union[150] and the funds therefore were not released.[151]

This would, however, not be the first time that a repayment of an inter-state debt to Iran is linked to the release of detained foreign nationals. In 2016, the United States openly conceded having coordinated the release of three American prisoners on the same day it made a payment of $400 million owed to Iran. The payment was said to be "the first installment" of reimbursement for another unfulfilled sales

143. Patrick Wintour, *Iran Sentences Nazanin Zaghari-Ratcliffe to Further One-Year Jail Term*, THE GUARDIAN (Apr. 26, 2021), https://www.theguardian.com/news/2021/apr/26/iran-sentences-nazanin-zaghari-ratcliffe-to-further-one-year-jail-term.

144. Rachael Burford, *Nazanin Zaghari-Ratcliffe: Why Does the UK Government Owe Iran £400million?*, EVENING STANDARD (Mar. 16, 2022), https://www.standard.co.uk/news/politics/nazanin-zaghari-ratcliffe-iran-uk-govenment-owe-ps400million-b965751.html.

145. Maher Chmaytelli & Parisa Hafezi, *Washington Denies Iran State Media Report Saying Prisoner Swap Agreed*, REUTERS (Mar. 2, 2021, 9:16 AM), https://www.reuters.com/world/middle-east/iran-us-agree-prisoner-swap-release-frozen-funds-says-lebanese-pro-iranian-2021-05-02/.

146. *See* Written Evidence Submitted by the Foreign and Commonwealth Office, Foreign and Commonwealth Office § 24 (U.K.), https://committees.parliament.uk/writtenevidence/6201/pdf/.

147. *See Zaghari's Case Not Linked to UK Debts to Iran*, KAYHAN INT'L (Apr. 9, 2018, 10:02 PM), https://kayhan.ir/en/news/51626/zaghari%E2%80%99s-case-not-linked-to-uk-debts-to-iran.

148. Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Int'l Mil. Serv. Ltd. [2020] EWCA Civ. 145, [5]–[6] (Eng.).

149. *Id.* at [8].

150. Council Regulation 267/2012 of 23 March 2012, Concerning Restrictive Measures Against Iran and Repealing Regulation (EU) No 961/2010, 2012 O.J. (L 88) 70.

151. Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Int'l Mil. Serv. Ltd. [2020] EWCA Civ. 145, [9] (Eng.).

contract of military equipment dating back to before the Iranian Revolution.[152]

Iran was open about making deals over detained persons with other states. Speaking at a public event in New York in April 2019, the Iranian Foreign Minister "put an offer on the table publicly" to exchange prisoners, mentioning Nazanin Ratcliff and Negar Ghodskani, an Iranian citizen waiting in Australia for extradition to the United States.[153] The Minister claimed that he had made the proposal to the United States six months before but had not yet received any response.[154] He later referred to his successful record in releasing Jason Rezaian, a Washington Post journalist, in 2016 and said he was "ready to do it again" and he "ha[d] the authority to do it."[155] Rezaian had been arrested and convicted on espionage charge in 2014; he was later released, together with two other U. S.-Iranian nationals, on the same day when sanctions on Iran were lifted after the nuclear agreement, in exchange for seven Iranians held for sanctions violations by the United States.[156]

As of the writing of this Article, the case of Nazanin Zaghari-Ratcliffe had a breakthrough—after being held hostage in Iran for six years, she was released on 17 March 2022. The Iranian Foreign Ministry confirmed in a statement the day before that the British government had paid the debt. In the same statement, the spokesperson also confirmed the release of Zaghari-Ratcliffe and two other British-Iranian nationals, Anoosheh Ashoori and Morad Tahbaz.[157] Iran, however, insisted that "there is no relationship" between the payment and the release of these prisoners, and that the sentences of Zaghari-atcliffe and Ashoori were commuted "out of Islamic mercy and on humanitarian grounds."[158]

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152. David Sanger, *US Concedes $400 Million Payment to Iran Was Delayed as Prisoner "Leverage,"*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/world/middleeast/iran-us-cash-payment-prisoners.html.

153. *Iran: Minister of Foreign Affairs Mohammad Javad Zarif*, ASIA SOCIETY (Apr. 24, 2019), https://asiasociety.org/video/iran-minister-foreign-affairs-mohammad-javad-zarif-complete?page=325.

154. *Id.*

155. *Zarif Says Iran Ready to Swap Prisoners With US*, RADIO FARDA (Apr. 25, 2019), https://en.radiofarda.com/a/zarif-says-iran-ready-to-swap-prisoners-with-u-s-/29901661.html.

156. Catherine Philp, *Kylie Moore-Gilbert: Iran Uses Crisis to Get What It Wants*, TIMES (Jan. 21, 2020), https://www.thetimes.co.uk/article/kylie-moore-gilbert-iran-uses-crises-to-get-what-it-wants-0j2qsjp95.

157. Morad Tahbaz is also a US citizen. *Foreign Ministry Spokesman Comments on UK Debt Payment and Political Prisoners Release*, ISLAMIC REPUBLIC OF IRAN MINISTRY OF FOREIGN AFFAIRS (Mar. 16, 2022), https://en.mfa.gov.ir/portal/newsview/673745.

158. *Id.*

C. *The Muddy Contours—Criminals, Political Prisoners, or Hostages?*

There have also been other reports about American "hostages" held by Egypt[159] and North Korea[160] who were subsequently released at the time when the relations with the United States had improved. In some other cases, the parties were reported to be overtly talking about "swap deals," such as the "pastor for a pastor" exchange publicly proposed by the Turkish President.[161] The proposal concerned the release of an American pastor, Andrew Brunson, in exchange for Fethullah Gulen, an Islamist preacher wanted in Turkey for "inspiring the [2016] coup attempt."[162] In some other cases, dual-nationals were being detained for mysterious "espionage" or even without charges, including the cases of Canadian-Chinese Huseyin Celil,[163] Australian-Chinese Yang Henqiun,[164] and American-Iranian Siamak Namazi.[165] Nevertheless, there seem to be

159. *See* Michael Shear & Peter Baker, *American Aid Worker, Release Secured by Trump Officials, Leaves Egypt*, N.Y. TIMES (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/us/politics/american-aid-worker-released-egypt-trump.html.

160. Alex Ward, *North Korea Has Just Released 3 American Hostages*, VOX (May 9, 2018), https://www.vox.com/2018/5/9/17333964/north-korea-hostages-release-trump.

161. *See Turkey's Erdogan Links Fate of Detained US Pastor to Wanted Cleric Gulen*, REUTERS (Sept. 28, 2017), https://www.reuters.com/article/us-usa-turkey-cleric-idUSKCN1C31IK.

162. *See* Stephanie Saul, *An Exiled Cleric Denies Playing a Leading Role in Coup Attempt*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/2016/07/17/us/fethullah-gulen-turkey-coup-attempt.html.

163. Ethnically a Uighur, Celil was arrested by the Uzbek authorities during a family visit in Uzbekistan in 2006. Despite the request of Canada to have him returned to Canada, Celil was extradited to China and was tried for "terrorist related" charges. Celil is detained in China since 2006. *See* Amnesty Int'l, *Further Information on UA 99/06 (EUR 62/008/2006, 24 April 2006) and follow-up (EUR 62/014/2006, 19 June 2006) - Fear of torture and ill-treatment/Forcible return/Fear of death penalty: CHINA Husein Dzhelil (known as Huseyin Celil) aged 37, Canadian citizen*, AI Index ASA 17/037/2006 (July 4, 2006).

164. Yang was arrested by the Chinese authorities in July 2019 and officially charged only in October 2020 for allegations of 'engaging in criminal activities that represented a danger to China's security. *See Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 25 January 2019*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 25, 2019), https://www.fmprc.gov.cn/ce/cgmb/eng/fyrth/t1632577.htm; *Statement on Dr Yang Jengjun*, MINISTER FOR FOREIGN AFFAIRS MINISTER FOR WOMEN SEN. THE HON MARISE PAYNE (May 21, 2021), https://www.foreignminister.gov.au/minister/marise-payne/media-release/statement-dr-yang-hengjun-0; Ben Doherty, *Yang Hengjun: Australian Writer Held in China for Almost Two Years Officially Charged with Espionage*, GUARDIAN (Oct. 10, 2020), https://www.theguardian.com/world/2020/oct/10/yang-hengjun-australian-writer-held-in-china-for-almost-two-years-reportedly-charged-with-espionage.

165. Siamak Namazi, an Iranian-American businessman, who has been detained in Iran since October 2015; his father, Baquer Namazi, who had travelled to Iran to help free his son, was also arrested and detained with unclear charges. *See* Anthony J. Blinken, *Sixth Anniversary of Iran's Wrongful Detention of Siamak Namazi*, U.S. DEP'T OF STATE (Oct. 13, 2021), https://www.state.gov/sixth-anniversary-of-irans-wrongful-detention-of-siamak-namazi/.

no demands made so far to the other nationality state, either explicitly or implicitly. Only time may tell whether they are being held captive as hostages to leverage demands in foreign relations or whether they are actually political prisoners.

This highlights the difficulties in defining what constitutes "hostage diplomacy." While many of the detention cases do not seem to have sufficiently met the safeguards of due process (or at all) and their lawfulness is highly questionable, it is not clear that all of the cases could be considered as hostage-taking. Gilbert and Piché observed that the difficulties in making the distinction between whether the person is a "prisoner" or a "hostage" lie with the fact that 'the early stages of a hostage-taking situation resemble lawful detention.'[166]

The distinguishing feature is the existence of a demand as a condition for release. Hostages are taken as a means to exercise pressure on the target with the purpose of influencing the target's behavior.[167] The key differentiating factor, therefore, is whether there is a demand to another concerned state (the target) *in relation to* the detention of the person (the hostage). States make demands to each other on a daily basis; that is in the nature of international relations and cooperation. It is, however, the *linkage* of the demand to the detained person, as a condition for his or her release, that renders the situation one of hostage-taking. Perpetrating states, nonetheless, seldom overtly communicate the linkage, but rather orchestrate it to be uncovered in subsequent bilateral diplomatic negotiations or simply let it be inferred through the synchronized timing of the events. In some cases, victims may be directly informed of the political or economic concessions desired from the target state as a condition of their release, expecting that the message will then be communicated to their consular officials. The uncertain temporal scope renders it challenging for proper determination that it is a hostage-taking situation.

It is equally possible that perpetrating states maintain a pattern of detaining foreign nationals as an "inventory" of potential hostages to be used when specific foreign policy objectives so require at a later date. It is in this process that a case of hostage-taking can be identified—the pretense that the individual is a criminal will fall and the real function of the detainee emerges: a bargaining chip in foreign policy.[168]

166. Danielle Gilbert & Gaëlle Rivard Piché, *Caught Between Giants: Hostage Diplomacy and Negotiation Strategy for Middle Powers*, 5 TEX. NAT'L SEC. REV. 11, 14 (2021).

167. *Id.* at 15.

168. *Id.* at 14.

D. *Other Salient Features of "Hostage Diplomacy"*

Based on the cases examined, other features of "hostage diplomacy" include:

First, as the objective of the detention is to coerce certain behavior of another state, the target victim would be an individual with foreign nationality. Quite often, these victims hold dual or multi-nationalities, including that of the perpetrating state. The UN Working Group on Arbitrary Detention ("WGAD") has confirmed the observation that Zaghari-Ratcliffe and the Namazis were targeted because of their status as foreign or dual nationals.[169] The latter category is particularly vulnerable due to personal jurisdiction the perpetrating state can lawfully assert over the victim and the *perceived* limitation on the right to offer consular assistance and exercise diplomatic protection due to the doctrine of non-responsibility;

Second, there is an established pattern that victims are arrested and charged for espionage or activities endangering national security—offences to which evidence need not be disclosed due to state secret privilege and therefore charges and convictions are extremely difficult to challenge, if at all. The UN Special Rapporteur noted that the "option for the release" proposed by the Iranian Minister of Foreign Affairs raised "concerns about the veracity of the Government's allegations against the individuals detained."[170] The UN Working Group on Arbitrary Detention (WGAD) has also confirmed the lack of evidence supporting the criminal charges laid against Zaghari-Ratcliffe and Namazi;[171]

Third, to facilitate the construction of the pretense, due process in the proceedings is often violated: arrests are made with no warrant,[172] there is often no access to meaningful legal representation,[173] indictments

169. Working Grp. on Arbitrary Det., Op. No. 28/2016 Concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran), ¶¶ 47–48, U.N. Doc. A/HRC/WGAD/2016/28 (Sept. 21, 2016) [hereinafter WGAD Op. No. 28/2016]; Working Grp. on Arbitrary Det., Op. No. 49/2017 Concerning Siamak Namazi & Mohammed Baquer Namazi (Islamic Republic of Iran), ¶ 45, U.N. Doc. A/HRC/WGAD/2017/49 (Sept. 22, 2017) [hereinafter WGAD Op. No. 49/2017].

170. Special Rapporteur on the Situation of Hum. Rights in the Islamic Republic of Iran, *Rep. of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, ¶ 28, U.N. Doc. A/HRC/43/61 (Jan. 28, 2020); *see* Carla Ferstman & Marina Sharpe, *Iran's Arbitrary Detention of Foreign and Dual Nationals as Hostage-Taking and Crimes Against Humanity*, 20 J. INT'L CRIM. JUST. 403, 413–14 (2022).

171. WGAD Op. No. 28/2016, *supra* note 169, ¶ 49; WGAD Op. No. 49/2017, *supra* note 169, ¶ 45; Ferstman & Sharpe, *supra* note 170, at 413.

172. WGAD Op. No. 28/2016, *supra* note 169, ¶ 44.

173. *Id.* ¶ 45.

informing the charge usually arrive with a significant time lapse after the detention,[174] the charges are ill-defined or unrecognized,[175] and convictions are made behind closed-doors or are sham trials with secret evidence, without appropriate allowances for meaningful defense preparation.[176]

Fourth, to augment the pressure to the target state, the suffering of the victims is sometimes accentuated by some form of ill-treatment accompanying the arbitrary detention: many of them are reported to have been kept in solitary confinement[177] or being kept in extremely crowded and unhygienic detention conditions,[178] rendered incommunicado or with limited and sporadic access to consular access and communications with families. Interrogation techniques that amount to torture, such as sleep deprivation and prolonged interrogations[179] are reported to have been used.

Some question why in cases where both states concerned are detaining the national(s) of the other state that only one side is acknowledged as a victim to "hostage diplomacy." For example, a Hong Kong barrister questioned whether Canada's arrest of Meng Wanzhou was not also politically motivated and that China was not also a victim of "hostage diplomacy." It is because, according to this barrister, that Canada had not

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174. *See* the matter of Kovrig and Spavor, *supra* Section III.B.1.

175. *See Five-Year Prison Sentence for Dual National Casts Shadow Over Iran's Opening to World*, CTR. FOR HUM. RTS. IN IRAN (Sept. 12, 2016), https://www.iranhumanrights.org/2016/09/nazanin-zaghari-sentenced/; *UK-Iranian Mother Nazanin Zaghari-Ratcliffe 'Jailed on Secret Charges'*, BBC NEWS (Sept. 10, 2016), https://www.bbc.com/news/uk-37321030.

176. WGAD Op. No. 49/2017, *supra* note 169, ¶¶ 22, 23, 46.

177. *See* Baker, *supra* note 119; WGAD Op. No. 28/2016, *supra* note 169, ¶¶ 10, 30; Amnesty Int'l, *Urgent Action: Jailed Dual National Denied Dental Care* (June 11, 2020), https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE1324752020ENGLISH.pdf (according to Amnesty International, Anoosh Ashoori was subject to solitary confinement during the first six week of his detention).

178. *See* Amnesty Int'l, *supra* note 177; Peter Xavier Rossetti, *The Detention of the Two Michaels: A Story on China's Human Rights Abuses*, AMNESTY INT'L UNIV. TORONTO CANDLELIGHT, https://amnesty.sa.utoronto.ca/2022/01/05/the-detention-of-the-two-michaels-a-story-on-chinas-human-rights-abuses/; Tristin Hopper, *No Sunlight, a Hole for a Toilet: What Two Years in Chinese Detention Has been Like for the Two Michaels*, NAT'L POST (Mar. 19, 2021), https://nationalpost.com/news/canada/no-sunlight-a-hole-for-a-toilet-what-two-years-in-chinese-detention-has-been-like-for-the-two-michaels.

179. *See* James Dean, *House Arrest Gives Huawei Boss Meng Wanzhou Time for Finer Things*, TIMES (Dec. 3, 2019, 12:01 AM), https://www.thetimes.co.uk/article/house-arrest-gives-huawei-boss-meng-wanzhou-time-for-finer-things-mngzr2hp7 (lights in the cells of the Two Michaels are left on 24 hours; both were interrogated up to 8 hours per day); Rossetti, *supra* note 178; Amnesty Int'l, *supra* note 177 (according to Amnesty International, Anoosh Ashoori was also subject to sleep deprivation); Semple, *supra* note 132 (Julia and Kevin Garratts were subject to six hours per day of interrogations).

imposed sanctions against Iran, so the double criminality condition for extradition could not have been met. The arrest and detention of Meng in Canada was therefore unjustified.[180] The Supreme Court of British Colombia reasoned, however, that the double criminality condition was met on the count of fraud; this is the correct way to interpret extradition law in Canada, the Supreme Court explained, as Canada takes a conduct-based rather than an offence-based approach to double criminality. In other words, "it is not necessary that the foreign offence have an exactly corresponding Canadian offence identified in the Minister's authority to proceed [with the extradition]."[181] Notwithstanding, applying the defining features identified above, the fact that Meng had unfettered access to a full team of lawyers of her choice, was kept under house arrest with freedom of movement during day-time within the greater Vancouver area where she could do shopping, and even had the "luxury of time" to "finish an oil painting or read a book from cover to cover,"[182] and most pertinently, the lack of demand from Canada to China as a condition of Meng's release, would illustrate why Kovrig and Spavor were hostages and Meng was highly unlikely to be one.

E. *Defining Criteria of State-to-State Hostage-Taking*

Gilbert and Piché define "hostage diplomacy" as "the detention of foreign nationals in times of peace and under the guise of national law as a way to gain leverage in the conduct of a country's foreign affairs."[183] This definition succinctly captures all the critical elements of situations that may qualify as "hostage diplomacy." However, further assistance is required to determine whether the detention is a disguise. In that regard, the U.S. Congress has made such an attempt by the enactment of the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act.[184] The Act, named after Robert Levinson, the longest-held American hostage

180. *See* Tang Jiahua (湯家驊), *Shui Shi Dashujia* (誰是大輸家) [*Who is the Biggest Loser?*], MINGBAO XINWEN WANG (明報新聞網) [MINGPAO NEWS] (Oct. 1, 2021), https://news.mingpao.com/pns/%E4%BD%9C%E5%AE%B6%E5%B0%88%E6%AC%84/article/20211001/s00018/1633025397608/%E8%AA%B0%E6%98%AF%E5%A4%A7%E8%BC%B8%E5%AE%B6.

181. United States v. Meng, 2020 BCSC 785, ¶ 21 (Can.).

182. Dean, *supra* note 179; *Meng Wanzhou: Oil Paintings and Books for Huawei Executive Fighting Extradition*, BBC NEWS (Dec. 2, 2019), https://www.bbc.com/news/world-asia-china-50625483.

183. Gilbert & Piché, *supra* note 166, at 13 n.7.

184. *Id.* at 14.

TABLE 1: COMPARISON OF THE OPERATION OF HOSTAGESHIP FROM MEDIEVAL TO CONTEMPORARY ERA

Types of hostageship	**Basis**	**Demand**	**Leverage**
Medieval diplomacy	People's acceptance of the right of their kings and rulers to decide over the lives and liberty of their son	A pledge of compliance – allegiance – guarantee of peace	The lives of someone with important status and pedigree
17C-19C warfare	Collective responsibility	Deterrence of hostile conduct, compliance with occupying power	Membership of the victim in the group
Contemporary "hostage diplomacy"	Legal and moral obligation of states to their nationals; Public pressure (applicable for democratic government)	Economic or political concessions	Nationality of the victim

to date,[185] lays down the criteria to determine if a national is being taken as an inter-state hostage, including:

- "United States officials receive or possess credible information" or questions by "independent nongovernmental organizations or journalists have raised legitimate questions about the innocence of the detained individual," indicating that "the detention is a pretext for an illegitimate purpose;"[186]

185. Robert Levinson is believed to have been detained in Iran while he was on a CIA mission in 2007, though the Iranian Government does not acknowledge his arrest. The US government announced his presumed death in March 2020.

186. S. 712, 116th Cong. § 2(a)(1), (6), (7).

- "the individual is being detained solely or substantially because he or she is a United States national;"[187]
- "the individual is being detained solely or substantially to influence United States Government policy or to secure economic or political concessions from the United States Government;"[188]
- "the detention appears to be because the individual sought to obtain, exercise, defend, or promote freedom of the press, freedom of religion, or the right to peacefully assemble;"[189]
- "the individual is detained in a country where the Department of State has determined in its annual human rights reports that the judicial system is not independent or impartial, is susceptible to corruption, or is incapable of rendering just verdicts;"[190]
- "the individual is being detained in inhumane conditions"[191] and "due process of law has been sufficiently impaired so as to render the detention arbitrary;"[192]
- "United States diplomatic engagement is likely necessary to secure the release of the detained individual;"[193]
- the assessment is to be done giving regard to "the totality of the circumstances."[194]

There are a few observations about this set of criteria: first, the formulation of some of the criteria remains highly dependent on the subjective assessment of the victim state. For example, the assessment of the judicial system or the general human rights record of the alleged perpetrating state. Some other criteria are prone to the influence of subjective selection of evidence, such as the information or reports suggesting the innocence of the individual or that individual is being detained "solely or substantially because he or she is a United States national" and for the purpose of "influenc[ing the] United States Government."[195] The evaluation is susceptible to any existing tension or dispute between the

187. *Id.* § 2(a)(2).
188. *Id.* § 2(a)(3).
189. *Id.* § 2(a)(4).
190. *Id.* § 2(a)(8).
191. *Id.* § 2(a)(9).
192. *Id.* § 2(a)(10).
193. *Id.* § 2(a)(11).
194. *Id.* § 2(b).
195. *Id.* § 2(a)(2), (3).

target and the alleged perpetrating states and thus the probative value of these criteria can be limited. Having said that, an objective assessment based on some of the criteria through careful corroboration and applying a standard of proof on the balance of probabilities by a third party, such as an international arbitrator, tribunal or court, is still possible. Finally, this Article argues that the criterion about the individual being detained as a result of exercising or defending political and civil rights does not seem to apply to cases that demonstrate a strong indication of a hostage-taking situation, such as "the two Michaels" case or the Nazanin Zaghari-Ratcliffe case. The detention of individuals exercising or defending human rights or political and civil freedoms may be driven purely by domestic interests and has no link to the state's foreign policy ambitions. Notwithstanding, the codification of these criteria carries significant weight of *opinio juris* from one the most powerful and frequently targeted states in inter-state hostage-taking, which will certainly influence the development of legal norms addressing "hostage diplomacy."

IV. Existing Legal Frameworks and Their Limitations

A. *Human Rights Instruments*

In *Hostage in Tehran*, the ICJ commented in dicta that the act of hostage-taking by a state is "manifestly incompatible with . . . the fundamental principles enunciated in the Universal Declaration of Human Rights,"[196] suggesting the relevance of international human rights law on the matter.

As illustrated in the previous chapter, "hostage diplomacy" potentially engages a range of human rights violations, including the freedom from arbitrary arrest and detention, freedom from torture or cruel, inhuman or degrading treatment, and right to fair trial. These rights are well protected in various international and regional human rights instruments, such as the 1948 Universal Declaration of Human Rights,[197] the 1966 International Covenant on Civil and Political Rights (ICCPR),[198] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the European Convention on Human Rights,[199] the American Convention on Human Rights,[200]

196. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I. C.J. Rep. 3, ¶ 91 (May 24).

197. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3, 5, 9 (Dec. 10, 1948).

198. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 7, 9, 14 (Dec. 16, 1966).

199. European Convention on Human Rights art. 3, 5, 6, Nov. 4, 1950, E.T.S. No. 005.

200. American Convention on Human Rights art. 5, 7, 8, Nov. 22, 1969, O.A.S.T.S. No. B-32.

and the African Charter on Human and People's Rights.[201] Subject to the condition of ratification of the respective treaties or the obligation to protect the right under customary law (such as the prohibition of torture and right to fair trial[202]), the practice of "hostage diplomacy" runs contrary to the binding obligations of the perpetrating State towards the victim hostage who is within its territorial jurisdiction.

The CAT is equipped with a compromissory to settle a dispute arising between states in relation to the interpretation or application of the Convention, including the possibility of a referral to the ICJ upon the failure of settling through negotiation and arbitration or the lapse of six month from the date of the request for latter.[203] Nevertheless, twenty-eight state parties have made reservations about the clause.[204] Both the CAT[205] and ICCPR[206] provide for an inter-state communication mechanism by which a state party can transmit a communication to the treaty body and point out the violations of the provisions by another state party. However, this mechanism is only applicable to states that have made a declaration accepting the competence of the respective committee in this regard, and only a minority of state parties have done so.[207]

Article 22 of the CAT provides for the possibility of individual petitions to the implementing committee, though only forty-seven state parties have made a declaration for the provision to be operative.[208] The individual petition mechanism is provided for the ICCPR by way of optional protocol; it has been ratified by 117 state parties though variations of reservation limiting the effect of the mechanism have been entered.[209] Additionally, individuals and states may also bring complaints to the respective regional courts for infractions of the rights protected under the regional conventions, though there is no parallel instrument existing in the Asian and Middle-Eastern regions.

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201. African Charter on Human and Peoples Rights art. 5, 6, 7, Oct. 21, 1986, 1520 U.N.T.S. 217.

202. AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW 14 (2021).

203. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 30, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter the Torture Convention].

204. *Id.*

205. *Id.* art. 21.

206. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 41.

207. 44 out of the 173 state parties of CAT have made the declaration; for ICCPR, amongst the 173 state parties, 49 have done so.

208. *See* the Torture Convention, *supra* note 203, art. 22.

209. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, Optional Protocol.

B. *Consular Assistance*

Under international law, consular access to detained persons is guaranteed by three possible sources. First, Article 36 of the Vienna Convention on Consular Relations (VCCR) bestows consular officers of a state the right to visit its nationals who are in prison, custody or detention, to correspond with them, and to arrange for their legal representation.[210] The Convention has been ratified or acceded to by 182 states, including Canada, China, Iran, and the United Kingdom.[211] Notably, other than Italy and Qatar, no other state party has entered reservation to the provision.[212]

Second, countries may also have concluded consular agreements that provide such guarantees on a bilateral basis. This is the case, for example, between China and Canada. Article 8 of the Consular Agreement Between the Government of Canada and the Government of the People's Republic of China[213] contains consular rights with regards to person in detention similar to that in Article 36 of the VCCR. Notably, Article 8(2) explicitly defines the time frame in relation to visits by the consular officer to the detained person: that visit "shall not be refused after two days" upon the notification of the detention and that "[n]o longer than one month shall be allowed to pass between visits requested by a consular officer."[214]

Third, the obligation of a receiving state to respect the consul's right of access to his nationals can be found in customary international law, as confirmed by the International Law Commission (ILC) Special Rapporteur on the Law of Treaties, Sir Gerald Fitzmaurice, when he tabled the draft of Article 36 of the VCCR.[215] Williams notes also the lack of reservations to the provision, as well as the existence of equivalent substantive provisions in bilateral

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210. Vienna Convention on Consular Relations art. 36(1)(c), Apr. 24, 1963, 596 U.N.T.S. 261 [hereinafter VCCR].

211. Canada and China acceded to the Convention on 18 July 1974 and 2 July 1979 respectively. Iran and UK are one of the signatories to the Convention; both have ratified the Convention respectively on 5 June 1975 and 9 May 1972; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 8638, status as of 19 March 2022.

212. Italy subjects Article 36(1)(c) on the basis of reciprocity; this reservation was objected by Denmark. Qatar reserves the application of Article 36(1) from being applicable to consular employees who are engaged in administrative tasks or to the members of their families. *See id.*

213. Consular Agreement Between the Government of Canada and the Government of the People's Republic of China, Can.-China, art. 8, *entered into force* Mar. 11, 1999.

214. *Id.*

215. 1 Y.B. Int'l L. Comm'n 360, at 480.

agreements, which provide further support for the customary status of this right.[216]

Nevertheless, from the cases reviewed, victims of "hostage diplomacy" are often denied consular access completely (as in the case of Nazanin Zaghari-Ratcliffe)[217] or are allowed such access restrictively (for example, in the case of Michael Kovrig and Michael Spavor).[218] Following the analysis above, such denial or undue restriction on consular assistance constitutes a violation of the state's obligation under treaty or customary law, thus giving rise to a direct injury to the other state. The ICJ in *Avena* held, for example, that Mexico was entitled to a direct claim as a result of the United States' failure to grant consular access to its nationals under Article 36(1) of the VCCR.[219]

1. Consular Assistance to Persons with Dual Nationality

In certain cases, the denial of consular access is premised on the fact that the detaining state does not recognize a second nationality according to its domestic nationality law. Iran, for example, justified its position in denying access to Nazanin Zagharis-Ratcliffe by U.K. consular officials on that basis.[220] Similarly, consular assistance to Huseyincan Celil[221] had been persistently denied by the Chinese authorities on the basis that his Canadian citizenship is not recognized in China.[222] The question is, therefore, how international law regulates the exercise of

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216. David W Williams, *Consular Access to Detained Persons*, 29 INT'L & COMPAR. L.Q. 238, 244 (1980).

217. *See supra* Section III.B.2.

218. *See* Peter Zimonjic, *China Grants Canadian Officials Consular Access to Michael Kovrig, but Not to Michael Spavor*, CBC NEWS (Jan. 22, 2021, 12:17 PM), https://www.cbc.ca/news/politics/michael-kovrig-spavor-consular-access-1.5883882. It is noted Canada has also alleged a violation of diplomatic immunity for the case of Michael Kovrig, who is a former Canadian diplomat posted. *See* Peter Zimonjic, *Trudeau accuses China of violating diplomatic immunity in arrest of Michael Kovrig*, CBC NEWS (Jan. 11, 2019, 7:26 PM), https://www.cbc.ca/news/politics/trudeau-diplomatic-immunity-michael-kovrig-1.4975759; *see also* Walter Arevalo-Ramirez & Robert Joseph Blaise Maclean, *Dual Nationality and International Law in Times of Globalization. Challenges and Opportunities for Consular Assistance and Diplomatic Protection in Recent Cases*, 17 BRAZ. J. INT'L L. 288, 290 (2020).

219. Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 40 (Mar. 31); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 74–75 (2006) [hereinafter *I.L.C. Report 2006*].

220. *See supra* Section III.2.2.

221. Though it is not clear at this point whether Celil should be categorised as a hostage in diplomatic relations or a political prisoner. *See* Amnesty Int'l, *supra* note 163.

222. Arevalo-Ramirez & Maclean, *supra* note 218, at 302. It is worth noting, however, by the operation of Article 9 of the Nationality Law of China, Celil would have lost his Chinese nationality due to his naturalisation in Canada and therefore rendering China's claim on Celil as its national inconsistent with its nationality law.

consular assistance when the detainee is simultaneously a national of two states, including the detaining state. This can be examined from two angles:

First, Article 36(2) of the VCCR states that the rights enshrined in the provision "shall be exercised in conformity with the laws and regulations of the receiving State" though it is equipped with a powerful proviso that "the said laws and regulations must *enable full effect* to be given to the purposes for which the rights accorded under this article are intended" (emphasis added).[223] The proviso was originally worded differently in the ILC draft. The original proposal stated that the national law of the receiving states "must not nullify these rights."[224] The British delegate was of the view that the ILC wording would "appear to be open to the literal interpretation that the laws and regulations of the receiving State could be allowed to impair the rights referred to in paragraph 1."[225] As "protecting and helping nationals of the sending State had become one of [the consul's] most important functions," it was of paramount importance that the rights and obligations agreed in paragraph 1 be laid down clearly and unequivocally.[226] Given this drafting history, not only does Article 36(2) envision that national legislation cannot nullify the rights of the second nationality state under sub-paragraph 1, the domestic rules must even give way to allow the full effect to be realized. In other words, by virtue of Article 36, even if the domestic law of a state does not recognize a second nationality, the state is not entitled to deny the right of the other nationality state to provide consular assistance.

However, it is observed that many states communicate in their advisories that their ability to offer consular assistance to dual nationals detained by their other nationality state is limited.[227] Based on the above analysis, it seems that the position is based on political choice to

223. VCCR, *supra* note 210, art. 36(2).

224. *Report of the Commission to the General Assembly*, [1961] 2 Y.B. Int'l Law Comm'n 88, U.N. Doc. A/CN.4/SER.A/1961/Add.1, at 112.

225. U.N. Conference on Consular Relations, *Vienna Convention on Consular Relations*, at 346, U.N. Doc. A/CONF.25/16 (Apr. 22, 1963).

226. *Id.* at 40.

227. *See e.g.*, *Travelers with Dual Nationality*, U.S. DEP'T OF STATE (Sept. 1, 2022), https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/Dual-Nationality-Travelers.html; *Travelling as a Dual Citizen*, GLOBAL AFFAIRS CANADA (June 26, 2022), https://travel.gc.ca/travelling/documents/dual-citizenship; *Dual Citizenship*, (UK), https://www.gov.uk/dual-citizenship; *Advice for Dual Nationals*, AUSTL. GOV'T: DEP'T FOREIGN AFFS. & TRADE, https://www.smartraveller.gov.au/before-you-go/who-you-are/dual-nationals.

avoid diplomatic tension rather than a limitation imposed by international law.

Second, the reasoning of states, like Iran or China, to refuse consular assistance on the basis that their domestic law does not recognize a second nationality is also flawed under the general principles of international law regulating nationality. Even though Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality ("Hague Nationality Convention")[228] recognizes that the *conferment* of nationality is a matter within the *domaine réservé* of states, the ICJ in *Nottebohm*[229] clearly expounded that the "international effect" of nationality is a matter on the international plane and is governed by international and not domestic law.[230] The Court explains:

> When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.[231]

However, the domestic law of a state for the purpose of determining who are its nationals "shall be recognized by other States in so far as it is consistent with . . . international custom, and the principles of law generally recognized with regard to nationality."[232] In that case, the Court held that Guatemala was under no obligation to recognize the nationality granted by Liechtenstein[233] because, although the acquisition was lawful under the internal nationality law of Liechtenstein, the "right is exercised intentionally for an end which is different from that for which the right has been created."[234] In other words, the nationality was acquired as a result of an "abuse of rights."[235] Having said that, it is not

228. Convention on Certain Questions Relating to the Conflict of Nationality Law art. 1, Apr. 13, 1930, 179 L.N.T.S. 4137 (1930).

229. Nottebohm Case (Liech. v. Guat.) (Second Phase), Judgment, 1955 I.C.J. Rep. 4 (Apr. 6).

230. *Id.* at 21.

231. *Id.*

232. *Id.* at 23.

233. *Id.* at 26.

234. Alexandre Kiss, *Abuse of Rights, in* OXFORD PUB. INT'L L.: MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 5 (2006); *see also* Robert Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L. J. 1, 20 (2009).

235. Sloane, *supra* note 234, at 20.

a determination that can be made by the domestic jurisdiction. An invocation of a right protected by international law by a sovereign state, such as a claim on nationality that conflicts with another right of another sovereign state raises the matter to the international plane. Following *Nottebohm*, the question whether the nationality is validly conferred or acquired is to be considered by international arbitrators, tribunals or courts.[236]

Applying this analysis to the present discussion, unless it can be established that the British nationality of Zagharis-Ratcliffe or the Canadian nationality of Celil has been conferred or acquired in a manner that is inconsistent with international custom or the general principles of law, there is no ground under international law to militate its recognition. The denial of consular assistance therefore constitutes a breach of the detaining state's international obligations under the VCCR and a direct injury to the other nationality state.

C. *Diplomatic Protection*

Diplomatic protection, as part of the law of state responsibility,[237] is one of the mechanisms available to a state to secure reparation for injury to both the state itself or its nationals.[238] Its utility is particularly recognized with regards to violations of human rights suffered by an individual in the hands of a foreign state.

1. Contours of Diplomatic Protection

To invoke a claim of diplomatic protection, there must be a commission of an "internationally wrongful act,"[239] which is an act that violates international law. As the claim is premised on the responsibility of another state, it must therefore be shown that the international wrong is attributable to that state, following the rules of attribution stipulated in the Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA).[240] The language of Article 1 of the ADP is clear that the international wrong must have been committed against a national of the invoking state[241] and the victim must have been a

236. *See* Nottebohm Case (Liech. v. Guat.) (Second Phase), Judgment, 1955 I.C.J. Rep. 21 (Apr. 6).

237. *I.L.C. Report 2006, supra* note 219, ¶ 5, at 26; Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT'L L. 37, 49 (2007).

238. *I.L.C. Report 2006, supra* note 219, ¶ 3, at 25.

239. *Id.* at 24 art. 1.

240. ARSIWA, *supra* note 102 art. 4–11.

241. *I.L.C. Report 2006, supra* note 219, art. 1, at 24.

national of the invoking state both at the time the wrong was committed and when the claim was presented.[242] Moreover, the claim can only be made after the victim has exhausted all the local remedies.[243]

2. Application in the context of "hostage diplomacy"

a. Internationally Wrongful Act

An international wrongful act is defined in ARSIWA as conduct that "constitutes a breach of an international obligation of the State."[244] As illustrated, "hostage diplomacy" involves violations of a range of human rights. The requirement can be met if there are infractions of the perpetrating state's obligations under any human right treaties it has ratified or under customary international law. The requirement is also met if the right infringed is of *jus cogens* character. Additionally, as established above, the refusal of consular access to the detained national constitutes by itself a breach of the perpetrating state's responsibility towards the invoking state.

b. Exhaustion of local remedies

The requirement of exhaustion of local remedies in the exercise of diplomatic protection is premised on the notion that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[245] The principle is also enshrined in customary international law.[246] However, in the context of "hostage diplomacy", exceptions to this requirement can be established on several grounds. First, the rule does not apply where the claimant state is directly injured by the wrongful act of another state.[247] Next, Article 15 of the ADP explicitly provides for the exception to the rule where:

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242. *I.L.C. Report 2006*, *supra* note 219, art. 5, at 35.

243. *Id.* art. 14, at 70.

244. ARSIWA, *supra* note 102 art. 2(b).

245. Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (Mar. 21); Annemarieke Vermeer-Künzli, The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument 189 (Dec. 13, 2007) (Ph.D. thesis, University of Leiden), https://hdl.handle.net/1887/12538; Vasileios Pergantis, *Towards a "Humanization" of Diplomatic Protection?*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 351, 375 (2006) (Ger.).

246. Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (Mar. 21); Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 42, §50 (July 20); *I.L.C. Report 2006*, *supra* note 219, ¶ 1, at 71.

247. *I.L.C. Report 2006*, *supra* note 219, ¶ 9, at 74.

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
(b) there is an undue delay in the remedial process which is attributable to the State alleged to be responsible;[248]

As illustrated in the previous chapter, "hostage diplomacy" is constructed on the detention of the victim "under the *guise* of national law as a way to gain leverage in the conduct of a country's foreign affairs" (emphasis added).[249] To insist on an exhaustion of local remedies in "hostage diplomacy" is equivalent to requesting the injured victim to rely on the system that has been deployed to perpetrate the injury to end the injury. It is a classic "catch-22" situation and is bound to be futile. As surveyed in the cases, victims are put through criminal proceedings in which due process is consistently violated. Fundamentally, if the formulation of "hostage diplomacy" is correct, the construct works precisely because the national legal system is instrumentalized to deliver the political objective. It is well-established that international law does not require such pointless pursuit.[250]

3. Question of Dual Nationality in Diplomatic Protection: Doctrine of Non-Responsibility?

Rooted in the 1930 Hague Nationality Convention, the doctrine prohibits a state from affording diplomatic protection to a national against a state whose nationality the person also possesses.[251] However, the United States Claims Tribunal, in adjudicating whether American-Iranian dual nationals could bring claims under the Algiers Declaration against Iran, cautioned against a blanket application of the doctrine.[252] Noting that the Convention had only 20 State Parties and that significant development in the law of diplomatic protection had occurred over the 50 years period, the Tribunal concluded that the

248. *Id.* art. 15(a)–(b), at 76–77.

249. *See supra*, Section III.E.

250. Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 46, § 59 (July 20) Elettronica Sicula, *supra* note 246, § 59, at 46; *see* illustration in Craig Forcese, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'*, 17 EUR. J. INT'L L. 369, 378 n.46 (2006); *see also Draft Articles on Resp. of States for Internationally Wrongful Acts with Comment*aries, [2001] 2 Y.B. Int'l L. Comm'n 30, § 5, at 121, U.N. Doc. A/56/10.

251. Convention on Certain Questions Relating to the Conflict of Nationality Law art. 4, Apr. 13, 1930, 179 L.N.T.S. 89; *see also* Arevalo-Ramirez & Maclean, *supra* note 218, at 294.

252. Iran v. United States, 5 Iran-U.S. Cl. Trib. ¶ 23 (1984) (concerning the question of jurisdiction over claims of persons with dual nationality).

jurisprudence and legal literature have pointed to the test of "effective nationality"[253] as the dominant arbitrating factor, at least before international tribunals.[254] A similar finding was made by the Italian-U.S. Conciliation Commission on the *Mergé* case[255]: it concerned whether a U.S.-Italian national, having comported and been treated as an Italian national during the Second World War while residing in Japan, was entitled to compensation as a U.S. national. The Court held that "sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality . . ." .[256] Noting these developments and that subsequent codification proposals have given approval to this approach,[257] the Special Rapporteur confirmed that this rule exists in customary law.[258] The recognition of effective nationality in the doctrine of non-responsibility is captured in Article 7 of the ADP, which reads:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national *unless* the nationality of the former State is *predominant* . . . [259]

Noting that Article 7 does not use the word "effective" but rather "predominant" nationality–a deliberate choice to convey a notion of relativity, that the ties with one state is stronger than with the other.[260] The determination requires an assessment of the relative strengths of the competing nationalities based on factors that include habitual residence, the amount of time spent in each country of nationality, the length of the period spent as a national of the invoking state before the claim arose, employment and financial interests, place of family life, family ties in each country, participation in social and public life, use of language, taxation, bank account, social security insurance, visits to the

253. *See* Nottebohm Case (Liech. v. Guat.) (Second Phase), Judgment, 1955 I.C.J. Rep. 22–23 (Apr. 6)

254. Iran v. United States 5 Iran-U.S. Cl. Trib. ¶ 29 (1984); *see* Arevalo-Ramirez & Maclean, *supra* note 218, at 298.

255. United States ex. rel. Mergé v. It. (It. v. U.S.), 14 R.I.A.A. 236 (1955).

256. *Id.* at 247; Forcese, *supra* note 250, at 387.

257. *I.L.C. Report 2006, supra* note 219, at 45.

258. *Id.* at 46; *see also* 22 INTERNATIONAL LAW REPORTS 455 (1955).

259. *I.L.C. Report 2006, supra* note 219, art. 7, at 43 (emphasis added).

260. *Id.* ¶ 4, at 46.

other state of nationality, and possession and use of passport of the other state.[261–262]

Applying the test to the case of Nazanin, for example, given that her effective as well as predominant nationality is British,[263] it would seem that Iran's refusal to acknowledge the diplomatic protection invoked by the U.K. government was unlawful.

4. A Development towards a Duty to Exercise Diplomatic Protection?

With the robust development of human rights law in recent decades, it is only logical to question whether the law of diplomatic protection should evolve from the right remaining purely as a state prerogative. After all, as diplomatic protection may indeed be an effective tool for protecting an individual facing mistreatment by a foreign state, should it not be the case to promote an individual's right to diplomatic protection by his or her government?

As a starter, there are close to thirty states with constitutional guarantees of the individual right to receive diplomatic protection for injuries suffered abroad,[264] signifying a "corresponding duty of the State to exercise protection."[265] There have also been signs suggesting that governments may no longer be "the sole judge"[266] on the matters of diplomatic protection. The domestic courts in other countries have, in the absence of explicit constitutional rules, found that the decision to grant, and the manner to provide, diplomatic protection are subject to judicial review. Special Rapporteur Dugard viewed these domestic constitutional stances and jurisprudence as growing support of the view that there is some form of obligation on the state to exercise diplomatic protection when its nationals abroad are subject to significant human

261. Of note, countries that do not recognise dual/multiple nationalities generally forbid their nationals to enter and depart from the country using a passport other than that of the country. In this regard, the possession and use of the passport of country X may be driven by necessity rather than an indication of genuine connection.

262. *I.L.C. Report 2006*, *supra* note 219, ¶ 5, at 46.

263. *See* John Dugard SC et al., *Re. Nazanin Zaghari-Ratcliffe, Legal Opinion II Availability of Diplomatic Protection*, https://redress.org/wp-content/uploads/2017/11/Zaghari-Ratcliffe-Opinion-Diplomatic-Protection-for-web.pdf (offering the factual analysis of her predominant nationality).

264. The states include, for example, Belarus, China, Georgia, Italy, Kazakhstan, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, Turkey, and Ukraine. S*ee* John Dugard (Special Rapporteur), *First Rep. on Diplomatic Protection ("Dugard I")*, ¶ 80, U.N. Doc. A/CN.4/506 (Mar. 7, 2000); *see* Craig Forcese, *The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad*, 57 U. NEW BRUNSWICK L. J. 102, 112 (2007).

265. *I.L.C. Report 2006*, *supra* note 219, ¶ 3, at 96.

266. See Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Second Phase, Judgment, 1970 I.C.J. Rep. 3, ¶ 44 (Feb. 5).

right violations.[267] However, the proposals to impose a legal duty on a state to exercise diplomatic protection on behalf of its nationals[268] and create a right for a state to exercise diplomatic protection of behalf of a non-national in the face of an injury resulting from a breach of *jus cogens* norm[269] were rejected at the International Law Commission readings.[270] The drafting of Article 19 is thus an in-between step taken to continue the 'progressive development' of crystallizing the customary international law in this regard.[271] A provision entitled "Recommended Practice" indicates that a "State entitled to exercise diplomatic protection according to the present draft articles, *should* . . . [g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred" (emphasis added).[272] The recommendatory language coupled with the wording of "should" in the *chapeau* demonstrates a calibrated attempt to balance the state prerogative and the emerging obligation for the protection of human rights.

At the same time, the wording of Article 19 leaves states with significant room for interpretation: what factors are relevant for the "due consideration" and what defines a "significant injury"? A review of the domestic jurisprudence[273] giving rise to this emerging customary rule suggests that when the injury involves "gross and flagrant infractions of international human rights such as physical abuse and torture", there is a compelling argument to find an emerging, even if qualified, duty to exercise diplomatic protection.[274] The jurisprudence distinguishes these cases from, for example, those involving property expropriation[275] where the traditional view of the state retaining the discretionary power to grant protection remains valid.

D. *The International Convention against the Taking of Hostages (ICATH)*

ICATH is the first and only international treaty designated to address hostage-taking outside the context of armed conflicts. The Convention

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267. *I.L.C. Report 2006*, *supra* note 219, at 96.

268. Dugard, *supra* note 263, ¶ 74.

269. *Id.* ¶ 185(a).

270. *Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Second Session*, [2000] 2 Y.B. Int'l L. Comm'n 1, ¶ 450–55, U.N. Doc. A/55/10.

271. *Id.* ¶ 97.

272. *I.L.C. Report 2006*, *supra* note 219, art. 19(a), at 94 (emphasis added).

273. *See* Vermeer-Künzli, *supra* note 245, at 181–202 (reviewing the case law extensively); *see also* Forcese, *supra* note 264, at 112–27; *see also* Pergantis, *supra* note 245, at 379–87.

274. *Kaunda v. President of S. Afr.* 2004 (10) BCLR 1009 (CC) at para. 69–70 (S. Afr.).

275. *Van Zyl v. the Government of S. Afr.* 2005 (11) BCLR 1106 (High Court) (S. Afr.); *R v. SOS for Foreign and Commonwealth Affairs, ex p Kamrudi Pirbhai* [1985] 107 ILR 462 (QB) (appeal taken from MR) (Eng.).

came into force on 3 June 1983 and enjoys an almost universal acceptance, having been ratified and acceded to by 176 states, including China and Iran.[276] It was driven by a series of hostage crises that proliferated in the 1970s,[277] including the seizure of the members of the Israeli Olympic team in Munich in 1972,[278] the incident at the German Embassy in Sweden in April 1975, the incident at the headquarters of the Organization of Petroleum Exporting Countries (OPEC) in Vienna in December the same year, and the crisis at the Entebbe airport in Uganda in June 1976.[279] As these incidents took place during peace time, the prohibition of hostage-taking in international humanitarian law was not engaged.[280] The few sectoral conventions dealing with aviation and aircraft safety that had existed could, at best, only tangentially address some of the incidents.[281]

Nevertheless, to apply this instrument to the context of "hostage diplomacy," two questions need to be answered first: i) whether the detention of the persons qualifies as hostage-taking as defined in the Convention and ii) whether the Convention covers an act of hostage-taking perpetrated by a state.

1. Applicability in "Hostage Diplomacy"

a. Definition of "Hostages" for the Purpose of the Convention

Article 1(1) of ICATH defines hostage-taking as:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain

276. China and Iran acceded to the Convention on 26 January 1993 and 20 November 2006 respectively.

277. Ben Saul, *International Convention Against the Taking of Hostages*, U.N. AUDIOVISUAL LIBR. INT'L L. 1 (2014), https://legal.un.org/avl/ha/icath/icath.html.

278. DARCY, *supra* note 47, at 123.

279. Saul, *supra* note 277, at 1.

280. In the crisis at Entebbe, the hijackers were members of the Popular Front for the Liberation of Palestine, who demanded an exchange of Palestinian prisoners in Israel for the hostages captured, including Israelis. To a certain extent, there was a clear link to the Israeli occupation of the West Bank and Gaza. *See* DARCY, *supra* note 47, at 123.

281. For example, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. *See* Saul, *supra* note 277, at 1.

> from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.[282]

Given the salient features of "hostage diplomacy" identified in the last chapter, it is clear that the conditions of i) the victim being seized or detained, ii) for the purpose to compel a third party, i.e. another state, iii) to do or abstain from any act as an explicit or implicit condition for the release are all satisfied.[283]

One of the key difficulties in this characterization is, as discussed in the previous chapter, that the conditions for release are not always explicitly communicated. However, the wording in Article 1 expressly covers an "explicit or *implicit* condition for the release of the hostage" (emphasis added).[284] Moreover, international jurisprudence has established that the intent to compel does not need to be actually communicated but can be inferred from circumstances. For example, in *Prosecutor v. Sesay, Kallon and Gbao* (RUF case), the Appeals Chamber of the Special Court for Sierra Leone (SCSL) drew on this definition and found that the offence of hostage-taking "requires only an *intention* by the perpetrator to compel a third party, which may be proved . . . by the issuing of a threat to the detained person alone, or inferred from other evidence" (emphasis added),[285] thus overturning the Trial Chamber's finding of the requirement in communicating the threat or demand to a third party.[286]

Similar emphasis on the mens rea of the perpetrator was found by the United States courts in *Simpson v. Socialist People Libyan Arab Jamahiriya*,[287] a case outside the context of an armed conflict involving a U.S. citizen and her husband, then permanent resident of the United States. They were forcibly removed from the cruise ship when it docked with authorisation at Benghazi as the port of safety and were subsequently arbitrarily detained and threatened. Relying on the explanatory commentary on the Convention, the Court held that "the words 'in order to compel' do not require more than a motivation on the part of the

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282. United Nations, International Convention Against the Taking of Hostages art. 1(1), Dec. 17, 1979, 1316 U.N.T.S. 205.

283. *See also* Ferstman & Sharpe, *supra* note 170, at 411–16 (noting similar analysis).

284. International Convention Against the Taking of Hostages, *supra* note 1, art. 1(1).

285. Saul, *supra* note 277, at 8–9 (citing Prosecutor v. Sesay, Kallon and Gbao (RUF Case), SCSL-04-15-A, Judgment, ¶ 582 (Oct. 26, 2009) (emphasis added).

286. Saul, *supra* note 277, at 9; Sesay, *supra* note 287, ¶ 580.

287. Saul, *supra* note 277, at 10 (citing Simpson v. Socialist People's Libyan Arab Jamahiriya, 470 F.3d 356, 360 (D.C. Cir. 2006)).

offender."[288] The Convention "speaks in terms of conditions of release," so the plaintiff needs to establish the existence of "a demand for *quid pro quo* terms" and the nexus with the detention of the hostage,[289] but is not required to demonstrate that the hostage taker had communicated the intended purpose to a third party.[290] Most crucially, the Court also held that the existence of another concurrent reason for the detention is not enough to establish that the persons were not hostages,[291] as the perpetrator "may have had more than one reason for their detention."[292]

Applying these parameters to the cases reviewed in the previous chapter would suggest that victims who are detained for other charges (e.g. espionage) can still qualify as "hostages" for the meaning of ICATH so long as an intended demand for quid pro quo, regardless if it has been communicated either explicitly or implicitly to the target state, and the nexus of the detention with the demand can be established.

b. State of Non-State Actor

The drafting and negotiation history of the Convention was preoccupied with the disposition of "anti-terrorism." It is well-established that the inception of "terrorism" and the instruments of international legislation against "terrorism" were historically developed in response to violent acts *against* the states.[293] This realist view of security was also evident during the drafting of the Convention as the legitimacy of national liberation movements created once again a political impasse.[294] It is pertinent, however, to warn against an interpretation of the Convention from the inherently biased state-centric

288. Simpson, 470 F.3d at 360.

289. *Id.* at 360.

290. *Id.* at 361.

291. *Id.* at 362.

292. *Id.*

293. Aston notes, for example,

> the League of Nations Convention for the Prevention and Punishment of Terrorism was stimulated by the assassination of King Alexander of Yugoslavia and Louis Barthou, the French Foreign Minister [. . .]. Similarly, the Dutch government's proposal that led to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, arose as a response to Amboinese siege of the Indonesian ambassador's residence in The Hague on April 31, 1970.

Clive Aston, *The United Nations Convention Against the Taking of Hostages: Realistic or Rhetoric?*, *in* BRITISH PERSPECTIVES ON TERRORISM 139, 139 (Paul Wilkinson ed., 1981).

294. Saul notes that the issue of hostage-taking by self-determination movements should have already been settled by the adoption of the two Additional Protocols to the four Geneva Conventions of 1949. *See* supra Section II.D.4; Saul, *supra* note 277, at 2–3.

view that presupposes that "terrorism" or hostage-taking can only be carried out by non-state actors.[295] The discussion of whether states can be actors of terrorism or if hostage-taking by states can be counted as "state terrorism" is beyond the scope of this Article,[296] the pertinent point, however, is that the prohibition of hostage-taking in ICATH is based on an *action-based* rather than an actor-based analysis, as the drafting history shows.[297]

Article 1(2) stipulates that:

> Any person who:
>
> (a) [a]ttempts to commit an act of hostage-taking, or
>
> (b) [p]articipates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.[298]

The commentary to this article emphasizes that, although the word "any person" makes it clear that the Convention is "directed towards individual liability," it does not mean that "acts committed by a person acting at the behest of a State" are exempted from the application of the Convention.[299] In fact, the drafters were explicit that the Convention covers the hostage-taking acts of state agents. The representative of the Federal Republic of Germany, the author of the foundational working paper for the drafting of ICATH, stated that the Convention covers "the case of a person who, acting on behalf of a public institution or a State, committed an offence within the terms of the convention."[300] This interpretation would support the application of ICATH in "hostage diplomacy" cases.

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295. Wright notes that a number of academic writers take the view that terrorism can only be carried out by non-state actors. For example, *see* BRUCE HOFFMAN, INSIDE TERRORISM (3rd ed., Columbia Univ. Press 2006); Peter Alan Sproat, *Can the State Commit Acts of Terrorism? An Opinion and Some Qualitative Replies to a Questionnaire*, 9 TERORRISM & POL. VIOLENCE 117 (1997); Joshua Wright, *State Terrorism: Are Academics Deliberately Ignoring It?*, 6 J. GLOB. FAULTLINES 204, 207 (2019).

296. For a good discussion of the notion of state as "terrorist", see Michael Stohl, *The State as Terrorist: Insights and Implications*, 2 DEMOCRACY & SEC. 1 (2006), https://www.jstor.org/stable/48602564. Scholars also note a voluntary or otherwise induced bias in academic research in avoiding state terrorism. *See* Wright, *supra* note 295, at 207.

297. JOSEPH LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW: A COMMENTARY ON THE HOSTAGES CONVENTION 1979 (Grotius Publications Ltd. 1990).

298. International Convention Against the Taking of Hostages, *supra* note 1, art. 1(2).

299. *Id.* art. 79–80.

300. LAMBERT, *supra* note 297, at 80 (citing U.N. GAOR, 32nd Sess., Supp. 39 at 64, U.N. Doc. A/32/39 (1977)).

Another avenue is to rely on Article 12, which deals with the relationship of ICATH with the 1949 Geneva Conventions the 1977 Additional Protocols. It stipulates that ICATH does not apply to an act of hostage-taking as already covered by the IHL instruments.[301] This can be beneficial for the context of "hostage diplomacy" as any act of hostage-taking that is *not* covered under humanitarian law falls within the remit of ICATH, with no exception for state or non-state actor.[302]

c. Application to Dual-Nationals

Article 13, however, removes the application of the Convention from hostage-taking that are "internal in nature."[303] The provision stipulates the following four cumulative conditions in defining the exclusion:

i) the offence is committed within a single state;
ii) the hostage is a national of that state;
iii) the offender is a national of that state; and
iv) the offender is subsequently found in the territory of that state.[304]

In the context of "hostage diplomacy," this gives rise to the question whether victims who hold more than one nationality, including that of the perpetrating state, are protected by the Convention. Particularly, states that do not recognize dual-nationality may be tempted to rely on this clause to exclude the application of the Convention. However, this would be countered by the "international effect" of nationality as discussed above. The fact that the victim is also a national of another state would militate against the assertion that the offence is purely internal. Furthermore, it can be argued that as "effective nationality" or "predominant nationality" represents customary law, subject to the factual analysis of the circumstances of the individual concerned, the hostage may even be considered as a hostage of another state.

Ferstman and Sharpe also contend that as the purpose of the hostage-taking is "to compel the other state of nationality . . . this internationalizes what might otherwise be a purely domestic act" and thus Article 13 cannot operate.[305] The *travaux préparatoires* show that the drafting delegations had debated quite extensively over whether the

301. International Convention Against the Taking of Hostages, *supra* note 1, art. 12.
302. Saul, *supra* note 277, at 3.
303. LAMBERT, *supra* note 297, at 299.
304. *See* International Convention Against the Taking of Hostages, *supra* note 1, art. 13.
305. Ferstman & Sharpe, *supra* note 170, at 418.

Convention applies when the target of demands is a foreign state.[306] Opinions were divided: one group believed that "the Convention should apply whenever *any* state is subjected to demands" (emphasis added); a second group supported the view that it only applies "when the State that was subjected to demands was *other* than the State wherein the offence took place" (emphasis added); and a third group treated the targeted state being a foreign state as irrelevant "if the offence was otherwise purely internal" and that the situation would be caught by Article 13 and the Convention would not apply.[307] Lambert analyzes that as the draftsmen did not adopt the various proposals which would have given effect to the first two groups' position but instead agreed with the adoption of the final wording as in the existing provision, even though the delegates were well aware it would result "in a restriction of the scope of the Convention," Article 13 would operate to bar the application of the Convention if the demand is targeted to a foreign state.[308] However, Ferstman and Sharpe observe that the state of law has evolved since 1990 when Lambert wrote the commentary; transnational crime treaty instruments adopted after 1990 recognizes "internationalisation" as an additional basis for the applicability when the criminal act was directed at the national of a foreign state.[309]

To say the least, Lambert recognizes that the purely domestic circumstances contemplated by Article 13 would not apply if the pattern of hostage-taking by the perpetrating state involves multiple nationals, including foreign nationals. This is because for the offence to remain outside of the scope of the Convention, "*all* the hostages and *all* the offenders must be nationals of the State in which the offence was committed."[310] That is to say, so long as any one of the persons detained under the practice is a foreign national, this is sufficient for the Convention to apply.[311]

2. Enforcement

Any inter-state disputes concerning the Convention are to be settled according to Article 16: a dispute which is not settled by negotiation

306. *See* LAMBERT, *supra* note 297, at 308–10.

307. *Id.* at 309 (emphasis added).

308. *Id.* at 310 (citing U.N. GAOR, 34th Sess., Supp. 39 at 19, U.N. Doc. A/34/39 (1979)).

309. *See* U.N. International Convention for the Suppression of Terrorist Bombings art. 3, 6(2), Dec. 15, 1997, T.I.A.S. 02-726; *see also* U.N. International Convention for the Suppression of the Financing of Terrorism art. 3, 7(2), Dec. 9, 1999, T.I.A.S. 13075; *see also* U.N. International Convention for the Suppression of Acts of Nuclear Terrorism, art. 3, 9(2), Sept. 14, 2005, T.I.A.S. 15-1030; *see* Ferstman & Sharpe, *supra* note 170, at 418 n.77.

310. Ferstman & Sharpe, *supra* note 170, at 418 (quoting LAMBERT, *supra* note 299, at 312).

311. *See id.* (quoting LAMBERT, *supra* note 297, at 300).

shall be submitted to arbitration. Should agreement fail to be reached within six months of the request, "any one of those parties may refer the dispute to the International Court of Justice."[312] Several states have nonetheless entered reservations specifically to this clause,[313] which significantly reduces the feasibility of a resolution adjudicated by the ICJ.

It is also pertinent to highlight an Israeli Supreme Court decision, which is an illuminating example of the application of the Convention by a domestic judiciary. The case concerns the administrative detention of Lebanese nationals by the Israeli Ministry of Defense to bargain for the release of Israeli soldiers held captive in Lebanon.[314] The Supreme Court held that "holding persons in detention as 'bargaining chips'" did not comply with Article 1 of the Hostages Convention and Article 34 of the Fourth Geneva Convention. Even though international treaty law was not binding on Israel's domestic order "without an act of implementation by virtue of a domestic law," there was, however, a "presumption of compatibility between public international law and the domestic law."[315] Justice Dorner also opined that, as the prohibition against holding hostages was part of customary international law,[316] it would be directly incorporated into domestic law in the Israeli judicial system.[317] Subject to the respective national legal tradition in relation to treaty and customary international law, this decision provides a persuasive legal authority for the application of the Convention by domestic courts and can be potentially powerful in resolving state-to-state hostage-taking situations given its broad ratification status.

V. Opportunity and recommendations

The previous sections demonstrate the proliferation of the practice of hostage diplomacy in inter-state relations, while the existing legal instruments available for states fall short in satisfactorily addressing the increasingly intensified phenomenon. The main shortcomings include the uncertainty around the characterization of the practice as "hostage-taking", the uncertainty around the operation of the ICATH, the discretionary nature in the exercise of diplomatic protection, and the

312. International Convention Against the Taking of Hostages, *supra* note 1, at art. 16(1); *see also* Saul, *supra* note 277, at 8; *see also* LAMBERT, *supra* note 297, at 343.

313. These states include, for example, China, Democratic People's Republic of Korea, Iran, and Turkey.

314. *See* Case 7048/97 Anonymous (Lebanese citizens) v. Minister of Defence, PD 12 (2000) (Isr.).

315. *Id.* ¶ H1 (internal quotations omitted).

316. *Id.* ¶ H4.

317. *Id.* ¶ H5.

difficulties in applying these instruments to dual national victims. Although the protection of individuals possessing dual or multiple nationalities has been addressed in the ADP, its draft status may not provide sufficient strength to counter the well-established rule of non-responsibility. There is a strong case to argue for a change in the status quo. International law should be developed to better address the threats of "hostage diplomacy."

In February 2021, Canada launched the Declaration Against Arbitrary Detention in State-to-State Relations. The Declaration aims to reaffirm the principles of the prohibition against arbitrary arrest and detention (Article 9 of the UDHR, Article 9(1) of the ICCPR) and the right to exercise consular function to nationals in detention as provided in Article 36(1) of the VCCR.[318] The Declaration is also accompanied by a Partnership Action Plan, which lays out six areas of voluntary cooperation and engagement between States "in order to deter and sustain momentum against the practice of arbitrary arrest, detention or sentencing in State-to-State relations."[319] As of March 2022, the Declaration had been endorsed by the European Union and sixty-eight other states.

Despite its non-binding nature, the Declaration is a concrete step forward to raise awareness and galvanize support amongst the international community to tackle the increasing threat to states, and their nationals who travel, work, or live abroad. It sets in course the development of an emerging norm amongst states that such practice should be deterred, curbed, and sanctioned. The momentum, therefore, presents a conducive opportunity for states to solidify the norm and aspirations as law. The following are some proposed key elements to be considered for the development.

A. *Proper Characterization as Hostage-Taking*

Despite its progressive vision, the Canadian government fell short of calling a spade a spade. The Declaration is couched as an initiative against arbitrary detention; the official web page introducing the

318. *See Arbitrary Detention in State-to-State Relations*, GOVERNMENT OF CANADA, https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitrary_detention-detention_arbitraire.aspx?lang=eng (last visited Apr. 26, 2022).

319. *See id.*; *Arbitrary Detention in State-to-State Relations - Partnership Action Plan*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitrary_detention-detention_arbitraire-action_plan.aspx?lang=eng (last visited Apr. 17, 2022).

Declaration says that "[a] round the world, foreign nationals are being detained arbitrarily and used as bargaining chips in international relations."[320] As discussed, this characterization is distracting. In its handling of the case of Nazanin Zaghari-Ratcliffe, the U.K. also shares the reluctance to use the "hostage" label. Similarly, the U.N. bodies have also stayed with the language of "arbitrary detention" in their opinions,[321] and the comment closest to describing the reality was that "foreign and dual nationals have been targeted."[322]

The label of "hostage-taking" is essential as it is the characterization that correctly reflects the nature of the practice: persons possessing specific nationalities are being targeted and used as leverage for bargaining. As expressed by Richard Ratcliffe, the husband of Nazanin, the issue cannot be appropriately addressed unless it is properly identified.[323] The correct labelling also carries an expressive function, which is crucial in bringing this emerging practice within the well-established position that hostage-taking, in armed conflicts or peace time, by state or non-state actors, is unlawful.

However, the labelling will not be meaningful if it is not accompanied by a qualifying definition. In this regard, the eleven criteria listed in the U.S. Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act[324] can be a good foundation to start with.

B. *Framework of Diplomatic Protection*

As a state-to-state hostage-taking situation involves a tripartite relation among the hostage, the nationality state, and the perpetrating state, this Article proposes that the framework of diplomatic protection would be more fitting. Unlike the other state-to-state framework, the law of diplomatic protection puts the protection of the individual in the center stage in the inter-state dispute. Rather than reinventing the wheel, the new instrument can take the well-elaborated ILC Draft Article on Diplomatic Protection as a blueprint. However, to make it fit

320. *Arbitrary Detention in State-to-State Relations*, *supra* note 318.

321. Ferstman & Sharpe, *supra* note 170, at 421, 421 n.95.

322. *Id.* at 422 (referencing Javaid Rehman (Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran); *Rep. of the Situation of Human Rights in the Islamic Republic of Iran*, §3, U.N. Doc. A/HRC/46/50 (Jan. 11, 2021).

323. Dominic Dudley, *'Alienated But Streetwise' Hunger Striker Demands U.K. Does More to Rescue Wife From Iran*, FORBES (Oct. 27, 2021, 10:11 AM), https://www.forbes.com/sites/dominicdudley/2021/10/27/alienated-but-streetwise-hunger-striker-demands-uk-government-does-more-to-rescue-wife-from-iran/.

324. *See* S. 712, 116th Cong. § 2(a)(1)–(11) (2020).

for the purpose of addressing state-to-state hostage-taking, the following modifications and additions are recommended.

1. An Obligation to Grant Protection

As analyzed, the victims in state-to-state hostage-taking were targeted precisely because of their foreign nationality;[325] the victim has befallen a hostage and suffer because he or she is a national of the target state. It is, therefore, a forceful argument to deviate from the discretionary approach and impose in the new instrument an obligation for the nationality state to grant protection.

2. Removal of the Exhaustion of Local Remedies Rule

Although Article 15 ADP has already provided for circumstances where the local remedies rule is exempted, it remains insufficient given the conditions that need to be satisfied to claim for the exceptions. It is equally dissatisfactory to rely on the interpretation of Article 14(3), as explained previously, to construe the exception to the rule in cases of a direct injury to the invoking state. For a scenario of hostage-taking by state, this Article argues that the exhaustion of the local remedies rule should be removed in this new instrument.

3. Unequivocal Right to Invoke Protection against the State of Nationality

To address the difficulties facing victims who possess dual or multiple nationalities, including that of the perpetrating state, the instrument should explicitly provide for the right to invoke protection against the state to which the person concerned is a national of, if the predominant nationality of the victim is determined to be that of the invoking state. That is, a provision mirroring Article 7 of the ADP.

C. *Safeguards in Enforcement*

In addition, there is a need to include a compromissory clause to settle disputes, including the determination of predominant nationality of dual-national victims. Compulsory arbitration should be included as a safeguard in case disputes cannot be settled through negotiation. The possibility of a referral to the ICJ should be provided as a last resort.

In that regard, it would be beneficial to envision an establishment of an implementing Committee under the new instrument. In addition to

325. *See* WGAD Op. No. 28/2016, *supra* note 169, ¶ 49; WGAD Op. No. 49/2017, *supra* note 169, ¶ 43; Dugard, *supra* note 263, ¶ 39; *see also* Ferstman & Sharpe, *supra* note 170, at 413.

being an option as the arbitrator, the Committee can assume some of the areas of cooperation and engagement envisioned in the Canadian Partnership Action Plan, particularly in relation to the tracking and monitoring of cases. The establishment of a systematic pattern of practice can provide essential contextual information in the classification of cases; the periodic reports identifying cases and probable pattern may also have deterrent effect. Furthermore, without prejudice to the possibility of a referral to the ICJ, the Committee should be empowered with the authority to order cessation, reparation, and guarantee of non-repetition. Individual petitions should be recognized. As a progressive step in synchronization with human rights development and to avoid fragmentation in remedies, the Committee may also consider the possibility of coordinating individual cases with other relevant treaty body committees, such as the Human Rights Committee, the Committee for CAT, and the Working Group on Arbitrary Detention.

VI. Conclusion

This Article advocates that human beings cannot be an instrument in foreign relations and state-to-state hostage-taking cannot be a form of diplomacy. Although international legal norm against hostage-taking already exists, the law at present seems insufficient to sanction the practice. It is because the so-called "hostage diplomacy" is orchestrated under the guise of national law. The human pawn may have the function of a hostage though officially, he or she is a "prisoner" convicted and sentenced according to the domestic legal system of the detaining state. Without a proper framework to "pierce the veil" and qualify the situation as a state-to-state hostage-taking, states may have limited legal avenues to effectively sanction the practice.

This Article presents the contours of "hostage diplomacy" by first laying out a historical understanding of the use of hostageship in inter-state relations. Section II surveys the evolution of hostageship, dating back to the ancient civilizations and the medieval times. The notions of public utility and collective responsibility sustained the practice until at least the 17th century. With the emerging corpus of laws of war introducing the principal distinction between combatants and civilians, the legality of hostage-taking was finally settled with the codification of the Geneva Conventions and their Additional Protocol.

The use of hostages in inter-state relations outside the context of war, however, continued to perpetuate throughout the Cold War era and there are signs that since the last decade, states have been increasingly engaging in the practice of detaining foreign nationals as hostages for foreign policy purposes. However, not all foreign nationals convicted

and detained are to be categorized as "hostages." Section III reviews selected case studies of state practice, academic literature, and the U.S. Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act to identify criteria for proper characterization of a state-to-state hostage-taking situation. Section IV explores various existing legal frameworks that may provide redress or relief for a situation of "hostage diplomacy," though each comes with certain limitations and constraints, except for the guarantee of the right to provide consular protection by the nationality state, which is applicable even when the victim is also a national of the detaining state. By virtue of Article 36(2) of the VCCR, the detaining state is not entitled to refuse consular access by the other nationality state on the basis that its domestic law does not recognize second nationality.

This Article ends with Section V, which identifies the opportunity presented by Canada's introduction of the non-binding Declaration Against Arbitrary Detention in State-to-State Relations, which is endorsed by the European Union and sixty-eight other states to date. This Article recommends that states capitalize the momentum and to develop a binding, fit-for-purpose instrument based on the blueprint of the DAP with a number of crucial modifications and additions.

The author does not under-estimate the difficulties in the negotiation of a new convention. On the other hand, combating hostage-taking in state-to-state relations is perhaps one of the few matters where the interests of states and the individuals concerned are most aligned: for the individual, it is about being freed from arbitrary detention and mistreatment; for the state, even if it is not for the worth of the protection of human rights and at the crudest form, it is certainly in its interest to recover the "human pawn" so as to be freed from the coercion imposed by the perpetrating state. For democratic governments, the expectations from the constituencies to bring the victim home or to be assured of the capacity of the government to protect them in case they fall victim to hostage diplomacy in the future converge states' political interests with human rights imperative. A holistic new convention unequivocally calling out the practice as hostage-taking, incorporating human rights protection dimensions and supported by a robust interstate dispute settlement would be an optimal way forward.