Committee Secretary

Foreign Affairs, Defence and Trade Committee

Department of the Senate

PO Box 6100

Parliament House

Canberra ACT 2600

30/08/2024

Dear Officer,

RE: Inquiry into Wrongful detention of Australian citizens overseas

The Australian National University Law Reform and Social Justice Research Hub (‘ANU LRSJ Research Hub’) welcomes the opportunity to provide this submission to the Foreign Affairs, Defence and Trade Committee, responding to the terms of reference of the Inquiry into Wrongful detention of Australian citizens overseas.

The ANU LRSJ Research Hub falls within the ANU College of Law’s Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law’s complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. That the Commonwealth Parliament enacts an Act facilitating for the clear identification of incidents of hostage diplomacy, to a similar effect as the United States Hostage Recovery Act, including emphasising the matter as a breach of human rights and international law.

2. That this inquiry directs the Executive Government to use the proper terminology of ‘hostage diplomacy’ when referring to the practice.

3. That this inquiry directs the Parliament and Executive to undertake responses in international law, and human rights law in response to cases of hostage diplomacy.

4. That this inquiry directs the Commonwealth Parliament to enact legislation to extend universal jurisdiction to cases of hostage diplomacy, at the very least on the narrow view expounded above.

5. That this inquiry directs the Commonwealth Parliament and the Executive perpetrators of hostage diplomacy to Australia's current framework of universal jurisdiction of border security, domestic investigation and prosecution, and international crime cooperation.

6. That this inquiry directs the Executive to advocate for the adoption of treaty body enforcement mechanisms of international human rights instruments in diplomatic cases, and pursue cases in the international courts.

7. That this inquiry directs the Executive to pursue relief under injury to the State in international courts if consular access to hostages are not granted.

8. That this inquiry recommends that the Executive use diplomatic protection on the basis of the principles set out in the International Law Commission Draft Articles on Diplomatic Protection as a blueprint, and that the Commonwealth Parliament is directed to legislate as is necessary for this purpose. The Executive must also be directed to advocate the elevation of these Draft Articles to a treaty in diplomatic engagements.

9. That this inquiry directs the Commonwealth Parliament to enact legislation to the effect that diplomatic protection must always be considered, subject to judicial and merit review. The Executive must also be directed to institute a policy principle that any resolution of a hostage situation must be preceded by the granting of diplomatic protection.

10. That this inquiry directs the Executive to pursue relief under the ICATH through both the international mechanisms of negotiation, arbitration, and referral to the International Court of Justice and where possible, the domestic courts.

11. That this Committee recognises the Executive treat cases of hostage diplomacy involving dual nationals as if they were solely Australian citizens by excluding the Doctrine of Non-Responsibility on the basis of effective nationality.

12. That this inquiry directs the Department of Foreign Affairs and Trade to provide families of hostages with the necessary support for the conducting of an effective public campaign. This can be through the provision of access to experts and conditions imposed on such a campaign so as to not jeopardise sensitive negotiations.

13. That this inquiry directs the Executive to advocate for the universal adaptation of a Treaty against Hostage Diplomacy in State-to-State Relations, building upon the non-binding declaration to that effect headed by Canada in 2021.

14. That this inquiry directs the Commonwealth Parliament to legislate as is necessary to impose Magnitsky Sanctions on individuals perpetrating hostage diplomacy. The Executive must also be directed to apply these judiciously in conjunction with multilateral partners.

15. That this inquiry directs the Executive to adopt policy to consider the best alternative to a negotiated agreement in remedying instances of hostage diplomacy. There must also be a stated policy position that Australia will not compromise certain principles like the rule of law.

On behalf of the ANU LRSJ Research Hub,
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Improving Australia's current processes for categorising and declaring cases of wrongful detention [Term of reference (c)].

This submission notes that hostage diplomacy is not the only form of wrongful detention.

Defining hostage diplomacy

Hostage diplomacy is a phenomenon loosely described as occurring where 'states detain foreign nationals as a means to coerce the foreign policy of another state'.[1] The key feature distinguishing hostage diplomacy from arbitrary detention is 'the existence of a demand as a condition for release'.[2] Detention of foreign nationals in times of peace, in the absence of international humanitarian law which usually only operates in war, is a 'way to gain leverage in the conduct of a country's foreign affairs'.[3]

This is not an exhaustive set of conditions. An attempt at codifying a definition of hostage diplomacy is seen in the United States through the Congressional consideration of the *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* ('The US Hostage Recovery Act').[4] This laid out criteria for ascertaining an instance of hostage diplomacy having regard to the 'totality of the circumstances'.

Where a suspected incident of hostage diplomacy of a US National has occurred, under the Act, US Officials would have 'receive[d] or possess credible information' or questions by non-governmental organisations or journalists having raised legitimate questions about the innocence of the detained' indicating their detention is a 'pretext for illegitimate purposes'.[5] Further, the detainee is being 'detained solely or substantially' because 'he or she is a United State national'[6] to 'influence United States Government policy or to secure economic or political concessions'.[7] They are also to be detained in a State where the State Department has deemed the 'judicial system is not independent or impartial, is

[1] Beatrice Lau, '"Hostage Diplomacy" – A Contemporary State Practice Outside the Reach of International Law?' (2022) 53(3) *Georgetown Journal of International Law* 343, 345 ('*A Contemporary State Practice*').
[2] Ibid 369.
[3] Ibid 372.
[4] *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act*, S712, 116 Congress (2020) ('*United States Hostage Recovery Act*').
[5] Ibid s2(a)(1), (6), (7).
[6] Ibid s2(a)(2).
[7] Ibid s2(a)(3).

susceptible to corruption, or is incapable of rendering just verdicts'.[8] It provides for the detainee being held in 'inhumane conditions'[9] where 'due process of law has been sufficiently impaired' to render the detention arbitrary.[10] Another defining feature is also captured in that United States 'diplomatic engagement is likely necessary to secure the release' of the detainee.[11]

Issues in ascertaining a case of hostage diplomacy

Even such a definition as provided in the US Hostage Recovery Act leaves certain issues unclear when categorising cases of hostage diplomacy.

It is often the case that at the 'early stages of a hostage taking situation resemble lawful detention'[12] as it is likely most Australians arrested overseas actually have a case to answer.[13] Australia must not be seen to judicially invoke the serious matter of hostage diplomacy to protect citizens subject to mere due processes of law. If prudence is not exercised the damage to Australia's international reputation may weaken its responses in actual cases of hostage-taking.

It may also be the case that the State takes Australians hostage and only makes a demand – a core component of hostage diplomacy – when a relevant situation arises, such as a realpolitik desire for revenge or need of bargaining chips. This 'uncertain temporal scope'[14] may make it impossible to properly categorise a matter as a case of hostage diplomacy.

Further, challenges arise relating to the criminal charges usually laid on hostages used as tools for diplomacy. It is often the case that 'victims arrested and charged for espionage or activities endangering national security offences to which evidence need not be disclosed due to state secret privilege'.[15] Due process is hence often violated and detainees may be subject to ill-treatment behind doors closed by international law, with little discretion paid to whether the matter constitutes a genuine case of espionage.

[8] Ibid s2(a)(8).
[9] Ibid s2(a)(9).
[10] Ibid s2(a)(10).
[11] Ibid s2(a)(11).
[12] *A Contemporary State Practice* (n1) 369.
[13] Ian Kemish, *The Consul: An Insider Account from Australia's Diplomatic Frontline* (University of Queensland Press, 2022) 236 ('*The Consul*').
[14] *A Contemporary State Practice* (n1) 369.
[15] Ibid 370.

These factors work to cloud a proper assessment of the circumstances relating to a particular case of alleged hostage diplomacy. Therefore, a proper assessment to whether the present case is an actual matter of hostage diplomacy on a sound evidentiary basis is made difficult, at least initially – or even impossible.

By contrast, it is unclear if there is a transparent and consistent framework for categorising victims of hostage diplomacy in Australia at all.

Recommendation 1: That the Commonwealth Parliament enacts an Act facilitating for the clear identification of incidents of hostage diplomacy, to a similar effect as the United States Hostage Recovery Act, including emphasising the matter as a breach of human rights and international law.

The statutory framework considered in the United States could help mitigate some of the concerns that challenge the proper ascertainment of a case of hostage diplomacy as outlined above.

However, a flaw in the United States' framework is that many elements are subjectively decided by the United States itself. This could work to dampen the credibility of any assessment made under the Act in the eyes of the hostage-taker. The legislation to be enacted in Australia must provide for an objective and unbiased assessment of the situation to enhance the authority of any ascertainment of hostage diplomacy under the Act.

This can be done by applying carefully corroborated evidence and applying a standard of proof of the balance of probabilities (owing to the unavailability or evidence of a good standard in many instances) by a third party. This could be by a process of referral to an international arbitrator, court, or treaty body. A treaty body arising out of the Canada-led Declaration Against Arbitrary Detention in State-to-state Relations – or an instrument of similar effect – might fulfil this role due to the multilateral support it has.

The amendments must be adapted to Australian circumstances. However, the emphasis placed on key identifiers of hostage diplomacy – such as the use of the hostage as a bargaining tool – and the basis of the test considering the totality of the circumstances must be retained. This is to ensure that the absence of just one condition on the balance of probabilities, like the condition in the US Hostage Recovery Act that the detainee 'sought to … exercise … [among other things] the right to peacefully assemble'[16] in the

[16] *United States Hostage Recovery Act* (n4) s2(a)(4).

state holding the detainee does not vitiate an assessment that the person is a victim of hostage diplomacy.

Proper characterisation of hostage diplomacy by the Executive Government

The Australian Government is highly averse towards the use of the term 'hostage diplomacy'.

The joint statement of Prime Minister Anthony Albanese and Foreign Minister Penny Wong on 11 October 2023[17] upon the release of Chinese-Australian journalist Chieng Lei, called the case a matter of 'detention'. It made no reference to her arbitrary detention, let alone Ms. Chieng being a victim of hostage diplomacy. Former Foreign Minister Marise Payne, while being forthright in her description of the detention of Dr Yang Jun as a matter of 'arbitrary detention' stopped short of a reference to the practice as hostage diplomacy.

The proper label of 'hostage-taking' and 'hostage diplomacy' is essential as it is the only characterisation that correctly reflects the nature of the practice[18] as distinct from other forms of arbitrary detention. To abstain from the proper terminology also obviates its expressive function that the matter is serious and criminal.[19] It is possible that this may have the effect of an adverse diplomatic reaction by the hostage-taker. To that effect, the proper labelling must at the very least be used internally to ensure that the proper processes in the specific circumstances are being used.

Recommendation 2: That this inquiry directs the Executive Government to use the proper terminology of 'hostage diplomacy' when referring to the practice.

[17] Minister for Foreign Affairs, 'Ms Chieng Lei' (Joint Statement with Anthony Albanese, 11 October 2023).
[18] *A Contemporary State Practice* (n1) 395.
[19] Ibid.

Improving Australia's policy framework and deterring the practice of arbitrary detention for diplomatic leverage [Term of reference (a)].

Defining hostage diplomacy

Hostage diplomacy is a phenomenon loosely described as occurring where 'states detain foreign nationals as a means to coerce the foreign policy of another state'.[20] For a more exhaustive definition refer to the definition laid out by this submission above.

Undertaking a response in international law

The International Court of Justice (ICJ) in *United States Diplomatic and Consular Staff in Tehran*,[21] commented in dicta that the practice of hostage taking by a State is 'manifestly incompatible with … the fundamental principles enunciated in the Universal Declaration of Human Rights'.[22] This shows the practice of hostage diplomacy is to be dealt with as a matter of international law, and international human rights law.

These violations of human rights include the freedom from arbitrary arrest and detention, freedom from torture or cruel, inhuman or degrading treatment, and the right to a fair trial protected under binding international instruments[23] like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights,[24] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[25] States practising hostage diplomacy often have many or all of these instruments ratified, binding the States to the adherence of the relevant human rights.

Recommendation 3: That this inquiry directs the Parliament and Executive to undertake responses in international law, and human rights law in response to cases of hostage diplomacy.

Application of universal jurisdiction

[20] Ibid.

[21] *United States Diplomatic and Consular Staff in Tehran* (US v Iran) (Judgment) [1980] ICJ Rep 3, 91.

[22] Ibid, sourced from *A Contemporary State Practice* (n1) 375.

[23] *A Contemporary State Practice* (n1) 375.

[24] *International Covenant on Civil and Political Rights*, opened for signature 5 February 1952, (entered into force 23 March 1976).

[25] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed 4 February 1985, (entered into force 26 June 1987),

Universal jurisdiction 'ensures that, where a serious crime of international concern has been committed, and States which have jurisdiction are unable or unwilling to act, and international courts lack the jurisdiction or practical means of prosecuting the perpetrators of grave crimes, then another State may take up the action on behalf of the international community'.[26] A State may exercise universal jurisdiction regardless of where the crime of concern occurred.[27]

Article 4 of the 1949 Geneva Convention, ratified by all 197 United Nation Member States explicitly forbids the taking of hostages. The conjunction of the Additional Protocols I and II of 1977 mean the 'taking of hostages by military agents or non-state actors is to be sanctioned by domestic law and is even elevated to the status of an international crime punishable under universal jurisdiction'.[28] This clearly shows there is a perspective to be considered as to the application of universal jurisdiction to the practice of hostage taking.

The rationale underpinning universal jurisdiction is that a crime is of such an exceptional nature to render its suppression a joint concern of all members of the international community.[29] The proper investigation and punishment of perpetrators is necessary to uphold the international rule of law.[30] Having been developed to prevent pirates from escaping to safe havens on the view that they are 'enemies of all mankind'[31] universal jurisdiction has since extended to cover the crimes of genocide, war crimes, crimes against humanity, slavery and torture.

Hostage diplomacy often occurs in circumstances where detainees are held without due process on charges of espionage or activities involving national securities. Hence, the 'evidence [relating to their conviction] need not be disclosed due to state secret privilege'.[32] Detainees here are likely to be subject to ill-treatment – even as an incentive for the State from whom the detainee originates – to conclude the bargain on the hostage-takers terms.

On a narrower view, Australia must extend its exercise of universal jurisdiction to cases of hostage diplomacy where it is likely that hostages were subject to crimes punishable by existing universal jurisdiction, including torture and slavery in times of peace.

[26] Permanent Mission of Australia to the United Nations, 'Australia's Views on the Scope and Application of the Principle of Universal Jurisdiction, Submission to the Secretary-General of the United Nations, 28 April 2018, 2 ('Australia's Submission to UNSG').
[27] Ibid 1.
[28] *A Contemporary State Practice* (n1) 359.
[29] Australia's Submission to UNSG (n26) 1.
[30] Ibid.
[31] Ibid.
[32] *A Contemporary State Practice* (n1) 370.

On a broader view, Australia must extend its exercise of universal jurisdiction to all cases of hostage diplomacy. Hostage diplomacy is an exceptional crime that violates such a plethora of human rights – including freedom from torture. It is of such a nature, as in the case of pirates, that hostage-takers must be viewed as enemies of all humankind to render its suppression a concern of all members of the international community. Ending impunity for hostage takers in state-to-state relations is essential to uphold the international rule of law. To hold otherwise would be to excuse violations of human rights and international law in circumstances where the State with the jurisdiction to act – the hostage-taker itself – is unwilling to act.

In order for universal jurisdiction to have effect in Australian law, it must be incorporated into Australian domestic law.[33]

Recommendation 4: That this inquiry directs the Commonwealth Parliament to enact legislation to extend universal jurisdiction to cases of hostage diplomacy, at the very least on the narrow view expounded above.

Recommendation 5: That this inquiry directs the Commonwealth Parliament and the Executive perpetrators of hostage diplomacy to Australia's current framework of universal jurisdiction of border security, domestic investigation and prosecution, and international crime cooperation.

Prosecution and punishment of a crime like hostage-taking for diplomatic purposes is essential to dispel the impunity that currently exists for the practice. In the absence of broad and comprehensive punishment of perpetrators of hostage diplomacy, the practice cannot be deterred.

Pursuing matters of hostage diplomacy through treaty bodies

Binding international instruments protect against the taking of hostages in state-to-state relations for the purposes of diplomacy including the International Covenant on Civil and Political Rights,[34] and the Convention against Torture and Other Cruel, Inhuman or

[33] Australia's Submission to UNSG (n26) 2.

[34] *International Covenant on Civil and Political Rights*, opened for signature 5 February 1952, (entered into force 23 March 1976).

Degrading Treatment or Punishment.[35] However, issues persist with the enforcement of these obligations.

For instance, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[36] in Article 22 provides for the possibility of individual petition to the implementation committee. However, only forty-seven States Parties have made a declaration making this provision operative.[37]

Nonetheless the pursuit of hostage diplomacy matters as a human rights violation through treaty bodies is vital. It may well change the psychology of the hostage-takers by creating new detriments for engaging the practice, such as the possibility for a finding against them by an international court or treaty body contrary to their interests of a positive international standing.

Treaty bodies are also vital in creating periodic reporting and identification of cases and probable patterns which may have a deterrent effect.[38]

Recommendation 6: That this inquiry directs the Executive to advocate for the adoption of treaty body enforcement mechanisms of international human rights instruments in diplomatic cases, and pursue cases in the international courts.

Provision of consular assistance

Article 36 of the *Vienna Convention on Consular Relations*[39] bestows consular officers of a State the right to visit its nationals. Some States guarantee these on a bilateral basis. This is also guaranteed as a matter of customary international law.[40] This makes the right binding upon all States regardless of their accession to Article 36.

[35] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed 4 February 1985, (entered into force 26 June 1987).
[36] Ibid.
[37] *A Contemporary State Practice* (n1) 376.
[38] Ibid 397.
[39] *Vienna Convention on Consular Relations*, signed 24 April 1963, (entered into force 19 March 1967) ('*VCCR*').
[40] *A Contemporary State Practice* (n1) 377, citing Sir Gerald Fitzmaurice, 1 YB International Law Commision 360, 480.

The refusal of consular access gives rise to a direct injury to the State refused the access.[41] The International Court of Justice, in *Avena and Other Mexican Nationals*,[42] held that Mexico was entitled to a direct claim due to the failure of the United States to grant consular access to its nationals under the *Vienna Convention*.[43]

The customary nature of the requirement that consular access be provided, and the injury resulting to the State from its refusal means Australia can pursue these matters in the international courts. This might result in findings in Australia's favour and result in access being granted, and the deterrent effect of introducing the detriment of a finding against the hostage-taker and its negative effect on that State's standing.

Recommendation 7: That this inquiry directs the Executive to pursue relief under injury to the State in international courts if consular access to hostages are not granted.

The granting of diplomatic protection

Diplomatic protection is generally a discretionary measure that can take any form not prohibited by international law on behalf of the State's nationals whose rights have been injured by the hostage-taker. The practice of hostage-diplomacy inherently involves countless human rights violations, thus warranting diplomatic protection as a response.[44]

To invoke a claim in diplomatic protection there must be the commission of an 'internationally wrongful act' which is any act that violates international law. The claim, as it charges the responsibility of another State, must show that the international wrong is attributable to the State.[45] This condition is met, for example, if the hostage-taker refuses Australian diplomats consular access to the hostage.

The use of diplomatic protection also requires the precondition that the victim must exhaust all local remedies for resolving the matter. This prima facie poses issues in the absence of due process, the use of closed door trials, and the endless delaying of trials under local courts. It is thus unclear whether local remedies could ever be properly exhausted so that diplomatic protection can be applied. This is therefore a futile exercise not required under international law.[46]

[41] Ibid.
[42] *Avena and Other Mexican Nationals* (Mex v US) (Judgment) [2004] ICJ Rep 12, 40.
[43] *A Contemporary State Practice* (n1) 378.
[44] Ibid.
[45] Ibid.
[46] *Case Concerning Elettronica Sicula SpA (ELSI)* (US v It) (Judgment) [1989] ICJ Rep 46, 59.

Alternatively, the requirement for the exhaustion of local remedies is vitiated where the claimant is injured as the direct result of a wrongful act of the harming State.[47] The Draft Articles on Diplomatic Protection[48] exclude this requirement if 'there are no reasonably available local remedies … or the local remedies provide no reasonable possibility of such redress' and/ or 'there is an undue in the remedial process which is attributable to the State alleged to be responsible'.[49]

It is sometimes challenging attributing international harm to the hostage-taking State itself. It may be that local authorities read signals from the top and act accordingly,[50] making it difficult to attribute the wrong to the State per se. It must then be argued that the hostage-taking was done at the behest and behalf of the State, and this satisfied most of the time.

Recommendation 8: That this inquiry recommends that the Executive use diplomatic protection on the basis of the principles set out in the International Law Commission Draft Articles on Diplomatic Protection as a blueprint, and that the Commonwealth Parliament is directed to legislate as is necessary for this purpose. The Executive must also be directed to advocate the elevation of these Draft Articles to a treaty in diplomatic engagements.

A duty to exercise diplomatic protection?

Close to thirty States have constitutional guarantees granting the individual the right to receive diplomatic protection for injuries suffered abroad, including Australian allies like Poland, Lithuania and Ukraine.[51] The International Law Commission Report (2006)[52] notes that a State entitled to exercise diplomatic protection per the Draft Articles on Diplomatic Protection[53] '*should* … [give] due consideration for the possibility of exercising diplomatic protection'.[54]

[47] International Law Commission, *Report on the Work of Its Fifty-Eighth Session*, UN Doc A/61/10 (2006), 74—75 ('*ILC Report 2006*').
[48] *Draft Articles on Diplomatic Protection*, UN GAOR, UN Doc A/61/10 (2006) ('*ILC Draft Articles*').
[49] Ibid, quoted in *A Contemporary State Practice* (n1) 383.
[50] *The Consul* (n13) 240.
[51] *A Contemporary State Practice* (n1) 385.
[52] *ILC Report 2006* (n47).
[53] *ILC Draft Articles* (n48).
[54] Ibid (emphasis added), quoted in *A Contemporary State Practice* (n1) 386.

A potential mechanism for this domestically in Australia – short of a constitutional amendment – could be the enacting of a legislative provision compelling the relevant Minister to consider diplomatic protection as a method considered in the dealing of hostage situations. That decision is then subject to judicial review on questions of law, and merits review on questions of facts (as whether the detainee is a hostage for the purpose of hostage diplomacy).

The Executive could also consider the imposition of a public and bedrock principle in Australian diplomatic policy that diplomatic protection *will* be requested and that it *must* be granted for a resolution to be considered by the Australian Government. This could assist in elevating Australia to an equal in the negotiation space whereby the bullying or extortion of this country is limited.

Hostage taking must be seen as a tripartite relationship among the hostage, the nationality State and the hostage-taker.[55] Using the tool of diplomatic protection as a tool places the victim at the centre of the response. The judicious application of the tool may on the whole restrict the ability of hostage-takers to take hostages as in most cases diplomatic protection can be applied.

Recommendation 9: That this inquiry directs the Commonwealth Parliament to enact legislation to the effect that diplomatic protection must always be considered, subject to judicial and merit review. The Executive must also be directed to institute a policy principle that any resolution of a hostage situation must be preceded by the granting of diplomatic protection.

The International *Convention Against the Taking of Hostages* (‘*ICATH*’)[56]

The *ICATH* enjoys almost universal acceptance, having been ratified and acceded to by 176 States Parties, including China and Iran.[57]
Article 1(1) of the *ICATH* declares that any ‘person who seizes or detains … in order to compel a third party … to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage’ commits the *offence* of hostage-taking.[58] The *mens rea*, or the intention to compel does not need to be communicated but can be

[55] *A Contemporary State Practice* (n1) 395.
[56] *Convention Against the Taking of Hostages*, signed 18 December 1979, (entered into force 3 June 1983) (‘*ICATH*’).
[57] *A Contemporary State Practice* (n1) 387.
[58] *ICATH* (n56), art1(1).

inferred from circumstances,[59] and only requires the mere motivation of the perpetrator of a hostage-taking.[60]

The requirement that quid pro quo exists is not extinguished by concurrent reasons[61] such as the existence of a genuine charge for the detainee to answer. Therefore, hostages charged on charges like espionage can still qualify for the purposes of the *ICATH*. The action based analysis in the instrument means the crime extends to non-state perpetrators, including those acting on behalf of a State.[62]

Article 16 of the *ICATH* provides that all matters not settled by negotiation shall be submitted to arbitration, and should that fail, within six months of a request, 'any of those parties may refer the dispute to the International Court of Justice'.[63] The prohibition of hostage-taking under international humanitarian law usually does not apply in peace time (unless they overlap with human rights law). Therefore, the *ICATH* can be a powerful tool to redress hostage-taking situations, and this mechanism must be pursued, particularly as it has a referential process to the ICJ.

If open, the matter should also be pursued in the domestic courts of the hostage-taker. The decision of the Supreme Court of the State of Israel in *Anonymous (Lebanese Citizens) v Minister for Defence*[64] can be persuasive authority in such a matter. There, a presumption operating in domestic law against the contradiction of international law led the Court to apply the Convention (even though Israel is not a States Party) and nullify a decision of the Minister of Defence to detain some Lebanese citizens Lebanon agreed to release Israeli hostages.

Recommendation 10: That this inquiry directs the Executive to pursue relief under the *ICATH* through both the international mechanisms of negotiation, arbitration, and referral to the International Court of Justice and where possible, the domestic courts.

Dual Nationality and the Doctrine of Non-responsibility

[59] *A Contemporary State Practice* (n1), citing *Prosecutor v Sesay (Appeal)* (Special Court for Sierra Leone), Appeals Chamber, Case No SCSL-04-15-A (26 October 2009) 582.
[60] Ibid, citing *Simpson v Socialist People's Libyan Arab Jamahiriya*, 470 F3d 356, 360 (DC Circ, 2004).
[61] Ibid.
[62] Ibid 390.
[63] *ICATH* (n56), art16.
[64] *Anonymous (Lebanese Citizens) v Minister for Defence* (12 April 2000), FCrA 7048/97, Supreme Court of the State of Israel, cited in *A Contemporary State Practice* (n1) 393.

There is a pattern of targeting dual nationals in hostage-taking.[65] Some States perpetrating hostage diplomacy, including Iran and China do not recognise dual nationality.[66] This is the basis on which hostage-takers often limit or deny Australia consular access or diplomatic protection to hostages. However, the reluctance to challenge this is a political decision taken to avoid tension rather than a limitation posed by international law.

Article 1 of the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* ('*The Hague Convention*')[67] recognises the conferment of nationality as existing within the exclusive domain of a State.[68]

However, nationality itself is a matter on the international pane and its determination 'shall be recognised by other States [only] so far as it is *consistent with … international custom, and … law*'.[69] Non-recognition in *Nottebohm*[70] was predicated on the basis of an abuse of rights and not the non-justiciability of the matter in international law. The *Vienna Convention on Consular Rights* states that domestic laws must 'enable *full effect* … [to] the rights under this article'[71] envisioning that domestic laws must give way to the international law of nationality, even if not recognised by the State.[72] Alternatively, the invocation of a right under international law by a sovereign State that conflicts with another right of another sovereign States makes the matter justifiable under international law.[73]

Further, while *The Hague Convention* (1930)'s Doctrine of Non-responsibility prohibits the granting of diplomatic protection to a national against a State whole nationality the detainee also possesses, the Courts have been less textual. The United States Claims Tribunal cautioned against the blanket application of the doctrine.[74] The test is one of effective nationality.

[65] *The Consul* (n13) 240.
[66] *A Contemporary State Practice* (n1) 391.
[67] *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*, (entered into force 1 July 1937).
[68] Ibid, cited in *A Contemporary State Practice* (n1) 380.
[69] *A Contemporary State Practice* (n1), citing *Nottebohm Case* (Leich v Guat) (Second Phase) (Judgment) [1955] ICJ Rep 4.
[70] Ibid.
[71] *VCCR* (n39) art36(2).
[72] *A Contemporary State Practice* (n1) 379.
[73] Ibid 381.
[74] Ibid 383, citing *Iran v United States*, 5 *Iran-US Claims Tribunal* 1 23 (1984).

Sovereign States excluding diplomatic protection on grounds of dual nationality 'must yield before the principle of effective nationality'[75] which exists in customary international law – binding all international actors regardless of their assent to it.[76] The Draft Articles of Diplomatic Protection reflects this view in asserting that the Doctrine of Non-responsibility is excluded where 'the nationality of the former State [claiming diplomatic protection] is predominant'.[77]

The *ICATH* removed the Convention from being applied in situations internal in nature, but this is countered to the extent of any inconsistency by the international effect of nationality discussed above.[78] For the matter to be internal in nature 'all the hostages and all the offenders must be nationals of the State in which the offence was committed'.[79]

Recommendation 11: That this Committee recognises the Executive treat cases of hostage diplomacy involving dual nationals as if they were solely Australian citizens by excluding the Doctrine of Non-Responsibility on the basis of effective nationality.

However, this can still pose challenges. If X, who moved to Australia at the age of 20, is arrested upon a visit back to their country of origin at age 35, the test of effective nationality could lend itself to the conclusion that their effective nationality is the one in which they are being held hostage. It is therefore essential that in ascertaining whether the case is one of hostage diplomacy involving dual nationals, the test of effective nationality be conducted holistically. Emphasis must be placed on the fact that if there is an element of quid pro quo for the release of a hostage, the hostage-taking State is implicitly conceding the hostage's effective nationality to be Australian.

Support for families in pursuing public campaigns

Australia is often reluctant to lend support for public pressure campaigns in situations where an Australian is being held as a hostage for diplomatic purposes. This is done to minimise damage to international relationships,[80] or the risk that a public campaign might jeopardise negotiations.

[75] Ibid 384, citing *United States ex rel Merge v Italy* (It v US), [1955] 14 RIIAA 236.
[76] Ibid, citing *ILC Report 2006* (n47) 46.
[77] Ibid, citing *ILC Draft Articles* (n48) 384.
[78] *ICATH* (n56) art13.
[79] *A Contemporary State Practice* (n1) 384.
[80] *The Consul* (n13) 245.

This is untrue as a blanket general rule and must be considered in the particular circumstances.

In the case of Peter Greste – held hostage in Egypt – a public campaign assisted in his release. The campaign to release him became global as governments and international organisations backed by public and media support coalesced to advocate for his release around the theme of press freedom.[81]

There were some parables to be learned in the success of that public campaign. There, the strategists carefully considered the targets of messaging and the different messaging tracks required, while maintaining the centrality of the approach being facilitative.[82] It was conducted in a way that allowed the Egyptian Government to distinguish the campaign from the 'noise' of social media, while at the same time allowing the noise to keep the world focused on the matter.[83] Greste's family had access to a group of advisors with highly relevant experience and skills.

Recommendation 12: That this inquiry directs the Department of Foreign Affairs and Trade to provide families of hostages with the necessary support for the conducting of an effective public campaign. This can be through the provision of access to experts and conditions imposed on such a campaign so as to not jeopardise sensitive negotiations.

It is not necessary that the Australian Governments condone the public campaign. In response to an earlier submission, the Department of Foreign Affairs and Trade undertook a policy change to assist families private entities who may undertake measures the Australian Government will not – including the consideration of ransom payments, though policy rightly remains that ransoms shall not be paid.

Changing the negotiation space

Australia can expand the negotiation space by considering the negotiation in terms of all possible parties so as to include other States that have an interest in the matter.[84]

[81] Ibid 246.

[82] Ibid.

[83] Ibid 247.

[84] Danielle Gilbert and Gaëlle Piché, 'Caught Between Giants: Hostage Diplomacy and Negotiation Strategies for Middle Powers' (2021/2022) 5(1) (Winter) *Texas National Security Review* 12, 23 ('*Caught Between Giants*').

Accounting for all interests and navigating the negotiation space as a joint front can balance the power imbalance between Australia and the hostage-taker.

Engaging in multilateral dialogue to address the categorisation of hostage diplomacy and possible responses to it might give any response predicated upon it much more credibility. Upon this it is likely that Australia will be able to rule out the undertaking of actions that Australia is unwilling to pursue as a liberal democracy – like violating the rule of law – or those that indicate Australia can be bullied or is willing to pay.[85]

Recommendation 13: That this inquiry directs the Executive to advocate for the universal adaptation of a Treaty against Hostage Diplomacy in State-to-State Relations, building upon the non-binding declaration to that effect headed by Canada in 2021.

Multilateral responses in judiciously exercising universal jurisdiction over the grave crime of hostage-taking in state-to-state relations could also work to punish perpetrators and promote the international rule of law. It could also act to deter offences by imposing high burdens on perpetrators of hostage diplomacy.

Recommendation 14: That this inquiry directs the Commonwealth Parliament to legislate as is necessary to impose Magnitsky Sanctions on individuals perpetrating hostage diplomacy. The Executive must also be directed to apply these judiciously in conjunction with multilateral partners.

Asserting equal power in negotiations

Asserting equal power in negotiations requires the reframing of the negotiation to include not just what there is to be gained (i.e., the return of the hostage), but a best alternative to a negotiated agreement. This refers to the most positive outcome that can be had in the failure of a negotiated agreement. The stronger this best alternative can be made, the stronger Australia's position in negotiations.[86]

In reframing the power balance in negotiations, the hostage-taker's best alternative to a negotiated agreement must also be considered. This is because hostage diplomacy occurs in the context of the hostage-taker having something to be gained or having an opportunity to obviate a loss through using Australians as bargaining tools. Framing the matter as what would happen if the hostage-taker does not get what they want and

[85] Ibid 24.
[86] Ibid 25.

comparing that to Australia's best alternative to a negotiated agreement could strengthen Australia's position in negotiations by underscoring that the hostage-taker also has something to be lost.

As discussed above – through pursuing issues through the courts or multilateral responses – this might mean a State highly concerned with its international image may risk it being tarnished holistically, or that the response is of a such magnitude that the state incurs significant reputational and actual cost by not deporting the hostage back to their State, including but not limited to sanctions. In the absence of a negotiated agreement from the hostage-takers perspectives, this is a significant cost.

This deters 'unnecessary bullying'[87] of Australia as a middle power and can countenance the view that Australia will pay for international crimes of grave concern and human rights abuses. In doing so Australia gains some additional benefits. The Commonwealth may – without bullying – not be forced to accept concessions that a greater power would not accept. Australia could also better preserve its principles as a liberal democracy such as the rule of law by not being forced to "trade prisoners" amidst mounting domestic political pressure.[88]

Recommendation 15: That this inquiry directs the Executive to adopt policy to consider the best alternative to a negotiated agreement in remedying instances of hostage diplomacy. There must also be a stated policy position that Australia will not compromise certain principles like the rule of law.

Such principled negotiations can also provide positive-sum outcomes where both the hostage-taker and Australia benefits from a negotiation that considers the best alternative to a negotiated agreement.[89]

[87] Ibid.
[88] Ibid 31.
[89] Ibid 26.