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Reparations for the survivors of state hostage-taking

Carla Ferstman

Essex Law School and Human Rights Centre, University of Essex, Colchester, United Kingdom

ABSTRACT

When survivors of state hostage-taking are eventually released they face a new set of hurdles to adjust back into their communities and resume their lives. This paper explains why reparations are so crucial to the recovery process yet so difficult to achieve in practice. It analyses the legal and procedural impediments which make reparations so challenging in state hostage-taking cases, including state immunity and the limited will of most states of nationality to take up the cases of their nationals after they have been released to the extent required. Drawing some parallels with the efforts to support families of victims of terrorism, it identifies some pathways for improvement. The paper also calls for greater use of survivor-centred approaches when crafting compensation schemes and support structures to meet survivors' needs in both the short and longer-term.

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Introduction

States are increasingly resorting to hostage-taking (Nadjibulla and Foggett, 2023; Ferstman, 2024a, chapter 7). They use the cover of law to detain foreign or dual nationals on spurious charges with the ulterior purpose of exerting leverage against detainees' states of nationality. Detainees are held arbitrarily often for many years; some are subjected to sham trials and appeals. Release typically only comes when a deal is struck which might involve prisoner exchanges or any other benefit for the detaining state.

Much diplomatic arsenal is expended by states of nationality to secure the release of their arbitrarily detained nationals. Comparably less attention is devoted by them to ensure released survivors can obtain redress for the harms suffered, including adequate and effective reparation. There seems to be a sense amongst some states of nationality that released survivors are lucky, and their responsibilities were mainly met by securing their nationals' freedom.

There is an ever-growing population of survivors who deserve to have their rights and needs respected. This paper considers the importance of reparation and assistance for survivors of state hostage-taking to restore their rights, contribute to their reintegration and increase the costs of state hostage-taking to prevent recurrence.

CONTACT Carla Ferstman cf16045@essex.ac.uk Essex Law School and Human Rights Centre, University of Essex, Wivenhoe Park, CO4 3SQ Colchester, United Kingdom

The paper begins by explaining some of the harms associated with state hostage-taking. It then considers the challenges associated with both inter-state and survivor-initiated reparations claims against the detaining state and state officials. As is explained, the dearth of available venues to pursue a claim and applicable immunities in most jurisdictions make civil claims against states and their officials difficult to pursue and to succeed. A further challenge is states' often failure to assert diplomatic protection (taking up the claim of its national against another state to obtain reparation for the internationally wrongful act inflicted) for want of expending further political capital. The paper considers what obligations can be imputed to states of nationality to help ensure survivors' access to reparation. Many of these arguments have been tried (mainly unsuccessfully) in other contexts and for other crimes (Jones v. United Kingdom, 2014; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 2012). The paper considers whether there is anything unique about state hostage-taking to require a novel approach.

Because of the challenges to secure reparation through the courts, and also the limitations of a purely legal approach to address survivors' manifold needs, the paper also analyses support structures in place in the aftermath of survivors' release and in the longer-term.

Some of the identified concerns can be addressed with strengthened political will and intergovernmental coordination. All governments, including those directly affected through the victimisation of their nationals and others who have shown commitment to working jointly to enhance international cooperation and end state hostage-taking (Declaration against arbitrary detention, 2021) should recognise the indivisibility of the goals of reparation for survivors with the overarching aim of eradicating state hostage-taking. These states acting in a coordinated fashion hold the key to unblocking survivors' access to reparations and support.

Physical and psychological harms

A Dutch study on hijacking survivors found that approximately one-third still suffer from symptoms associated with post-traumatic stress, generalised anxiety and other medical symptoms many years after the events (Alexander and Klein, 2009; van der Ploeg and Kleijn, 1989). Other studies of released political prisoners reveal like consequences including 'enduring personality change, acute psychological trauma as a result of the miscarriage of justice, chronic psychological trauma, PTSD, other psychiatric disorders such as depression, and problems adjusting on release' (Grounds, 2004).

These consequences are also present in cases of state hostage-taking (Australian Senate, 2024, paras. 4.82-4.85). For example, the physical mistreatment and severe psychological abuse Jason Rezaian endured in Evin prison means 'he will never be the same; he will require specialized medical and other treatment for the rest of his life' (Rezaian v. Iran, 2016, para. 11). Anoosheh Ashoori's counsel explains that for released hostages 'the harm associated with the grave violations they suffered continue, and new and unexpected difficulties and hurdles present themselves as a result of the ordeal and injustices they have suffered' (Ashoori and family, 2023, para. 88). As Prof Peter Greste explains, 'once released, [detainees] carry those burdens in a society that has virtually no understanding of what they have been through and therefore no capacity for empathising with their experience. That makes detainees often isolated and traumatised' (Greste, 2024). Dr Kay Danes further explains, 'I experienced an overwhelming sense

of isolation, struggling to find individuals who could truly comprehend the depths of my ordeal. The unique nature of my experience created a barrier, making it difficult to connect with others who I felt had not endured similar circumstances' (Danes, 2024, p. 14).

Reparations for state hostage-taking

According to the International Law Commission's Articles on the Responsibility of States, a breach of an international law obligation by a state entails its international responsibility. The responsible state must cease any continuing wrongful conduct, offer appropriate assurances and guarantees of non-repetition if the circumstances so require, and make full reparation for the injury caused (International Law Commission [ILC], 2001, articles 1, 30, 31), which would require (depending on the acts and the harms caused) restitution, compensation and satisfaction, either singly or in combination (article 34). Survivors' right to reparation is a feature of human rights standard-setting texts (Basic Principles and Guidelines, 2005; Basic Principles of Justice, 1985), subject-relevant treaties (Convention Against Torture, 1984, article 14; Convention for the Protection of All Persons from Enforced Disappearance, 2006, articles 18, 20(2), 24(4); International Covenant on Civil and Political Rights, 1966, article 2(3)) and the comments of interpretive bodies (Human Rights Committee, 2004).

That states have an international law obligation to refrain from state hostage-taking and associated human rights violations such as arbitrary detention, torture and cruel, inhuman or degrading treatment and enforced disappearances is clear from applicable treaties and as a matter of customary international law. The treaty law basis depends on which treaties the detaining state ratified. If committed on a widespread or systematic basis, the practice may also amount to crimes against humanity (Ferstman, and Sharpe, 2022). The customary international law obligation to refrain from such acts has been asserted in relation to hostage-taking (Salinas Burgos, 1989, p. 198). As state hostage-taking may entail torture and/or enforced disappearances, the peremptory (*jus cogens*) status of the prohibition of torture (Prosecutor v. Furundzija, 1998, paras. 151-152) and enforced disappearances (Goiburú and others v. Paraguay, 2006, para. 84; ILC, 2019, paras. 125-127) are also relevant. State hostage-taking also constitutes a breach of the customary international law principle of non-intervention which prohibits states from using coercion to interfere in the domestic affairs of other states (*Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. USA), 1986, para. 202).

The obligation to refrain from state hostage-taking exists regardless of whether the practice is recognised as a breach of the Convention on the Taking of Hostages (Hostages Convention, 1979, articles 1, 5). The Convention does not explicitly cover state sponsored hostage-taking though scholars have concluded that its reference to 'any person' in the definition of the taking of hostages in Article 1 includes state officials (Edwards, 2025, para. 37; Lambert, 1990, 79-80; Aust, 2002, p. 142) and thus can be said to cover state hostage-taking.

As the International Court of Justice (ICJ) held in the *Tehran Hostages* case:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights (*Case Concerning US Diplomatic and Consular Staff in Tehran (USA v Iran)*, 1980, para. 91).

Whether responsibility can be attributed to the state would be determined on the facts of any given case. But the determination would be legally uncontroversial in cases where a state's legal system is co-opted for the purpose of carrying out arbitrary detention through state officials (e.g. police, prosecutors, judges, prison wardens) for the purpose of carrying out arbitrary detention and the vehicle through which leverage is deployed (ILC, 2001, article 4(1)).

Inter-state claims

Inter-state claims are brought by one state against another to resolve a dispute and enforce international law when it has not been possible to resolve the matter by diplomatic means.

There are two principal challenges associated with inter-state claims for state hostage-taking. The first is the limited forums to pursue a claim and the minimal basis upon which claims can be pursued in such forums. The second is the limited will of states of nationality to pursue claims on behalf of their nationals.

Limited personal and subject-matter jurisdiction

The ICJ is the natural starting point for inter-state claims which cannot be solved through diplomatic means. However, few states involved in or at increased risk of perpetrating state hostage-taking (e.g. Afghanistan, China, North Korea, Iran, Mali, Myanmar, Russia, United Arab Emirates, and Venezuela) (Edwards, 2025, para. 29); Australian Senate, Foreign affairs, defence and trade references committee (2024, para. 5.100) have accepted the compulsory jurisdiction of the ICJ (Statute of the ICJ, 1945, article 36(1)). Absent compulsory jurisdiction, most states will rely for the purposes of jurisdiction on a treaty which recognises the ICJ as the appropriate forum to resolve disputes related to the interpretation of that treaty. While the Vienna Convention on Consular Relations ([VCCR], 1963) and the Hostages Convention (1979) recognise the ICJ as the appropriate forum to resolve disputes about the interpretation of the respective treaties, the VCCR covers only a limited portion of the facts of state hostage-taking – in particular the detaining state's obligation to ensure that consular officers can communicate with their detained nationals and have access to them (article 36). Consequently, the adjudication of VCCR matters would not account sufficiently for the full extent of state hostage-taking, the ICJ having established a practice of strictly limiting itself to the narrow aspects of disputes over which it has clear jurisdiction (Jahdav (India v. Pakistan), 2019, paras. 136, 137; Certain Iranian Assets, 2019). Adjudication under the Hostages Convention affords much wider coverage of the facts, though the compromissory clause requires states to first submit the complaint to arbitration and allows states to exempt themselves from ICJ dispute adjudication (most states engaged in state hostage-taking have exempted themselves) (Hostages Convention, Declarations pursuant to Article 16(2); see, for a similar procedure in cases involving torture, Convention against torture and other cruel, inhuman or degrading treatment or punishment, Article 30).

There are no other international bodies that can effectively adjudicate state responsibility for state hostage-taking. Many of the subject-relevant human rights treaties like the International Covenant on Civil and Political Rights and the Convention Against Torture allow states parties who have made a declaration accepting the competence of the

relevant committee for such purposes, to complain against another state party who has also declared its acceptance. However few states involved in state hostage-taking have made such declarations, making these routes largely moot.

Inter-state complaints are also possible under regional human rights courts with subject-matter jurisdiction stemming from violations of the right to liberty and security of the person, and depending on the facts, the prohibition against torture and fair trial rights. The difficulty stems from the personal jurisdiction of such courts, which are restricted to the conduct of parties to the relevant treaty. The states most often associated with state hostage-taking tend to operate outside of regional human rights frameworks. For example, China, Iran and North Korea were never part of regional frameworks. Following its 16 March 2022 expulsion from the Council of Europe, Russia ceased to be a party to the European Convention on Human Rights on 16 September 2022. In 2013, Venezuela withdrew from the American Convention on Human Rights, renouncing the jurisdiction of the Inter-American Court. This was later reversed by an interim government which has subsequently been dissolved. Also, inter-state claims require both the detaining state and the victim state to be parties to the same regional treaty, and the phenomenon of state hostage-taking is typically cross-regional.

Limited will of states of nationality to pursue claims on behalf of their nationals

States rarely bring inter-state claims for the violation of their citizens' rights (Trechsel, 2004). When they do, they refrain from raising issues which undermine their political interests (Alter, 2006, p. 24). Most instances in which states have taking up the claims of their nationals concern high profile incidents involving large numbers of victims, such as the taking of diplomatic and consular staff hostage in Iran (*Case Concerning US Diplomatic and Consular Staff in Tehran (USA v Iran)*, 1980), the bombing of aircraft (ICAO Council, 2025; Security Council, 2003; Ukraine and The Netherlands v. Russia, 2022), and other acts of international terrorism (Claims settlement agreement, 2020). There is less practice related to individual acts of state hostage-taking involving arbitrary detention for leverage. France's 16 May 2025 claim against Iran before the ICJ relating to VCCR breaches stemming from the arrest, detention and trial of French nationals Cécile Kohler and Jacques Paris was therefore novel (Application de la Convention de Vienne, 2025), though France discontinued the proceedings at a very early stage (Kohler and Paris (France v Islamic Republic of Iran) 2025).

The failure to take up the claim of its national against another state to obtain reparation for the internationally wrongful act inflicted (diplomatic protection), or take measures in furtherance of diplomatic protection, has been at issue in several UK state hostage-taking cases involving arbitrary detention for leverage. The UK government indicated it 'only considers exercising diplomatic protection in truly exceptional circumstances' (UK government, 2023, para. 34), though it has not clarified what would amount to such circumstances. It extended diplomatic protection to Nazanin Zaghari Ratcliffe in March 2019 (Foreign and Commonwealth Office and The Rt Hon Jeremy Hunt MP, 2019) though only after considerable delay and without any steps taken following the initial assertion that it was doing so (Foreign Affairs Committee, 2023, recommendations and conclusions para. 15). It chose not to do so for Anoosheh Ashoori, a point Ashoori's counsel noted resonated with the family as the 'most socially brutal factor,' creating the feeling of being 'unimportant, neglected, and not British enough', a decision that 'was predetermined, and would

not be utilised, no matter how vulnerable his situation, or how ineffective the UK's ability to protect him or provide consular support might be' (Ashoori and family, 2023, paras. 83-85).

The decision whether to exercise diplomatic protection is classically understood as a decision of the state of nationality in the exercise of its discretion. The claim is brought as an assertion of that state's own injuries (Mavrommatis Palestine Concessions (Greece v. UK), 1924, p. 12; Barcelona Traction Light and Power Company Ltd (Belgium v. Spain), 1970, para. 77). Over time, this classic position has evolved. Diplomatic protection is no longer understood only to relate to a state's own interests in injury to its citizens abroad; the principle now recognises that injured individuals are beneficiaries of rights and protection is requested for their benefit (ILC, 2004, article 19). The ICJ takes this approach in several judgments (Armed Activities on the Territory of the Congo (DRC v. Uganda), 2022, para. 102; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), 2012, para. 57) and advisory opinions (Legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, 2024; Legal consequences of the construction of a wall in the Occupied Palestinian Territory, 2004).

It has also been argued that where peremptory norms are at stake, the state of nationality is obligated to pursue the matter on behalf of the intended beneficiaries and secure reparations that accord with the nature of the breach of the peremptory norm (Orakhelashvili, 2008, p. 243). This is in part what motivated Italy's arguments on immunity before the ICJ in *Germany v Italy* – that an injured state would not be in a position to forego reparations for violations which reflect breaches of peremptory norms (Jurisdictional Immunities of the State (Germany v. Italy), 2011, para. 3.13). It also aligns with Judge Cançado Trindade's dissent in that case (Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), 2012, Dissenting Opinion para. 72).

There is growing support for the view that states are duty-bound to consider diplomatic protection for their nationals facing serious human rights abuses abroad. Reflecting the developing caselaw (R (Abbasi) v. Foreign Secretary, 2002; Kaunda v. President of South Africa and others, 2004) and the position of several national constitutions, the ILC *Draft Articles on Diplomatic Protection* recommend that states 'should … give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred' (ILC, 2006, article 19). The commentaries further explain that:

> there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. […]
>
> In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development' (ILC, 2006, Commentary to article 19, para. 3).

State hostage-taking cases, like terrorism cases, provide some unique aspects in that the victims/survivors are pawns in a game where the real target is the state of nationality. This provides a strong incentive for the state of nationality to assert diplomatic protection,

gravitating towards an obligation, or at the least a presumption in favour of exercising diplomatic protection so that states can exercise all possible lawful means to protect their nationals and ensure reparations is achieved (especially when there is no alternate forum). Article 19 of the Draft Articles on Diplomatic Protection is recommendatory because customary international law does not yet recognise a binding obligation on states to exercise diplomatic protection in all circumstances. However, the domestic law of many states can 'pose some limits on the freedom of action of the executive branch' (Ortu, 2024), even though the method of implementing diplomatic protection may be a matter of executive discretion (Kaunda v. President of South Africa and others, 2004). Thus, it is important to call out those states who fetter their discretion, or who exercise their discretion irrationally, without transparency, based on discriminatory or irrelevant considerations, or without regard for legitimate expectation (R (Abbasi) v. Foreign Secretary, 2002). These factors are crucial from the perspective of 'good governance' and equally to give effect to states' positive obligations to ensure victims' procedural and substantive human rights. Furthermore, where the only recourse to justice is an inter-state claim, a state that refuses to take up a matter on behalf of its nationals or does so half-heartedly because of other (conflicting) interests, could arguably be required under domestic law to compensate victims for foreclosing the possibility of an adequate and effective international settlement (Ferstman, 2018).

Survivor-led claims for reparation

Claims against the detaining state

As local courts in the detaining state will have been co-opted by the detaining states to help implement the state hostage-taking by sanctioning the detentions, they will be ineffective venues for survivors to pursue redress. Survivors could pursue a complaint against the detaining state before a UN treaty body if the detaining state ratified a subject-relevant treaty and consented for that treaty body to receive individual complaints (which is rare). If successful, such bodies may recommend that a state afford reparations (OHCHR, 2013). Survivors may also claim to the UN Working Group on Arbitrary Detention (WGAD), which addresses claims involving any UN Member State. The WGAD is effective at drawing attention to state hostage-taking cases (WGAD, 2021, paras. 61-63), though the focus of its engagement is securing individuals' release from detention as opposed to securing reparation post-release. Survivors can also pursue claims before a regional human rights commission or court if a detaining state is subject to that body's jurisdiction. This option is unlikely, however, as the states most often associated with state hostage-taking tend to operate outside of regional human rights frameworks.

Foreign courts too will usually be inaccessible because detaining states will be immune both from the jurisdiction of the courts and enforcement. Exceptions have been recognised over time, such as those that apply to commercial activities, and personal injuries and/or property damage occurring in the state where the claim is filed (Fox and Webb, 2015, chapter 12; Convention on jurisdictional immunities of states and their property, 2004). Territorial tort exceptions have sometimes helped to override state immunity where at least a portion of the harm occurred in the country where the claim was filed.

Arguments suggesting that state immunity is inapplicable or overridden in cases involving the gravest crimes or human rights violations, even when there is no alternative forum to present the claims, have mainly failed before international courts (*Jurisdictional Immunities of the State (Germany v. Italy)*, paras. 56, 82; Jones v. United Kingdom, 2014). Equally, arguments that a state implicitly waives its immunity when it engages in conduct that constitutes a fundamental violation of human rights or humanitarian law, have not succeeded (Smith v. Socialist People's Libyan Arab Jamahiriya, 1996). Though state immunity can bar an action from proceeding or being enforced before a particular court, this has no impact on the detaining state's responsibility for the internationally wrongful act. This underscores the important role played by states of nationality in resolving such matters by diplomatic or other lawful means either to avoid survivors having to go to court or to step in when courts are blocked by applicable immunities.

Different to most other states and arguably inconsistent with current customary international law, both the United States and Canada have responded to state immunities by legislating 'terrorist' exceptions.

The inability of the families of the victims of the Pan Am Flight 103 Lockerbie bombing to sue Libya in US courts (Schwartz, 2017), led American legislators to create a new exception to immunity for the crimes of torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources to same, which was introduced in 1996. This 'terrorism exception' allows Americans to sue foreign states that had been designated by the US State Department as state sponsors of terrorism and where the injury complained of was sustained as a result of the foreign state's commission of the act or support to it (Antiterrorism and Effective Death Penalty Act, 1996). A further 'terrorism' exception was enacted in 2016, the Justice Against Sponsors of Terrorism Act ['JASTA'], which largely overrides immunities for acts of international terrorism occurring on US soil. While these exceptions have led to significant monetary awards in an array of cases, the exceptionalist approach to state immunities they embody has been criticised. Stephens, for example, has referred to the exception as 'a perversion of accountability' and 'fundamentally politicized and hypocritical' (Stephens, 2020, p. 392).

Certain American survivors of state hostage-taking have availed themselves of these opportunities to seek reparation against their state abusers in US courts and some have been able to recover damages as a result of the measures put in place to aid with asset recovery. Also, a Victims of State Sponsored Terrorism Fund was established to compensate eligible Americans who successfully sued a designated state under the 'terrorism exception.' In 2016, Washington Post journalist Jason Rezaian sued Iran for damages related to his 544-day imprisonment and was ultimately awarded $$180 million in damages (WilmerHale, 2019).

Current US designated state sponsors of terrorism are Cuba, Iran, North Korea, and Syria. Americans are known to have been subjected to wrongful detention potentially amounting to state hostage-taking in at least three of those countries, Iran (US Department of State, 2025b), North Korea (US Department of State, 2025a), and Syria (Browne, 2025).

Canada made similar amendments to its legislation in 2012 (Provost, 2012). The Justice for Victims of Terrorism Act (JVTA) provides a private cause of action for acts of terrorism, against alleged perpetrators and supporters of terrorism, including designated states. Parallel amendments to the State Immunity Act (section 6.1(1)) waive the immunity from

jurisdiction, execution and attachment of designated states in proceedings against them for their support of terrorism or terrorist activities on or after 1 January 1985. At the time of writing, Iran and Syria were designated (Department of Justice Canada, 2025).

Unlike the US 1996 'terrorism exception' which applies to act of torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such an act, the Canadian version is limited to 'terrorist activity' (Canadian Criminal Code, 1985, section 83.01(1)(a)). The restrictive nature of the amendments was referred to in a Supreme Court of Canada case concerned with state immunity for torture and killing, in that:

> it reveals that Parliament can and does take active steps to address, and in this case pre-empt, emergent international challenges, thereby reinforcing the conclusion, […] that the SIA is intended to be an exhaustive codification of Canadian law of state immunity in civil suits (*Kazemi Estate v. Islamic Republic of Iran*, 2014, para. 44).

In other words, had the Parliament wished to codify an exception for state immunity in respect to torture or killings, it would have done so explicitly. Even so, when explaining what conduct may constitute 'terrorist activity', reference in the Canadian Criminal Code is made to all the international terrorism conventions (among those listed is the Hostages Convention). As previously argued, the reference to 'any person' in the Convention's definition of the taking of hostages may refer to both natural and legal persons, and in that sense can include the acts of state officials (and accordingly, state hostage-taking).

Under the JVTA, claims may be lodged by any person who has been injured as a result of terrorist activity occurring on or after 1 January 1985, so long as there is either a 'real or substantial connection' to Canada or the case is filed by Canadian citizens or permanent residents (s 4(2)). The JVTA also recognises terrorism-related judgments issued by foreign courts, as long as those judgments meet JVTA criteria. Successful plaintiffs can execute their awards against any property or assets of designated sponsors of terrorism.

Iran has challenged both the American and Canadian legislation before the ICJ. The claim against the US concerned measures of execution against Iranian state assets including state-owned Bank Markazi, which Iran argued violated the 1955 Treaty of Amity. The case did not proceed to the merits, the ICJ having accepted the US argument that the treaty did not concern sovereign immunity and therefore its compromissory clause could not be used as a basis to ground jurisdiction over the immunities aspect of the claim (Certain Iranian Assets, 2019). The claim against Canada concerns the violation of Iran's jurisdictional immunity and immunity from measures of constraint under customary international law, and at the time of writing remained pending (Alleged violations of state immunities (Islamic Republic of Iran v. Canada), 2023). While at the time of writing no formal arguments had been submitted, the findings in *Germany v. Italy* and the absence of a customary rule authorising terrorism exceptions to sovereign immunity present hurdles for Canada. As Provost wrote in 2012, noting the ironic timing of the JVTA coming into effect and the ICJ issuing its judgment in *Germany v. Italy*, 'It seems clear that Canadian courts will deny the immunity of a foreign state if it appears on the list of states sponsors of terrorism; it seems equally clear that this judicial decision will trigger the breach by Canada of its obligations under international law' (Provost, 2012).

Claims against state officials

Survivors may seek to claim damages from state officials in a state hostage-taking situation: for example, the judge who maintains the detainee in detention despite the absence of any basis to detain or the head of the prison or chief interrogators who set in motion a regime of sensory deprivation and torture designed to keep the detainee anxious and disoriented so as to imbue the hostage negotiations with a sense of urgency. There would be a range of officials who engage in acts or omissions which collectively comprise the composite act of state hostage-taking over the course of the detention.

Ordinary officials benefit from functional immunity, meaning they would be immune from the jurisdiction of foreign courts for any acts performed in their official capacity as representatives of their state. This type of immunity reflects the understanding that state officials should not be liable for acts that are not attributed to them personally but to the state on whose behalf they acted. However, functional immunity would not shield officials from criminal proceedings pertaining to crimes under international law (including genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearances) (ILC, 2017, draft article 7). This exception to functional immunity reflects the principle of individual criminal responsibility whereby it is recognised that crimes are committed by individuals, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced (ILC, 1950, para. 99). Consequently, in a state hostage-taking context, any aspect of the conduct of hostage-takers which violated those norms would not be shielded from criminal proceedings.

It is less clear whether the impugned conduct would also be shielded from civil claims for damages. There is no clear answer under customary international law, given the various national approaches and the divergent caselaw. On one reading, as the underlying conduct is the same, the exception to functional immunity should be capable of applying to both civil and criminal proceedings. This approach is taken in some US cases (Yousuf v. Samantar, 2012). Applying that logic, there would be no obligation to accord state officials functional immunity. It would be for the courts to determine how best to assess the nature of the crimes and their relationships with the goals of accountability and access to justice.

Another line of argument is that civil claims against state officials who are acting on behalf of the state in their official capacity are immune because the civil claims would necessarily implead the state of those officials before the relevant foreign court (Jones v. United Kingdom, 2014, para. 202). This argument which essentially extends the rules on state immunity to state officials (and has been criticised on that basis) (Webb, 2014), emphasises that only the beneficiary of the immunity may choose to waive it; a domestic court cannot decide whether to recognise it regardless of the reasons it has for doing so. Applying that reasoning, the relationship between immunity and access to justice is irrelevant for the purposes of the recognition of immunity. However, it should be recalled that the outcome of a denial of immunity is limited to barring a particular court from adjudicating a claim against particular defendants; the detaining state's responsibility is not affected, nor does the denial of immunity extinguish the survivor's right to a remedy. Access to justice therefore remains a live issue. The state of nationality on the basis of

its general responsibilities towards its nationals should therefore afford a reasonable alternative to the claimants whose access to the courts has been blocked for reason of immunities. Appropriate modes of settlement could be via recourse to diplomatic protection (discussed earlier) to settle the dispute by diplomatic or legal means, or by establishing administrative structures to compensate such claimants as has been done in some countries for victims of terrorism and for domestic crimes (discussed below).

Complementary support and assistance by the state of nationality

Standard-setting texts recognise the importance for states to address survivors' underlying legal, medical and psychosocial needs, regardless of who bears the ultimate responsibility for the hostage-taking. They also recognise the need to treat survivors with dignity and respect, to keep them informed and involve them in decision-making. The *Basic Principles and Guidelines*, for instance recognise that 'states should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations' (2005, para. 16). Likewise, the UN Committee Against Torture has indicated that States Parties:

> shall ensure that effective rehabilitation services and programmes are established in the State, taking into account a victim's culture, personality, history and background and are accessible to all victims without discrimination and regardless of a victim's identity or status within a marginalized or vulnerable group […] (2012, para. 15),

and affirms that

> the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress (para. 22).

Compensation schemes

Criminal injuries compensation schemes are vital when recovery from the direct perpetrators is not possible, or court procedures are inaccessible. Some survivors of state hostage-taking have recommended that governments put in place compensation schemes 'to initiate ways to address the grievances and the needs of returning hostages' given the absence of progress to secure reparation directly from the detaining state (Diamond, Diamond and Abbot-Diamond, 2023, para. 9.3). This is an important recommendation but would require governments to take specific measures to implement, such as ensuring such schemes are available to address crimes perpetrated outside the jurisdiction (Ferstman, 2024b) and designating state hostage-taking as a recoverable crime. Victims of state hostage-taking are not necessarily part of a large group either when detained or upon their release, and because of the definitional vagaries associated with state hostage-taking, nor will government bureaucrats automatically classify them as crime victims

nor specifically as victims of state hostage-taking or wrongful detention. Thus, in accordance with many compensation schemes for overseas acts of terrorism, the victims would need to be classified as crime victims and the crime of state hostage-taking may need to be designated as an eligible crime for the victims to become eligible under the scheme.

Compensation schemes have been put in place by many states for victims of ordinary crime and for terrorism. One of the UN Office on Drugs and Crime ['UNODC']'s good practice recommendations is for states to consider establishing national victims' funds to support victims of terrorism (UNODC, 2015, p. 49) and others indicate similarly (EU Directive on combating terrorism, 2017, article 30; Protocol to the OAU Convention on the Prevention and Combating of Terrorism, 2004, article 3(1)(c); Emmerson, 2012, para. 57). The UN General Assembly has likewise called for 'the establishment, strengthening and expansion of funds, […] for compensation or reimbursement to victims' (UNGA, 2023, preamble).

Many states have established compensation schemes which victims can apply to, and the schemes vary significantly in their scope and approach and providing timely, fair and reasonable compensation coverage for victims remains a challenge for many governments (UNODC, 2015, paras. 191-219). In the United Kingdom, the Criminal Injuries Compensation Authority, with a mandate geared to victims of violent crime, has also been assigned to administer specific programmes for specially designated classes of victims such as the victims of the 7 July 2005 London terrorist bombings and a scheme for victims of overseas terrorism (Criminal injuries compensation authority). Some survivors of terrorism with experience of using the scheme have found it 'inadequate,' problematic, and failing to 'take into account long-term needs':

> some survivors are prioritised over others, even within the same family. Others mention that they had to provide the same medical documents multiple times, felt like they were on trial, and felt pressured into disclosing to CICA every horrific detail of their experience (Survivors Against Terror, 2023, p. 27).

There are also ad hoc approaches to specific incidents. For instance, the September 11th Victim Compensation Fund was established by the US Federal government to compensate for physical harm or death caused by the 11 September 2001 terrorist attacks, or the debris removal efforts in the immediate aftermath. It is a no-fault alternative to lawsuits (Tyler and Thorisdottir, 2003).

What is relevant to consider is how to balance the efficiency of a fund structure with the need to recognise the autonomy, dignity and uniqueness of victims' understandings of how they suffered, and the role compensation plays in their recovery process. Even basic financial payments will serve an important symbolic function if they are delivered in a way that fosters dignity, autonomy and trust, in line with accepted good practice (Basic principles and guidelines, paras. 10, 12). Involving victims in the design of compensation programmes is also a way to ensure that the procedures take into account and are sensitive to their needs and constraints.

Access to health and associated services

Naturally, many of the government entities working on the release of state hostages have a foreign affairs mandate. Once survivors are released, however, their needs will have

shifted, with foreign affairs officials having less competence or skills to meet those needs. There are not always relevant government agencies in place (e.g. health, social services) to support their reintegration and long-term needs, and these gaps are felt practically (Nadjibulla and Foggett, 2023, p. 39). Dr Kylie Moore-Gilbert, released in 2020 and returned to Australia, received no psychological counselling and only received medical checks two weeks after release on her insistence: 'My experience was that I was deposited into Australia and basically told, 'You're free now. Go on your way. Go find your own GP'' (Australian Senate, 2024, para. 4.87). According to submissions, this situation has improved, and basic medical checks and psychological counselling sessions have been incorporated into the Australian repatriation process (Australian Wrongful and Arbitrary Detention Alliance ['AWADA'], 2024, p. 17) though the problem persists for longer-term care:

> wrongful detainees fall through the cracks. A detainee or their family must proactively seek out medical and psychological treatment themselves, at their own expense, once they return to their home state. A repatriated detainee may have been the victim of physical or psychological torture, prolonged starvation, or exhibit symptoms of trauma-induced conditions such as PTSD, and as such require immediate specialist treatment. In the public system, in which waiting lists for specialist medical care and even general psychology have blown out to months or even years, there is a significant risk that repatriated wrongful detainees will miss out on medical and psychological care altogether (AWADA, 2024, p. 18).

There is a need for governments to adopt tangible plans to monitor the rights and well-being of persons released (Ashoori and family, 2023, para. 93). As Nadjibulla and Foggett indicate 'The whole-of-government approach required to manage state hostage-taking cases necessitates domestic government departments or entities equipped to support long-lasting needs and recoveries that can take years' (p. 39). But to do this, those departments or entities need to be made aware of survivors' presence in their areas through intake and signposting processes and referral systems which respect survivors' autonomy and privacy regarding their needs and decisions about any support or treatment.

Other practical support that has been recommended includes supporting community awareness and empathy for what survivors have experienced (to combat victim-blaming) 16(c) and assisting released survivors to expunge or otherwise address foreign criminal records (Greste, 2024) and to release survivors from the burden of tax penalties for failing to file returns while detained, and additional financial complications associated with long-term absences (Foley Foundation, 2024).

Conclusions

As more and more individuals are subjected to state hostage-taking, there is a growing community of survivors and families who have lost many years of their lives to wrongful detention and continue to live with long-term physical and psychological effects. The needs are real and significant and can present major hardship and distress when unmet.

At present, adequate and effective reparation remains illusory for most survivors of state hostage taking for the combination of reasons illustrated in detail in this paper. For the most part, states of nationality have not directed their attention to negotiating reparations through diplomatic means where feasible or to espousing survivors' claims. Given survivors' minimal ability to access a remedy through the courts by their own initiative because of narrow rules of standing and applicable immunities, I have argued that

states' exercise of diplomatic protection in favour of their nationals is an appropriate means by which they can support their nationals' access to justice. This also aligns with the objective of state hostage-taking which is to exert leverage on the state of nationality. Thus, the victims are taken hostage because of their nationality or national origins, and the state of nationality is injured by the act of hostage-taking both in its own right by virtue of the unlawful coercion as well as by virtue of the injury to its nationals.

Much more can be done to engage released detainees both in the immediate aftermath of their release and in the longer-term. The experience of state hostage-taking will have been life-changing in a range of ways making it difficult for survivors to simply resume their lives as if nothing happened. This need for pause will not always be evident at the outset and survivors' needs and challenges may become more apparent and also evolve over time. Establishing effective compensation schemes and systems of care that take account of these trajectories is therefore a complex and long-term project.

Greater coordination between states through multilateral forums will avoid certain states of nationality pursuing exceptionalist strategies which may produce short-term benefits however may impede the kind of global solutions that will help end the practice of state hostage-taking. This could involve a more organised approach to advancing progressively the state practice and *opinio juris* on 'terrorist exceptions' which are broad enough to address state hostage-taking and related egregious acts. It could also involve building consensus on collective measures of constraint that benefit all state hostages, whatever their state of nationality and wherever they are wrongfully detained.

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