INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES

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1. Historical Context

The impetus for the negotiation of the International Convention Against the Taking of Hostages ("Hostages Convention") was the proliferation of hostage-taking in the 1970s. In September 1976, the Federal Republic of Germany ("Germany") proposed that the drafting of a convention to address the problem should be included on the agenda of the thirty-first session of the United Nations General Assembly.[1] Hostages had recently been taken at the German Embassy in Sweden in April 1975, resulting in the loss of two lives. Other prominent seizures of hostages around that time included an incident at the Vienna headquarters of the Organisation of Petroleum Exporting Countries (OPEC) in December 1975 and an aircraft hijacking at Entebbe airport in Uganda in June 1976.[2]

In explaining its proposal for a convention, Germany stated that hostage-taking for any purpose was "abhorrent and inhuman", and "absolutely intolerable and incompatible with universally accepted standards of human conduct".[3] It was said to infringe basic values upheld by the United Nations, namely the dignity and fundamental rights of every individual, including the rights to life, liberty and security of person in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).[4] Germany further warned that hostage-taking threatened international peace and transnational relations.[5]

While hostage-taking was already prohibited under international humanitarian law,[6] including as a war crime,[7] there was not yet any international instrument addressing hostage-taking outside armed conflict. Nor did the few existing "sectoral" anti-terrorism conventions adequately address the problem, since they were confined to specific contexts such as aircraft safety or harm to internationally protected persons.[8] Other norms of general international law too were insufficient; for instance, rules on the inviolability of diplomatic premises and personnel did not cover other victims, criminalise the perpetrators, or impose obligations directly on non-State actors for whom no State can be held responsible.

[*] The author expresses appreciation to Ms. Kate Bones and Ms. Kathleen Heath for their assistance.
[1] A/31/242.
[2] Joseph Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge, Grotius Publications, 1990), pp. 2-3.
[3] A/31/242, para. 5.
[4] *Ibid*., para. 5.
[5] *Ibid*., para. 1.
[6] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 34 (in international armed conflicts); Additional Protocol I of 1977 to the Geneva Conventions, article 75(2)(c) and (e) (in international conflicts); four Geneva Conventions of 1949, common article 3(1)(b) (non-international armed conflicts); and Additional Protocol II of 1977 to the Geneva Conventions, article 4(2)(c) (non-international conflicts).
[7] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 146, and Additional Protocol I of 1977 to the Geneva Conventions, article 85(5) (both concerning international conflicts); subsequent to the Hostages Convention, see also Rome Statute of the International Criminal Court, article 8(2)(a)(viii) and (c)(iii).
[8] Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; and Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973.

The General Assembly referred the German proposal to the Sixth Committee,[9] which recommended establishing an *ad hoc* committee (of 35 State members) to draft a convention, and the General Assembly agreed in a resolution of 15 December 1976.[10] The creation of a new committee was in part designed to avoid the ideological deadlock which had developed in the existing Ad Hoc Committee on International Terrorism, established in 1972 and in place until 1979, over the definition of "terrorism" (including "State terrorism"), its causes, and debate over the legitimacy of national liberation violence. The Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages met in three sessions in 1977, 1978 and 1979.[11]

Hostage-taking persisted during the negotiations, further emphasising the need for a convention. Incidents included the hijackings of a German airliner to Somalia in 1977 and an Egyptian aircraft to Cyprus in 1978, as well as the protracted occupation of the United States Embassy in Tehran from November 1979 to January 1981.[12] Attention was also drawn to hostage-taking in armed conflict during the contemporaneous negotiations on Additional Protocols I and II to the four Geneva Conventions of 1949, both adopted in 1977.[13]

2. Significant Developments in the Negotiating History

The drafting of the convention proceeded on the basis of a German working paper ("Working Paper").[14] The proposal deliberately avoided reference to the politicized term "terrorism".[15] Instead, the Working Paper modelled the draft convention on the existing sectoral anti-terrorism conventions, which strongly influenced the negotiations and the final instrument.

Some States felt that a convention should fill the gaps in and supplement the existing legal framework without duplicating, disturbing or derogating from existing instruments, including the sectoral treaties and the Geneva Conventions.[16] However, no provision was ultimately included in the Hostages Convention concerning its relationship with other sectoral treaties.[17] Article 12 provides only that the Convention shall not apply to certain hostage-taking in armed conflicts covered by international humanitarian law.

The essential elements of hostage-taking were relatively uncontentious in the drafting. The most contested issue was whether the convention should apply to national liberation movements which, depending on how one approaches the issue, is a question of either definition or an exception to the definition. Many African and Eastern-bloc States preferred that the convention not apply to national liberation movements, as it "must above all protect the rights of a people which engaged in violent action against colonialist, racist, alien régimes in order to regain its legitimate rights or redress an injustice which it had suffered".[18] On this view, it was essential that a convention did not delegitimize national liberation movements[19] or impede their struggle for self-

[9] A/31/430.
[10] General Assembly resolution 31/103 of 15 December 1976.
[11] Its mandate was renewed in General Assembly resolutions 32/148 and 33/19.
[12] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 3.
[13] Additional Protocol I of 1977 to the Geneva Conventions, article 75(2)(c) and (e) and article 85(5) (in international conflicts); and Additional Protocol II of 1977 to the Geneva Conventions, article 4(2)(c).
[14] A/AC.188/L.3, reproduced in A/32/39, annex II.
[15] See Clive Aston, "The United Nations Convention Against the Taking of Hostages: Realistic or Rhetoric?", in *British Perspectives on Terrorism*, Paul Wilkinson, ed. (Allen & Unwin, 1981), pp. 139-140.
[16] A/32/39, p. 20 (Mexico), p. 22 (Canada), p. 54 (France) and p. 35 (Lesotho).
[17] A/34/39, p. 18.
[18] A/32/39, p. 30 (Algeria).
[19] *Ibid*., p. 28 (Yugoslavia) and p. 35 (United Republic of Tanzania).

determination.[20] On the other hand, Western States insisted that the convention should apply to all hostage-taking, since such violence was "inadmissible in all cases" and no matter how just or noble the cause.[21]

The controversy reopened a debate which had apparently been settled with adoption of the Additional Protocols to the Geneva Conventions in 1977, which absolutely prohibit hostage-taking "at any time and in any place whatsoever, whether committed by civilian or by military agents".[22] Self-determination movements too were covered by those prohibitions, whether as parties to an international conflict (under Additional Protocol I) or in non-international conflicts (under Additional Protocol II). Some of the States which supported the Additional Protocols nonetheless argued for a liberation exception in the context of a hostages convention.

There was thus a proposal to exclude from the definition of hostage-taking "any act or acts carried out in the process of national liberation against colonial rule, racist or foreign régimes, by liberation movements recognized by the United Nations or regional organisations".[23] Germany expressed concern that such an exception "would be interpreted as relieving liberation movements of their obligations under international law".[24]

A related suggestion introduced the concept of the "innocent hostage",[25] which implied a subjective distinction between innocent and "guilty" captives, with only the former entitled to protection. The suggestion did not gain wide support. A further proposal defined hostage-taking as "the seizure or detention, not only of a person or persons, but also of masses under colonial, racist or foreign domination",[26] but this definition, aimed at the conceptually different harm of State colonial repression, also did not attract support.

The impasse over liberation movements was resolved in part through a procedural move at the second session of the Ad Hoc Committee to establish two working groups, the first to examine "thornier questions" (including national liberation),[27] and the second to consider less controversial matters.[28] Working Group I eventually secured the agreement of many developing and developed States alike that, regardless of the cause, "no one should be granted an open licence for taking hostages".[29]

Such consensus was achieved partly because of an apparent concession, in article 12, to exclude from the application of the Convention certain hostage-taking in armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination".[30] Such exclusion does not, however, imply that hostage-taking by liberation movements is permitted, but only that it is dealt with by international humanitarian law rather than the Convention when humanitarian law imposes a prosecute or extradite obligation. It remains an offence for "any" person to commit hostage-taking under article 1 of the Convention and there is no exception for any actor (State or non-State) or cause, including liberation movements in peacetime or in armed

[20] *Ibid.*, p. 76 (Libyan Arab Jamahiriya).
[21] *Ibid.*, p. 55 (United States of America) and p. 20 (France).
[22] Additional Protocol I of 1977 to the Geneva Conventions, article 75(2)(c).
[23] A/AC.188/L.5, reproduced in A/32/39, annex II (United Republic of Tanzania and Lesotho, later joined by Algeria, Egypt, Guinea, Libyan Arab Jamahiriya and Nigeria).
[24] A/32/39, p. 70 (Federal Republic of Germany).
[25] A/C.6/31/SR.58; and A/32/39, p. 27 (Jordan), p. 36 (United Republic of Tanzania) and p. 38 (Egypt).
[26] A/AC.188/L.9, reproduced in A/32/39, p. 112 (Libyan Arab Jamahiriya).
[27] A/33/39, pp. 5 and 56.
[28] *Ibid.*, p. 7.
[29] *Ibid.*, p. 5.
[30] Based on a Mexican proposal in 1977: A/AC.188/L.6, reproduced in A/32/39, annex II.

conflicts where hostage-taking is not covered by an obligation to prosecute or extradite under humanitarian law.[31]

Another contested issue in the drafting concerned the transboundary use of force to rescue hostages, in the wake of a controversial Israeli operation at Entebbe, Uganda, in 1976. A number of African and Arab States insisted that "States shall not resort to the threat or use of force against the sovereignty, territorial integrity or independence of other States as a means of rescuing hostages".[32] Other States felt that such a provision was unnecessary.[33] An article was eventually adopted based on compromise language proposed by the Syrian Arab Republic in 1977.[34] Article 14 provides that the Convention itself cannot authorise the use of force. It does not, however, preclude or alter the application of the international law on self-defence, insofar as that law may apply to hostage rescue situations.[35]

Also contentious was a proposal by Mexico, supported by other Latin American States, that the convention should not impair the right of asylum.[36] Some Western States objected that such a provision was unnecessary because States enjoyed the right to choose between extradition or local prosecution, and so retained the option of granting asylum.[37] Working Group I was unable to agree on the issue; it was resolved later by a Sixth Committee working group in 1979, though some Latin American States were dissatisfied with the final article.[38] Article 15 preserves the right of asylum under "Treaties on Asylum". Also, the Convention does not require States to treat hostage-taking as extraditable non-political offences, despite proposals from some States that it should.[39]

In relation to the obligation to prosecute under article 7, the Netherlands suggested that prosecution should only be required if extradition were refused, since it would be unreasonable to expect the State of custody to prosecute if no other State, including the State in which the offence was committed, wished to prosecute.[40] It was objected that such a provision could create a loophole in the system and that a "no safe haven" approach should be preferred,[41] and the qualification was not included.[42]

A proposal to widen jurisdiction under article 5, to allow member States of an international organisation subject to demands by hostage-takers to assert jurisdiction,[43] was not adopted.[44] It was pointed out that if the United Nations was subjected to demands, virtually every State would have jurisdiction over the offence.[45] A different French proposal to permit passive personality jurisdiction was also debated but eventually included.[46] It was not, however, agreed to recognise jurisdiction over serious violent acts related to hostage-taking offences.[47]

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[31] On such circumstances, see Lambert, *op. cit.*, pp. 263-298.
[32] A/AC.188/L.7, reproduced in A/32/39, annex II, and A/32/39, p. 62 (United Republic of Tanzania).
[33] A/34/39, p. 7.
[34] A/AC.188/L.11, reproduced in A/32/39, annex II.
[35] On which, see Lambert, *op. cit.*, pp. 316-322. The question was not before the Court in relation to United States rescue operation in Iran: see *Tehran Hostages* case, *op. cit.*, paras. 93-94.
[36] A/AC.188/L.6, reproduced in A/32/39, annex II; and A/32/39, p. 21 (Mexico).
[37] A/32/39, p. 53 (United States of America) and p. 93 (Federal Republic of Germany).
[38] A/C.6/34/SR.62, p. 5 (Ecuador, Venezuela) and p. 12 (Cuba).
[39] A/C.6/31/SR.55, p. 9 (Australia).
[40] A/32/39, p. 89 (Netherlands) and A/AC.188/L.14, reproduced in A/32/39, annex II.
[41] A/32/39, p. 89 (United States of America) and p. 93 (Federal Republic of Germany).
[42] *Ibid.*, p. 16.
[43] A/AC.188/L.3, reproduced in A/32/39, annex II A.
[44] A/33/39, p. 10 and A/AC.188/L.14, reproduced in A/32/39, annex II L.
[45] A/32/39, p. 78 (Mexico). For the debate, see also A/32/39, p. 84 (United States of America), pp. 84-85 (Japan), p. 93 (Federal Republic of Germany); A/33/39, p. 39 (Netherlands), p. 40 (United Kingdom) and p. 44 (Canada).
[46] A/34/39, p. 12. For the debate, see A/33/39, p. 39 (Netherlands) and A/AC.188/L.13, reproduced in A/32/39, annex II.
[47] A/33/39, p. 39 (Netherlands) and A/34/39, p. 12.

In relation to penalties for hostage-taking under article 2 of the Convention, there was debate about whether penalties should be "severe" or "appropriate"[48] in order to sufficiently punish and deter offenders. The compromise was to require "appropriate penalties [for the offences] which take into account their grave nature".[49] A proposal for mitigation of penalties where hostages were voluntarily released was contentious and not accepted.[50]

The draft convention concluded by the Ad Hoc Committee was submitted to the General Assembly,[51] which referred it to the Sixth Committee. The draft was considered by a working group comprised of the same States that had constituted the Ad Hoc Committee,[52] and then by the Sixth Committee between 27 November and 7 December 1979. The General Assembly adopted the Convention without a vote on 17 December 1979, annexed to resolution 34/146. The Convention was opened for signature at New York on 18 December 1979. The Convention entered into force on 3 June 1983.

3. Summary of Key Provisions

The preamble to the Hostages Convention declares that "the taking of hostages is an offence of grave concern to the international community". It also highlights the Convention's role in furthering the purposes and principles of the Charter of the United Nations in maintaining international peace and security and promoting friendly relations and co-operation among States; and in securing the rights to life, liberty and security of person as recognised in the UDHR and ICCPR. While the preamble also describes "all acts of taking of hostages as manifestations of international terrorism", it is clear from the definition of offences in article 1 that hostage-taking is an offence even if it involves compulsion for private rather than political purposes.[53]

Article 1 of the Hostages Convention defines the offences of hostage-taking, attempted hostage-taking, and complicity in hostage-taking. There is, however, no offence of threatening to commit hostage-taking.[54] According to article 1, paragraph 1, the offence of hostage-taking is committed by:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage …

There is no requirement that force be used to take hostages as long as force is threatened. Article 2 requires States parties to make the above offences "punishable [in domestic criminal law] by appropriate penalties which take into account the grave nature of those offences".

There are two important limitations on the scope of application of the offences. First, the Convention only applies to hostage-taking which has a transnational element and does not apply to purely domestic acts. Thus article 13 provides that the Convention "shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State".

[48] A/32/39, p. 80 (Netherlands), p. 85 (Denmark) and p. 92 (Federal Republic of Germany).
[49] A/33/39, p. 9 and A/34/39, p. 11.
[50] A/AC.188/L.8, reproduced in A/32/39, annex II; and A/33/39, p. 30 (United Kingdom), p. 31 (Sweden) and p. 32 (United States of America).
[51] A/34/39.
[52] A/C.6/34/L.12.
[53] See *United States* v. *Rodriguez* 587 F.3d 573 (2d Cir 2009).
[54] Lambert, *op. cit.*, p. 83.

Secondly, pursuant to article 12, the Convention does not apply to hostage-taking committed in armed conflicts governed by the Geneva Conventions of 1949 and its Additional Protocols of 1977, where such laws already require States "to prosecute or hand over the hostage-taker". The Hostages Convention could still apply to hostage-taking by liberation movements committed in armed conflicts involving a State not party to Additional Protocol I, since then only common article 3 of the four Geneva Conventions would apply and it does not impose a prosecute or extradite obligation.

States must establish prescriptive jurisdiction over the offences in accordance with article 5, which invokes the territoriality, nationality, passive personality, and (treaty-based) universality principles. Specifically, mandatory jurisdiction must be established by a State in relation to offences committed (i) in its territory or on board a ship or aircraft registered in that State; (ii) by its nationals; (iii) to compel the State to do or abstain from doing any act; or (iv) where the offender is present in the State's territory and the State declines to extradite. In addition, a State may optionally establish jurisdiction over stateless persons who are habitually resident in its territory, or where a hostage is a national of the State. The Convention does not, however, prioritize or otherwise resolve valid competing jurisdictional claims by different States.

The Convention is built around the "extradite or prosecute" (*aut dedere aut judicare*) principle that is common to many of the sectoral anti-terrorism conventions. As a first step, under article 6 a State has a duty to apprehend an alleged offender in its territory, to facilitate prosecution or extradition, and the State must conduct a preliminary inquiry into the facts. States parties must also afford one another "the greatest measure of assistance" in connection with criminal proceedings, including by supplying all necessary evidence (article 11, paragraph 1).

Under article 8, paragraph 1, if the State of custody does not extradite the alleged offender, "without exception whatsoever" it must submit the case to its competent authorities for prosecution. It is not, therefore, a duty to prosecute, but a duty to consider prosecution "in the same manner as in the case of any ordinary offence of a grave nature under the law of that State". The Convention does not establish any priority between local prosecution or extradition.

In either case article 8, paragraph 2, recognises a suspect's right to be "guaranteed fair treatment at all stages of the proceedings", including "all the rights" under local law. Persons taken into custody also enjoy a right to communicate with the nearest representative of their State of nationality or habitual residence (article 6, paragraph 3). A State claiming jurisdiction is also entitled to invite the International Committee of the Red Cross to communicate with and visit the alleged offender (article 6, paragraph 5).

The Convention facilitates extradition by deeming the Convention's offences as extraditable offences in any existing extradition treaty between States parties (article 10, paragraph 1). States parties also undertake to include such offences in every extradition treaty concluded between them. Where no extradition treaty exists between relevant States, the requested State may elect to treat the Hostages Convention as the legal basis for extradition (article 10, paragraph 2). The Convention may also serve as the basis for extradition where national law does not require an extradition treaty (article 10, paragraph 3). Article 10, paragraph 4, provides that the Convention's offences shall be treated as if they had been committed not only in the place they occurred but also in the territories of States required to establish their jurisdiction by the Convention.

National law continues to govern the preconditions of extradition to the extent not modified by the Convention. Thus, for instance, States which refuse to extradite their nationals may continue not to do so; or States could still insist on satisfaction of the "specialty" rule (namely, that an extradited person can only be extradited to face the charge for which extradition was requested). The State must then submit the case for prosecution.

The Convention contains important safeguards in respect of extradition. An extradition request must be refused if it was made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion, or if the person's position would be prejudiced for such reasons; or if a person cannot communicate with the State entitled to diplomatically protect him or her (article 9, paragraph 1).

Unlike a few later sectoral anti-terrorism treaties, the Hostages Convention does not "depoliticise" its offences by *requiring* States not to treat it as a non-extraditable "political offence" under national law.[55] Article 15 expressly preserves the right of asylum under the "Treaties on Asylum", as between States parties to those treaties. The asylum treaties are not specified and it is unclear whether it also includes the Refugee Convention of 1951.[56]

It is therefore conceivable that the extradition of an alleged offender may be refused on the basis that the conduct constitutes a "political offence" under national extradition and/or asylum law. The case must still then be submitted to the competent local authorities for prosecution. National legal systems may then take the political nature of the offence into account in various ways, such as in exercising the discretion whether to prosecute or in mitigation in sentencing.

The Convention contains various procedural obligations in relation to the criminal process. A State must notify affected States, through the United Nations Secretary-General, where an alleged offender is taken into custody (article 6, paragraph 2) and of the results of an investigation (article 6, paragraph 6). The final outcome of a prosecution must also be communicated to the Secretary-General for transmission to concerned States and international organisations (article 7).

Certain humanitarian considerations are addressed by the Convention. The State in which the hostage is held "shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure" (article 3, paragraph 1). The property of hostages must also be returned as soon as possible (article 3, paragraph 2).

The Convention thus accords a discretion to States in choosing how to respond to hostage-taking, conceivably extending from negotiation at one end of the spectrum to forcible measures of rescue at the other. While some States refuse to negotiate with terrorists or to pay ransoms as a matter of policy, the Convention neither requires nor prohibits either step.[57] Even granting immunity from prosecution may not be ruled out, as in the case of the *Achille Lauro* hijacking in 1986.[58] Any response must, however, comply with other relevant international laws, including human rights law and United Nations counter-terrorism financing obligations.[59]

Other States are prohibited, however, from taking forcible action to rescue hostages in the territory of another State without that State's consent. Article 14 thus provides that "[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations". That provision does not affect, however, the application

[55] See also Lambert, *op. cit.*, p. 233.

[56] Article 1F(b) of the Refugee Convention excludes from refugee status a person in relation to whom there are serious reasons for considering he or she has committed a serious non-political crime. Some acts of hostage-taking may thus be regarded as non-political under both international refugee law and certain national extradition laws. Criminal law defences must still be considered, such as pleas of duress or necessity which mitigate responsibility for an offence.

[57] The European Court of Human Rights has also recognised the discretion of States in their choice of response: see *Finogenov and others* v. *Russia* [2011] ECHR 2234 (20 December 2011), para. 223.

[58] Lambert, *op. cit.*, pp. 113-116.

[59] See, e.g., Security Council resolutions 1267 (1999) and 1373 (2001); and International Convention for the Suppression of the Financing of Terrorism 1999.

of any relevant international law of self-defence under Article 51 of the Charter of the United Nations and customary international law.

All State parties bear an obligation to cooperate to prevent hostage-taking under article 4. In particular, States must take all practicable measures to prevent preparations in their territories for its commission (within or outside their territories), including by prohibiting illegal activities by persons or groups that encourage, instigate, organize or engage in it. The rule is a specific reiteration of the general obligation on States not to permit their territories to be used for activities harmful to other States, including by terrorist acts.[60] Prevention must also be pursued through the exchange of information (such as, for example, intelligence) and administrative coordination.

Where inter-State disputes arise concerning the Convention, article 16 provides that they should be settled by negotiation, or failing that, arbitration or a subsequent reference to the International Court of Justice, unless a State reserves otherwise upon expressing its consent to the Convention.

4. Influence on Subsequent Legal Developments

By February 2014, the Hostages Convention had attracted 173 States parties and 39 signatories.[61] The influence of the Convention is difficult to evaluate. Prosecutions or extraditions arising pursuant to the Convention appear reasonably scarce, even though many States parties have enacted the necessary domestic implementing legislation. It is undoubtedly comforting for States to know that the Convention is available in the rare cases that it may be needed. Some States have gone beyond what the Convention requires to treat its offences as non-political crimes for the purpose of national extradition law[62] or refugee law.

Whether the Convention has deterred potential hostage-takers is more difficult to know. Certainly many terrorists do not care for international law prohibitions which get in the way of violently attaining their political goals. There is also a risk that the prohibition of hostage-taking may divert terrorists to resort to other, as yet unregulated methods of terrorism, in the absence of a comprehensive treaty prohibiting all terrorism.[63]

The Hostages Convention has nevertheless influenced various areas of international and national legal practice, including international criminal law and international humanitarian law. In *Prosecutor* v. *Blaskic*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia invoked the Hostages Convention in support of its definition of the war crime of hostage-taking in international humanitarian law.[64] This was the case notwithstanding that the Hostages Convention itself does not apply in armed conflicts.

Similarly, in *Prosecutor* v. *Sesay, Kallon and Gbao* (*RUF case*), the Appeals Chamber of the Special Court for Sierra Leone observed that the "elements" of the war crime of taking of hostages in armed conflict under the Rome Statute of the International Criminal Court borrow heavily from the Hostages Convention.[65] The international humanitarian law treaty prohibitions on hostage-taking provide no

[60] See, e.g., General Assembly resolution 2625 (XXV) of 24 October 1970, annex: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
[61] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, chapter XVIII.5 (https://treaties.un.org) .
[62] See, e.g., Australia, Extradition Regulations (1988), Reg. 2B(1)(d).
[63] The United Nations draft comprehensive convention on international terrorism has been under negotiation since 2000 but is not yet agreed.
[64] *Prosecutor* v. *Blaskic (Appeal Judgement)*, IT-95-14-A, ICTY, 29 July 2004, para. 639, footnote 1332.
[65] *Prosecutor* v. *Sesay, Kallon and Gbao* (RUF Case), SCSL-04-15-A (26 October 2009), para. 579.

definition of it.[66] The Appeals Chamber found the Hostages Convention "useful" in interpreting the war crime of hostage-taking. It drew on the Convention definition in overturning the Trial Chamber's finding that hostage-taking requires the communication of a threat or demand to a third party.[67] It found instead that the offence requires only an intention by the perpetrator to compel a third party, which may be proved, for instance, by the issuing of a threat to the detained person alone, or inferred from other evidence. The Appeals Chamber's review of domestic laws was also said to support that conclusion, with rare exceptions.[68] There is thus a convergence of the meaning of hostage-taking under the Hostages Convention, humanitarian law, and national law.

While the Hostages Convention is silent on State immunities, in the Pinochet proceedings before the British House of Lords, some judges suggested that the Convention has the effect of removing any immunity for hostage-taking.[69] This is because either adherence to the Convention constitutes a waiver of immunity or acts of hostage-taking cannot be viewed as official or sovereign acts of State. On this view immunity is removed at least in respect of hostage-taking involving States parties to the Convention (as opposed to all States under customary international law). The issue was not, however, definitively settled in the Pinochet case, because the final decision turned on the treaty crime of torture rather than the less factually well founded allegation of hostage-taking.

The duty on States under article 3 of the Convention to take all measures it considers appropriate to secure the release of a hostage was raised in a regional human rights case concerning Russia's rescue of hostages from a Moscow theatre. Russia invoked article 3 in defence of its use of gas to storm the theatre, which led to 125 deaths, in response to a claim that it had violated the right to life under article 2 of the European Convention on Human Rights.[70] The European Court of Human Rights did not address the point, instead deciding the case by applying the Court's jurisprudence on article 2. This may be because the incident was domestic not transnational. In any event article 3 of the Hostages Convention could not justify violations of human rights law. This view is consistent with many resolutions of the United Nations General Assembly and Security Council urging States to comply with their human rights obligations in countering terrorism.

Interpretation of the Hostages Convention has also arisen in a number of national criminal cases. For example, one United States court found that article 5 of the Convention supports the optional exercise of extraterritorial jurisdiction on the basis of the passive personality principle.[71] Another United States decision clarified that the United States hostage-taking legislation was enacted to implement the Hostages Convention to enable extraterritorial jurisdiction, and thereby expand the more limited reach of existing domestic kidnapping offences.[72]

While the Convention describes hostage-taking as manifestations of terrorism, the United States and United Kingdom criminal cases confirm that the offence is not limited to political violence. It can apply to a purely domestic, intra-familial abduction,[73] and to the many United States cases involving the confinement of illegal aliens where payment is demanded for their release.[74] The latter can include cases where an initially

[66] *Ibid*., para. 577.
[67] *Ibid.*, para. 580.
[68] *Ibid*., para. 582 (the exception being the Canadian Criminal Code, article 279.1).
[69] *R* v. *Bow Street Metropolitan Stipendiary Magistrate and others, Ex part Pinochet Ugarte (No. 3)* [2000] 1 AC 147.
[70] *Finogenov and others* v. *Russia* [2011] ECHR 2234 (20 December 2011), para. 186.
[71] *United States* v. *Yunis* 924 F.2d 1086 (DC Cir 1991) 1090.
[72] *United States* v. *Salad* 907 F.Supp.2d 743 (EDVa 2012).
[73] *HM, PM* v. *KH, HM* [2010] EWHC 870 (Fam); and *United States* v. *Santos-Riviera* 183 F.3d 367 (5th Cir 1999) (confinement of United States citizen infant to demand ransom for her release).
[74] *United States* v. *Tchibassa* 452 F.3d 918 (DC Cir 2006); *United States* v. *Si Lu Tian* 339 F.3d 143 (2d Cir 2003); *United States* v. *Ferreira* 275 F.3d 1020 (11th Cir 2001); *United States* v. *Fei Lin* 139 F.3d 1303, *supplemented by*

consensual agreement to be smuggled for a fee later turns into involuntary confinement.[75]

Detention is not limited to physical restraint, but can extend to threats, coercion, or deception which causes the person to remain under another's control. It thus includes, for instance, where an alien is frightened of her smugglers, witnessed the beatings of others, was threatened, and held in a guarded apartment.[76] The person's circumstances are relevant, such as where an alien is unfamiliar with the new country, cannot speak the language, and lacks the resources to escape.[77]

However, brief confinement for 15 minutes was not sufficient to constitute hostage-taking, in a case where an illegal alien was held in a "gypsy taxi" extortion scheme until her husband paid to release her, and while awaiting the arrival of police who had been called.[78] In part this was because although the Hostages Convention is not limited to terrorism, its anti-terrorism background suggests that the offence should not be stretched too far. Even so, detention for a few hours can constitute hostage-taking where, for instance, a vulnerable infant is abducted.[79]

The Hostages Convention has also influenced the development of national civil and administrative laws. A frequently litigated example is the United States' Foreign Sovereign Immunities Act (FSIA), which provides an exception to State immunity in civil proceedings before United States courts against foreign State sponsors of hostage-taking. The United States law offence of hostage-taking implements the United States' obligations under the Hostages Convention and defines hostage-taking in identical terms. The Convention itself does not establish any civil law exception to foreign State immunity for hostage-taking so the FSIA exception reflects domestic not international law.

Nonetheless, the significant number of FSIA cases involving hostage-taking provide useful interpretive guidance on the Convention definition, particularly given the scarcity of criminal or extradition proceedings in national law. Thus, for instance, United States courts have found that the intention of a perpetrator is decisive, not whether his or her purpose or demands were communicated to a third party,[80] or whether his or her demands are realistic or achievable.[81] Unpleasant imprisonment absent an intent to compel another is not hostage-taking.[82]

The United States cases have also clarified what it means to "seize" or "detain" a person, namely that a person is held or confined against his or her will for an appreciable period of time.[83] Actual physical force or violence is unnecessary as long as the person was threatened, frightened, deceived or coerced so as to cause the person to remain under the offender's control.[84] Thus a person may be constructively detained, as where Americans were compelled to hide in safe houses or diplomatic premises under the constant fear of capture by Iraqi security forces, where threats to Americans were being used by Iraq to prevent to the United States from attacking it.

In an administrative law case, the Israeli Supreme Court held that a domestic statute authorising administrative detention could not permit detaining non-threatening

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United States v. *Fei* 141 F.3d 1180 (9th Cir 1998); *United States* v. *Wang Kun Lue* 134 F.3d at 81; *United States* v. *Lopez-Flores* 63 F.3d 1468 (9th Cir 1995); and *United States* v. *Carrion-Caliz* 944 F.2d 220 (5th Cir 1991).

[75] *United States* v. *Si Lu Tian* 339 F.3d 143 (2d Cir 2003).

[76] *Ibid.*

[77] *United States* v. *Carrion-Caliz* 944 F.2d 220 (5th Cir 1991) 225.

[78] *United States* v. *Rodriguez* 587 F.3d 573 (2d Cir 2009).

[79] *United States* v. *Santos-Riviera* 183 F.3d 367 (5th Cir 1999).

[80] *Simpson* v. *Socialist People's Libyan Arab Jamahiriya* 470 F.3d 356 (DC Cir 2006) 360.

[81] *Wyatt* v. *Syrian Arab Republic* 362 F.Supp.2d 103 (DDC 2005) 113.

[82] *Price* v. *Socialist People's Libyan Arab Jamahiriya* 294 F.3d 82, 352 U.S.App.D.C. 284 (2002).

[83] *Vine* v. *Republic of Iraq* 459 F.Supp.2d 10 (DDC 2006) 17-19.

[84] *United States* v. *Si Lu Tian* 339 F.3d 143 (2d Cir 2003) 153.

persons as "bargaining chips", since that did not comply with article 1 of the Hostages Convention or article 34 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[85] While those treaty provisions were not domestically binding in the absence of legislation, the Court found that there was a "presumption of compatibility" between international law and domestic law, which applied in the interpretation of the domestic detention statute.

The cases mentioned above illustrate that the Hostages Convention has influenced diverse legal contexts, including criminal, extradition, civil, administrative, human rights, and refugee law.

Related Materials

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[85] *Anonymous (Lebanese citizens)* v. *Minister of Defence*, *Final decision*, Israeli Supreme Court (Court of Appeals), FCrA 7048/97.

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Australia, Extradition Regulations (1988).

Canada, Criminal Code (R.S.C., 1985, c. C-46).

United States, Foreign Sovereign Immunities Act (FSIA) (1976).

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United States Court of Appeals for the Fifth Circuit, *United States* v. *Carrion-Caliz*, 944 F.2d 220 (1991), 27 September 1991.

United States Court of Appeals for the Ninth Circuit, *United States* v. *Lopez-Flores*, 63 F.3d 1468 (1995), 10 August 1995.

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