

Wrongful Detention of Australian Citizens Overseas
Testimony from Dr. Danielle Gilbert, Northwestern University

**Senate Standing Committee on Foreign Affairs, Defence, and Trade
Wrongful Detention of Australian Citizens Overseas**

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Executive Summary:

- “Hostage diplomacy” occurs when states use their criminal justice system to take foreigners hostage. State hostage takers arrest foreigners under the guise of national law, yet they do so with the intention to use the prisoner for foreign policy leverage. Such cases have increased in number and prominence in recent years, as states including China, Iran, and Russia have wrongfully detained foreign nationals.
- The Australian Government should not be swayed by a deterrence logic of “no concessions,” for several reasons. First, concessions unambiguously work to bring current hostages home. Second, it is empirically unclear if concessions incentivize hostage taking in the future. Rather than “deterrence by denial,” the Australian Government should pursue “deterrence by punishment.”
- “Wrongful detention” is an umbrella term that encompasses two forms of captivity established in international law: “arbitrary detention” and “hostage taking.” The Australian Government should weigh the strengths and weaknesses of employing such terminology and the process for designating individuals as “wrongfully detained.”

Contributor credentials:

I am an Assistant Professor of Political Science at Northwestern University and a member of the Bipartisan Commission on Hostage Taking and Wrongful Detention at the Center for Strategic and International Studies (CSIS) in Washington, DC. My research explores the causes and consequences of hostage taking in international security, including projects on rebel kidnapping,¹ hostage recovery policy,² and hostage diplomacy.³ I also worked closely with the U.S. Senate Foreign Relations Committee as they drafted the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, detailed below.

At the invitation of the Senate Foreign Affairs, Defence and Trade References Committee, I am submitting evidence on hostage diplomacy and wrongful detention based on my academic research and public engagement on the subject. Some of the material and recommendations in this testimony reflect prior testimony submitted to the British Parliament’s Foreign, Commonwealth & Development Office for their similar inquiry in 2022.⁴

¹ Gilbert, Danielle. “The logic of kidnapping in civil war: Evidence from Colombia.” *American Political Science Review* 116, no. 4 (2022): 1226-1241.

² Gilbert, Danielle and Lauren Prather. “No Man Left Behind? Hostage Deservingness and the Politics of Hostage Recovery.” working paper (2024).

³ Gilbert, Danielle, and Gaëlle Rivard Piché. “Caught Between Giants: Hostage Diplomacy and Negotiation Strategy for Middle Powers (Winter 2021/2022).” (2022).

⁴ Gilbert, Danielle. 2022. “Testimony to the UK Parliamentary Inquiry on State-Level Hostage Takings.” Online <https://committees.parliament.uk/writtenevidence/108606/html/>.

Wrongful Detention of Australian Citizens Overseas
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Definitions and Policies

The phenomenon that my work defines as “hostage diplomacy” is “the taking of hostages under the guise of law for use as foreign policy leverage.”⁵ Hostage diplomacy occurs when:

... a state deploys its criminal justice system to detain a foreigner and then uses the prisoner for leverage in the pursuit of foreign policy objectives. This... occupies an ill-defined middle ground between legitimate arrests and prosecutions on the one side, and illicit kidnapping on the other. The early stages of hostage diplomacy resemble lawful detention: The state arrests a foreigner for suspected criminal wrongdoing, often espionage. The accused is detained and formally charged. However, the pretense soon falls away. Hostage diplomacy ends with the state negotiating for the prisoner’s release through a series of diplomatic or economic concessions. Along the way, the accused transitions from prisoner to bargaining chip.

Legally, the victims of hostage diplomacy are detainees. Functionally, they are hostages. This inherent duality makes hostage diplomacy particularly striking—and difficult to counter—because of the ways it blurs established categories of detention, norms of state behavior, and the rule of law.⁶

Observers have noted that state-level hostage takings have increased in recent years, replacing kidnapping by non-state actors as the chief international hostage-taking concern. Quantifying hostage taking is difficult, as many cases are never made public, but state hostage taking has undoubtedly risen in prominence, led by high-profile negotiations over American, Australian, British, Canadian, and Japanese citizens detained in countries including China, Cuba, Egypt, Iran, North Korea, Syria, Russia, and Turkey.

Hostage diplomacy presents two definitional problems that are relevant for policymakers. First, how do we know when an international detention is, in fact, a hostage taking? Detaining states rarely make their hostage taking so explicit. Instead, target states rely on a series of indicators that their citizen is being held for foreign policy leverage. Has the detaining state—explicitly or implicitly—made the prisoner’s release conditional on the satisfaction of demands beyond fulfilling a prison sentence? Do the arrest and other significant moments in the ordeal (hearings, charges, changes in treatment) follow equivalent moments in the countries’ diplomatic relations? Nevertheless, stage hostage takers maintain the guise of a legal process. State hostage taking works for perpetrators precisely because of this ambiguity: they rely on target states’ respect for and commitment to the rule of law.

Second, even without demands, target states may be concerned about the arrests of their citizens abroad. Individuals regularly break laws in foreign countries and face criminal consequences. However, target states may object to the treatment of their citizens by foreign criminal justice systems, even if they are unsure whether their citizen is a hostage—especially since detaining states may not make their intentions explicit. Thus, it is useful to establish a set of criteria for classifying international detentions as “wrongful” or “unlawful,” as described below.

⁵ Gilbert and Rivard Piché, 12.

⁶ Gilbert and Rivard Piché, 14.

Wrongful Detention of Australian Citizens Overseas
Testimony from Dr. Danielle Gilbert, Northwestern University

Two recent policy updates in the United States deal with these problems, which may be relevant to the Committee's inquiry. In 2015, in the wake of the kidnapping and beheading of several Americans by the Islamic State, the Obama White House conducted an internal policy review on U.S. hostage recovery activities. At the conclusion of the investigation, the White House released Presidential Policy Directive 30 (PPD-30) and Executive Order 13698.⁷ In addition to creating an interagency, operations-level body to coordinate hostage recovery activities, the Executive Order created the Special Presidential Envoy for Hostage Affairs (SPEHA), a senior-level position at the Department of State to coordinate diplomatic efforts to recover Americans kidnapped or wrongfully detained abroad. The definitional ambiguity in this office—empowering the SPEHA to work cases regarding both state and non-state actors, as well as those not explicitly labeled as hostage takings—provides useful flexibility in responding to hostage diplomacy cases.

In 2020, the U.S. Congress passed the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act. The law serves three central purposes: (1) It outlines the criteria that qualify an international detention as “unlawful or wrongful,” thereby referring the case to the SPEHA; (2) codifies PPD-30 and EO 13698; and (3) establishes new sanctions to punish hostage-taking individuals and organizations.

With these definitions and policies established, I turn to addressing two of the Committee's Terms of Reference:

Deterrence

Existing policy focuses on what is known as “deterrence by denial”—which can be ineffective when not consistently followed—rather than “deterrence by punishment.”⁸ I explain both below.

In both non-state and state-level hostage takings, the most reliable way to bring hostages home is to make concessions to the perpetrators' demand. However, from the government's perspective, making such concessions is undesirable for multiple important reasons: (1) Making concessions may be illegal;⁹ (2) making concessions *rewards* an adversary for targeting civilians; (3) making concessions—such as ransom payments or prisoner exchanges—may strengthen adversarial actors; and (4) making concessions could teach perpetrators that hostage taking works, potentially incentivizing future attacks. Thus, the actions that may best resolve the immediate hostage crisis serve to strengthen and reward the adversary; such actions could increase future risk.

Stated policy in United States and by many allied governments is that the government will provide “no concessions” to hostage takers. Such policies rely on a denial logic: hostage takers will be denied

⁷ The White House: Office of the Press Secretary (2015). Presidential Policy Directive – Hostage Recovery Activities, PPD-30. 24 June. Online <https://obamawhitehouse.archives.gov/the-press-office/2015/06/24/presidential-policy-directive-hostage-recovery-activities>.

⁸ Gilbert, Danielle. "The Prisoners Dilemma: America Must Adapt to a New Era of Hostage-Taking" *Foreign Affairs*, August 24, 2022, <https://www.foreignaffairs.com/united-states/prisoners-dilemma-america-adapt-hostage-taking>.

⁹ See 18 U.S.C. § 2339B, online at <https://casetext.com/statute/united-states-code/title-18-crimes-and-criminal-procedure/part-i-crimes/chapter-113b-terrorism/section-2339b-providing-material-support-or-resources-to-designated-foreign-terrorist-organizations>.

Wrongful Detention of Australian Citizens Overseas
Testimony from Dr. Danielle Gilbert, Northwestern University

the benefits of taking hostages if targets are unwilling to pay ransoms. There are several problems with relying on “no concessions” to deter hostage taking. For example, such policies punish the target (along with, or instead of, the perpetrator) by decreasing the likelihood of bringing hostages home. Such policies might satisfy the government’s goal of denying benefits to hostage takers, but it is cruel treatment of families in crisis. Moreover, the evidence is far from conclusive as to whether there is any validity to the “incentivizing” claim. In the last 5 years, many hostage deals were made, but attacks haven’t likewise increased.

Rather than rely on policies of *denial*, consistent, humane, and effective deterrence policies would instead focus on *punishment*. Deterrence by punishment requires promising such severe consequences for hostage taking that no rational state or non-state actor would take hostages in the first place.¹⁰ Unfortunately, designing and implementing a punishment strategy is difficult. Existing punishments include sanctions and prosecution. For example, the Levinson Act outlines the authorization of sanctions on any foreign person that the target government determines:

...is responsible for or is complicit in, or responsible for ordering, controlling, or otherwise directing, the hostage-taking of a United States national abroad or the unlawful or wrongful detention of a United States national abroad; or

knowingly provides financial, material, or technological support for, or goods or services in support of [hostage taking or unlawful detentions].¹¹

The Australian Government may consider policies to include sanctions, extradition, prosecution, and other processes in line with international law. Such punishment strategies would be dramatically strengthened through coordination among likeminded target countries—particularly Canada, the United Kingdom, and the United States. As recent targets of hostage diplomacy, each of these countries has led its own efforts to investigate and combat state-led hostage taking, including Canada’s “Initiative against arbitrary detention in state-to-state relations” and the UK’s inquiry on “The FCDO’s approach to state level hostage situations.” The governments of these countries should coordinate on definitions, policies, institutional arrangements, information, and punishment strategies.

Finally, the Australian Government may consider policies related to *prevention*, rather than deterrence, including unilateral travel warnings and education and outreach programs to communities and organizations at high risk of wrongful detention.

Categorizing and Declaring “Wrongful Detention”

As the Committee is likely aware, the Levinson Act lists eleven criteria that the Secretary of State may consider in determining whether an American is wrongfully or unlawfully detained. In short:

1. There is credible evidence that the individual is innocent;
2. The individual is being held “solely or substantially” because of their U.S. citizenship;

¹⁰ Thomas Schelling. 2008. *Arms and Influence*. Yale University Press.

¹¹ S.712 – Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, online at <https://www.congress.gov/bill/116th-congress/senate-bill/712/text>.

Wrongful Detention of Australian Citizens Overseas
Testimony from Dr. Danielle Gilbert, Northwestern University

3. The individual is being held to coerce foreign policy leverage or concessions;
4. The individual was arrested for pursuing freedoms (of press, assembly, or religion);
5. The detention itself violates the detaining country's laws;
6. Independent NGOs or journalists have questioned the individual's innocence;
7. American diplomats received credible evidence that the arrest is illegitimate;
8. The State Department's human rights reports designate the country's justice system as corrupt or unjust;
9. The individual is being held in inhumane conditions;
10. The individual has not received due process;
11. American diplomatic engagement is required to secure the individual's release.

As the law states, the "Secretary of State shall review the cases... to determine if there is credible information" that any such criteria are met. The designation is subjective and is made exclusively by the Secretary of State. If and when the Secretary of State makes such a determination "based on the totality of the circumstances," the case is transferred to the Office of the Special Presidential Envoy for Hostage Affairs, who then assumes responsibility for the case.

Unspecified, however, are several crucial elements of the criteria and designation process, which produce some strengths and some weaknesses:

First, the law is intentionally vague with regard to the designation process:

- There is no (public) deadline for making a "wrongful or unlawful" determination;
- There is no (public) explanation for how the Secretary of State makes the determination. At present, it comprises a deliberative process, wherein representatives from various interests present evidence related to the criteria to make a case to the Secretary;
- There is no (public) minimum number of criteria that must be met;
- There are no (public) criteria deemed necessary or sufficient to receive the designation;
- The Secretary of State and Special Presidential Envoy for Hostage Affairs are not required to make public the list of wrongfully detained Americans; nor are they required to indicate which criteria were met in any given case.

Second, "wrongful detention" constitutes an ambiguous overlap between two established categories of captivity, prohibited by international law: "arbitrary detention" and "hostage taking."

- Arbitrary detention is the deprivation of liberty without legitimate reason or legal process.¹² There are five separate categories of arbitrary detention, as defined by the United Nations Working Group on Arbitrary Detention: the deprivation of liberty lacks a legal basis; the individual is detained for exercising rights or freedoms; the individual has been denied a fair trial; asylum seekers, immigrants, or refugees are detained indefinitely; or the detention constitutes discrimination on a protected category.

¹² "About Arbitrary Detention," United Nations Working Group on Arbitrary Detention, <https://www.ohchr.org/en/about-arbitrary-detention>.

Wrongful Detention of Australian Citizens Overseas
Testimony from Dr. Danielle Gilbert, Northwestern University

- Hostage taking is detention “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.”¹³

The Levinson Act criteria for “wrongful detention” constitute a wide range of violations, which relate to the validity of charges (1, 5, 6, 7), purpose of captivity (2, 3, 4, 11), and the treatment of the prisoner (8, 9, 10). We might consider detentions marked by criterion 3 (and perhaps *only* criterion 3) to satisfy the definition of “hostage taking,” while those marked by criteria 2, 4, 5, and 10 seem to satisfy the definition of “arbitrary detention.”

As with the reporting requirements, the Australian Government may see benefit in the ambiguity—and categorical overlap—in the terminology of “wrongfully detained.” Individuals may satisfy multiple criteria simultaneously, becoming victims of both arbitrary detention and hostage taking.¹⁴ Ambiguity may suit diplomatic and rhetorical purposes. However, “wrongful detention” is a category that exists apart from international law, thereby complicating efforts at international coordination—to support allies or punish perpetrators.

¹³ International Convention Against the Taking of Hostages, Adopted by the General Assembly of the United Nations on 17 December 1979, <https://treaties.un.org/doc/db/terrorism/english-18-5.pdf>.

¹⁴ The American *Wall Street Journal* reporter Evan Gershkovich serves as one recent example: the United States government designated Gershkovich as “wrongfully detained,” and he was designated “arbitrarily detained” by the UN Working Group. He was ultimately released as part of a prisoner swap, which the Russian government made a condition of his release.