



Fighting back against global hostage-taking

A proposed new Act to hold state
and terrorist actors to account



The author of this document has worked independently and is solely responsible for the views presented here. The opinions are not necessarily those of the Macdonald-Laurier Institute, its Directors or Supporters, or those of the Canadian Coalition Against Terror.

Copyright © 2021 Canadian Coalition Against Terror and Macdonald-Laurier Institute. May be reproduced freely for non-profit and educational purposes.

Cover photo credits: Shutterstock

Contents

Executive Summary / Sommaire	4
Introduction	7
Backgrounder	7
Proposed legislation – explained	13
Draft language – “ <i>Hostage Accountability Act</i> ”	18
Part I: Sanctions	21
Part II: Assistance to families	26
Part III: Cooperation with foreign states and foreign nationals	27
Part IV: Miscellaneous	28
Acknowledgements	29
About the author	30
References	31
Endnotes	32

Executive Summary

The international community collectively decided to prohibit and punish hostage-taking with the adoption of the International Convention against the Taking of Hostages (the UN Hostages Convention), which entered into force in 1983. Following that convention, the government of Canada amended the Canadian *Criminal Code* to criminalize hostage-taking both at home and abroad. However, this is all that the Canadian government has done in response to the international calls to combat and prevent hostage-taking.

Canada currently lacks any domestic legislation that specifically addresses hostage-taking. Meanwhile, current Canadian policy with respect to hostage situations is distressingly unsupportive of the families of hostages.

Yet the taking of Canadians as hostages has only persisted. Canadians are seized at alarming rates by foreign state and non-state actors. The former can be seen in the unlawful detention of Canadians Michael Spavor and Michael Kovrig by Chinese authorities, while the latter has been evident in the hostage-taking of Canadians by groups like *Abu Sayyaf* in the Philippines.

The detention of Canadians like Spavor and Kovrig by foreign states in particular – a phenomenon popularly called “hostage diplomacy” – is becoming a new normal. Canadian hostages continue to be seized without justification or due process, and they continue to be abused, tortured, and murdered by their captors.

The Canadian government must take further legislative action to combat and deter hostage-taking. This paper is proposing legislation to this effect. This legislation is called “*An Act to Address the Taking of Innocent Civilians as Hostages*,” with a proposed short title of the *Hostage Accountability Act*. It is split into three parts:

- 1. Sanctions.** Part I would permit the government to impose sanctions on foreign states and foreign nationals engaged in the hostage-taking of Canadians.

2. **Support for families.** Part II would provide a framework to ensure that the families of Canadian hostages receive consistent and reliable support from government.
3. **Multilateral cooperation.** Part III would provide a framework for the Canadian government to communicate and collaborate with foreign states and foreign nationals, to secure the release of Canadian hostages.

The Canadian government has so far done relatively little, from a legal and legislative standpoint, to address hostage-taking and hostage diplomacy. This is not enough. States need to do more, at the domestic and multilateral levels, to combat hostage-taking, and to secure the release of hostages, without succumbing to ransom payments or political concessions.

For this to materialize, countries like Canada require an effective toolkit, in the form of novel domestic legislation, that specifically targets the problem of hostage-taking. This paper's proposal for a Hostage Accountability Act is meant to provide just such a toolkit that will allow Canadian authorities to address the taking of innocent civilians as hostages.

Sommaire

En adoptant la Convention internationale contre la prise d'otages, entrée en vigueur en 1983, la communauté internationale a résolu collectivement de condamner et de sanctionner les prises d'otages (Convention des Nations Unies sur les otages). Cette Convention a incité le gouvernement du Canada à modifier le Code criminel canadien pour ériger en infraction pénale la prise d'otages au pays et à l'étranger. Cependant, il n'a rien fait d'autre en réponse aux appels internationaux pour combattre et prévenir ce fléau.

En ce moment, le Canada ne dispose d'aucun instrument législatif visant expressément les prises d'otages, alors qu'en parallèle, le soutien à l'égard des familles touchées demeure désespérément absent de la politique canadienne.

Pourtant, les prises d'otages canadiens n'ont jamais cessé. Les Canadiens sont enlevés à des taux alarmants par certains États étrangers et acteurs non étatiques. Michael Spavor et Michael Kovrig, deux Canadiens détenus illégalement par les autorités chinoises, peuvent être considérés comme des otages pris par un État, alors que, manifestement, les Canadiens enlevés par des groupes comme Abu Sayyaf aux Philippines sont des otages pris par des acteurs non étatiques.

La détention de Canadiens comme Spavor et Kovrig par des États étrangers

en particulier – un phénomène communément appelé « diplomatie des otages » – est devenue une nouvelle norme. Des Canadiens continuent d’être enlevés sans justification ni droit à l’application régulière de la loi et sont toujours maltraités, torturés et assassinés par leurs ravisseurs.

Le gouvernement canadien doit adopter de nouvelles mesures législatives pour contrer et dissuader les preneurs d’otages. Ce document propose une loi qui circonscrit cette question. Cette loi est appelée « Une loi pour faire face aux prises d’otages de civils innocents », laquelle est abrégée en Loi redditionnelle relative aux otages. En voici les trois parties :

- 1. Sanctions.** La partie I aborde ce qui permettrait au gouvernement d’imposer des sanctions aux États et ressortissants étrangers impliqués dans les prises d’otages canadiens.
- 2. Soutien pour les familles.** La partie II fournit un cadre visant à assurer aux familles un soutien constant et fiable de la part du gouvernement.
- 3. Coopération multilatérale.** La partie III offre au gouvernement canadien un cadre de communication et de collaboration avec les États et ressortissants étrangers pour réussir à faire libérer les otages.

Sur le plan juridique et législatif, le gouvernement canadien a entrepris relativement peu d’efforts jusqu’à maintenant pour faire face à la prise d’otages et la diplomatie des otages. Ces efforts ne suffisent pas. Les États doivent en faire davantage, à l’échelle nationale et sur le plan multilatéral, pour lutter contre la prise d’otages et faire libérer les otages, sans céder aux demandes de rançons ou aux concessions politiques.

Pour que cela se concrétise, les pays comme le Canada doivent disposer d’une boîte à outils efficace, sous forme de projets de loi ciblant précisément le problème des prises d’otages. La Loi redditionnelle relative aux otages proposée dans ce document vise à fournir un tel outil pour permettre aux autorités canadiennes de remédier aux prises d’otages de civils innocents.

Introduction

Hostage-taking is an offence of grave concern to the international community. It was with the advent of international human rights law that the international community collectively decided to prohibit and punish hostage-taking, and the International Convention against the Taking of Hostages (the UN Hostages Convention) was entered into force in 1983.

Following this significant international legal prohibition, the government of Canada amended the Canadian *Criminal Code* to criminalize hostage-taking both at home and abroad. However, this is all that the Canadian government has done in response to the international calls to combat and prevent hostage-taking. There is no domestic legislation that specifically addresses hostage-taking, and current Canadian policy with respect to hostage situations is distressingly unsupportive of the families of hostages.

The taking of Canadians as hostages has persisted. Canadians are seized at alarming rates by foreign state and non-state actors. The detention of Canadians by foreign states in particular – a phenomenon popularly called “hostage diplomacy” – is becoming a new normal. Canadian hostages continue to be seized without justification or due process, and they continue to be abused, tortured, and murdered by their captors.

The Canadian government must take further legislative action to combat and deter hostage-taking. This paper is proposing legislation to this effect. A full first draft of the proposed legislation is attached, beginning on page 18.

Background

Hostage-Taking and Hostage Diplomacy

The practice of taking innocent civilians as hostages is ancient. However, with the advent of international human rights law and the recognition that ev-

everyone has the right to life, liberty, and security of person, the international community collectively decided to prohibit and punish hostage-taking with the adoption of the International Convention against the Taking of Hostages (the UN Hostages Convention) in 1979, which was entered into force in 1983.

The UN Hostages Convention recognizes that hostage-taking is “an offence of grave concern to the international community”¹ and that perpetrators must be deterred and punished. The UN Hostages Convention defines hostage-taking as the seizure or detention of another person “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” (Article 1). Pursuant to Article 1.2, culpability also extends to those who participate as accomplices.

Hostage-taking was then also criminalized in the Canadian *Criminal Code*, and the definition used domestically tracked that of the UN Hostages Convention. Section 279.1 of the Canadian *Criminal Code* now defines hostage-taking as the detention of a person “with [the] intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage.”

“ *The taking of Canadians as hostages has long been a pervasive tactic among nonstate actors.* ”

Hostage-taking may be committed by foreign state or non-state actors. The taking of Canadians as hostages has long been a pervasive tactic among non-state actors, particularly terrorist groups. One group that has infamously engaged in the hostage-taking of Canadians is *Abu Sayyaf* in the Philippines. This terrorist group kidnapped Canadians John Ridsdel and Robert Hall in September 2015. They beheaded John Ridsdel in April 2016 and Robert Hall in June 2016. These are only two examples of many; the reality is that countless foreign hostages have been seized by countless terrorist groups, and these include *Abu Sayyaf*, *Al-Qaeda*, and the Islamic State.

Terrorist groups are not the only entities that engage in hostage-taking. Foreign states engage in hostage-taking as well, as a means to influence foreign policy and gain leverage in international or bilateral negotiations. Increasingly, this use of “hostage diplomacy” – hostage-taking by state actors – is becoming a new normal. Canadian citizens and permanent residents have become

regular victims of hostage diplomacy, at alarming rates, as have the citizens and permanent residents of Canada's allies. The most notorious present-day examples include the continued detention of Canadians Michael Kovrig and Michael Spavor by the Chinese Communist Party (CCP) and the detention of British-Australian Kylie Moore-Gilbert by Iran's Revolutionary Guards.

Michael Kovrig and Michael Spavor were arrested days after Huawei CFO Meng Wanzhou was stopped in Vancouver, and their continued detention is being used to put pressure on the Canadian government to release the Huawei executive. Meng is currently facing extradition to the United States for financial crimes. So far, the Canadian government has upheld the independence of the judiciary by refusing to intervene in the extradition proceedings.

Kylie Moore-Gilbert was seized by Iran's Revolutionary Guards in 2018 as she attempted to fly out of the country following an academic conference at which she had delivered a lecture. She was convicted following a secret trial and faced 10 years in jail in Iran on espionage charges that have been widely dismissed as spurious, trumped-up, and politically motivated. This case was particularly egregious as Moore-Gilbert was moved from Evin prison, where she had spent months in solitary confinement, to Qarchak prison in August 2020. Qarchak prison is widely regarded as the worst women's prison in Iran and one of the worst women's prisons in the world. It is a nightmarish place where extrajudicial killings are widespread, torture is regular, and rape is used as a matter of course. In letters smuggled out of prison, Moore-Gilbert described feeling "abandoned [by Australia] and forgotten." She was finally released on November 25, 2020, and arrived back in Australia on November 27, 2020, after more than 800 days in prison.

Hostages and the law

The taking of hostages is illegal in both international and domestic law. Internationally, this tactic is in breach of the *Universal Declaration of Human Rights* (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which recognize that everyone has the right to life, liberty, and security of person. It is also in contravention of the UN Hostages Convention, described above, which was adopted by the UN General Assembly in its resolution 34/146 of December 17, 1979, and entered into force on June 3, 1983. The UN Hostages Convention presently has 176 states parties, including Canada. Canada signed the UN Hostages Convention in 1980 and ratified it in 1985, making its articles binding on Canada. Canada has also signed and ratified the ICCPR, and voted in favour of the UDHR when it was adopted by resolution.

Article 1 of the UN Hostages Convention defines the offence of hostage-taking as the seizure or detention of another person "in order to compel a third party ... to do or abstain from doing any act as an explicit or implicit con-

dition for the release of the hostage.” This includes those who attempt to commit an act of hostage-taking and those who participate as accomplices. Article 2 required all states parties – including Canada – to criminalize, in their domestic systems, these offences and make them punishable with appropriate penalties, taking into account the gravity of the offence. This placed a clear international legal obligation on the government of Canada to act to combat hostage-taking. Article 4 further required all states parties to “co-operate in the prevention of [hostage-taking],” particularly by “taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories” and by “exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.”

Generally, before Canada ratifies a treaty it has signed, it ensures that it has already taken the necessary legislative steps to ensure compliance with the treaty. In this case, Canada complied with Article 2 by criminalizing the offence of hostage-taking in section 279.1 of the Canadian *Criminal Code*. This offence used a definition that tracked the language used in the UN Hostages Convention: hostage-taking is defined in the Canadian *Criminal Code* as the detention of a person “with [the] intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage.” Anyone who commits this offence is liable, at a maximum, for imprisonment for life. Section 7 (3.1) of the Canadian *Criminal Code* also permits the prosecution of hostage-taking by Canadian criminal courts when the act occurs outside of Canada.



States need to do more, at the domestic and multilateral levels, to combat hostage-taking.

However, these amendments to the Canadian *Criminal Code* appear to be all that the Canadian government has done, from a legal and legislative standpoint, to address hostage-taking and hostage diplomacy. This is not enough. Article 4 of the UN Hostages Convention requires Canada to take “administrative and other measures as appropriate to prevent the commission of those offences.” This is in keeping with, as former Minister of Justice and Attorney General Irwin Cotler put it, “the customary international law obligation of all States to ensure the protection of the fundamental rights of their nationals to life, liberty, freedom from torture and enforced disappearance (including

hostage-taking)” (Cotler 2020, 65).

Other international instruments make clear that more needs to be done as well. The International Convention for the Suppression of the Financing of Terrorism requires states parties – which includes Canada – to “cooperate in the prevention of [hostage-taking offences] by taking all practicable measures.”² United Nations General Assembly resolution 68/276, which passed by consensus, expressed concern “at the increase ... in incidents of ... hostage-taking” and called on states to “secure the safe release of hostages” by means other than ransom payments or political concessions.³ United Nations Security Council resolution 2133 likewise expressed “its determination to prevent ... hostage-taking ... and to secure the safe release of hostages without ransom payments or political concessions.” This resolution also recognized “the need to further strengthen efforts to support victims,” and “call[ed] upon all Member States to cooperate closely” during incidents of hostage-taking.⁴

These international instruments exhibit what appears to be a general consensus that states need to do more, at the domestic and multilateral levels, to combat hostage-taking, and to secure the release of hostages, without succumbing to ransom payments or political concessions. For this to materialize, states like Canada require an effective toolkit, in the form of novel domestic legislation, that specifically targets the problem of hostage-taking.

Hostages and current Canadian policy

In 2016, a ground-breaking eight-part *Toronto Star* investigation detailed the disorganization, disrespect, and danger of the Canadian government’s approach to hostage situations. *The Star* interviewed over 50 people to gather firsthand accounts from hostages, their families, witnesses, private security consultants, and government, military, and intelligence officials.

According to the *Star*, when a Canadian is taken hostage, “Canada’s war room is more like a boardroom” – the response is led by “a leaderless, interdepartmental committee of good people with good intentions ... [filled] with bureaucratic and political inertia” (Shephard and Potter 2016a). These issues – “lack of leadership, lack of continuity, unnecessary secrecy and political paralysis” – were flagged as early as 2008 when Stephen Harper was prime minister and Ottawa faced five hostage situations in five months: Mellissa Fung in Afghanistan, Robert Fowler and Louis Guay in Niger, Beverley Giesbrecht in Pakistan, and Amanda Lindhout in Somalia. In January 2009, a US diplomatic cable, later released by WikiLeaks, described that Canada still responded to each new kidnap “on the fly” and without any firm policy guidance (ibid.). By December 2009, a comprehensive policy regarding hostage situations was apparently put together and ready to go, but then “it died completely.” Seven years later, in 2016, former MP Bob Rae (interviewed as part of the *Star*’s series) said that if changes were made since, he hadn’t seen them (ibid.).

One of the worst deficiencies in Canada’s approach to hostage situations is the failure to properly communicate with the families. Relatives of Canadian hostages generally get assigned a Family Liaison Officer (FLO) – an RCMP officer who is designated responsible for communicating with the family. The *Star* reported that families of hostages have “widely varying experiences” with FLOs, with some going above and beyond in their communication and responsiveness, and others displaying a disrespectful indifference (Shephard and Potter 2016b). Multiple interviewees reported being “impatiently rebuffed with excuses along the lines of officers having ‘to get back to their full-time jobs.’” Robert Fowler, who was released in 2009 after 130 days in custody, articulated that this still causes him “visceral anger”:

The issue that still causes me visceral anger is the lack of trust, courtesy – even respect – on the part of some of those charged with dealing with our families. This attitude, in our family’s view, too often threatens, however unreasonably, to overshadow the hard, innovative work done by so many others to win our release. This particular high muckety-muck has nothing but scorn for a senior RCMP officer who would seek to bully Al Qaeda kidnap victims’ families already distraught and vulnerable enough, and nothing but contempt for those who would stand aside and allow this to happen. (ibid.)

Fowler noted that his wife had to reach out to the UN secretary general of the time, Ban Ki-Moon, to receive any real update:

Lying in the hot Sahara sand, having made a proof-of-life video recording on Day 5, I never imagined that it would take 45 days before anyone told Mary [my wife] that we were alive, or that the person who eventually passed her such happy news would not be a Canadian. (Shephard and Potter 2016a)

Similar complaints were received by the *Star* from other family members of hostages. Kaeryn Boyle, sister of the Haqqani Network’s hostage Joshua Boyle, sent the following via text message:

I wish they took us seriously and acknowledged that while this is their job, it’s our daily life ... I wish they treated me – and Heather – with respect, not as children. They don’t end texts with smileys for other members of the family. (Shephard and Potter 2016b)

Kaeryn Boyle also articulated that they would have benefited from psychological support, but it was not offered. The *Star* stated that the lack of psychological support was also reported by other family members of hostages (ibid.).

Lorinda Stewart, Amanda Lindhout’s mother, detailed her frustrations in her book, *One Day Closer*. She wrote that Canadian police warned her against hiring outside help or paying the ransom, and pushed her into the role of the kidnappers’ main contact person, without telling her details of what government personnel were doing behind closed doors (Potter and Shephard 2018). She noted that at one point, “the negotiator on duty that day [said] that if I tried to answer the phone he would rip it out of the wall.” A year later, the RCMP withdrew from the case, citing a “lack of progress.” Stewart wrote that she felt abandoned. Stewart eventually hired a private security firm to negotiate Lindhout’s release for a ransom. This occurred despite the fact that paying a ransom to a terrorist group is against the Canadian *Criminal Code*: Providing material support to a terrorist organization is a criminal offence, and RCMP officers had previously warned family members of hostages that they could be prosecuted and face up to 10 years’ imprisonment for financing terrorism (ibid.).

Now, although the law is the same, RCMP officers provide “comfort letters” to families, guaranteeing that they will not be prosecuted criminally if they hire a negotiator. This is one adjustment the government made since the 2016 *Toronto Star* investigation in response to families’ requests. The other adjustment was specially designating two liaison officers to deal with families. One officer will arrange support, including mental health support. The second will be a go-to contact person to receive information (ibid.). Some family members welcomed these changes, but others expressed that they do not go far enough (ibid.). As the *Star* noted, “Families of hostages deserve greater respect” (Potter and Shephard 2016).

Failures to properly communicate with the families of hostages are unacceptable, and in direct contrast to articulated best practices. As articulated in a November 2020 report by Irwin Cotler, regular communication with a detainee’s contacts is important, and should be a minimum standard “that all States should adopt and expand upon” (Cotler 2020, 101).

Proposed legislation – explained

The United Nations Commission for Human Rights has specifically called upon all states to take all necessary measures – in accordance with relevant provisions of international law and international human rights standards – to prevent, combat, and punish acts of hostage-taking. Despite this, the Canadian government has taken only limited action to combat hostage-taking. The only domestic legislative action that has been taken was to criminalize hostage-taking in the Canadian *Criminal Code* and enable prosecution for cases that occur outside of Canada. Families do not receive enough support, and there is a demonstrated lack of clarity and leadership.

Moreover, the taking of Canadians as hostages has persisted. Hostage diplomacy is becoming a new normal. Canadians continue to be seized as hostages without justification or due process. They continue to be abused, tortured, and murdered by their captors. This persistence of hostage-taking and hostage diplomacy, combined with the limited domestic action taken by the Canadian government so far, demonstrates that Canada must take further action, and specifically legislative action, to prevent and combat acts of hostage-taking by foreign state and non-state actors.

This paper is proposing novel legislation that fills gaps left by the current legislative framework. The proposed legislation – attached beginning at page 18 of the present document – is designed to deter hostage-taking. Specifically, it serves the following three purposes:

1. To permit Canada to impose sanctions on foreign states and foreign nationals who engage in the hostage-taking of Canadians;
2. To provide a framework for consistent support for the families of hostages; and
3. To permit cooperation with foreign states and foreign nationals to secure the release of Canadian hostages.

The proposed legislation is called “*An Act to Address the Taking of Innocent Civilians as Hostages*,” with a proposed short title of the *Hostage Accountability Act*. The proposed legislation is split into three substantive parts, tracking the three purposes outlined above: Part I covers the sanctions regime; Part II provides the framework governing assistance to families; and Part III covers cooperation with foreign states and foreign nationals. Each of these parts will be briefly summarized in this section.

Part I: Sanctions

Part I of the *Hostage Accountability Act* permits the governor-in-council to impose sanctions on a foreign national or foreign state that is involved in the taking of a Canadian hostage. Specifically, sanctions may be imposed on a foreign national or foreign state that “knowingly orders, controls, or otherwise directs” the taking of a Canadian hostage. Sanctions may also be imposed on a foreign national or foreign state that has assisted or been complicit in the hostage-taking. Sanctions may be imposed if the hostage is a Canadian citizen, a Canadian permanent resident, or an eligible protected person.⁵

In terms of the nature of the sanctions, the governor-in-council may impose property-blocking sanctions and immigration sanctions pursuant to the *Hostage Accountability Act*. These proposed sections track the language used in Canada’s *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Mag-

nitsky Law), an existing Canadian human rights statute that similarly provides for the sanctioning of foreign nationals.

In terms of property-blocking sanctions, the Canadian Sergei Magnitsky Law permits the restriction or prohibition of any of the following activities, with respect to a foreign national who engages in certain human rights violations or corruption:

- a. The dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the listed foreign national;
- b. The entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a);
- c. The provision or acquisition, by any person in Canada or Canadian outside Canada, of financial services or any other services, for the benefit of, or on the direction or order of the foreign national; and
- d. The making available by any person in Canada or Canadian outside Canada of any property, wherever situated, to the foreign national or to a person acting on behalf of the foreign national.

The proposed *Hostage Accountability Act* enables the use of these same property sanctions against foreign nationals and foreign states involved in the taking of a Canadian hostage.

Then, also mirroring the Canadian Sergei Magnitsky Law, these foreign nationals would become inadmissible to Canada under the *Immigration and Refugee Protection Act* (IRPA). Just as the Canadian Sergei Magnitsky Law involved amendments to the IRPA, so too does the *Hostage Accountability Act* involve these amendments, making foreign nationals involved in hostage-taking inadmissible to Canada under section 35 of the IRPA.

The *Hostage Accountability Act* also includes a safeguard provision to ensure the legislation is used as intended, targeting those wrongdoers currently beyond the reach of jurisdictions that Canada fully recognizes as capable of adjudicating such cases in their own domestic legal systems. In service of that objective, the *Hostage Accountability Act* includes what we have coined as a “negative list” of countries that Canada would recognize in this regard as being beyond the reach of the proposed sanctions. Countries would be included in this list if they (1) are extradition partners according to the schedule to the *Extradition Act* or (2) share a bilateral extradition treaty with Canada. Such countries constitute Canada’s primary allies and possess legal systems in which Canada has expressed confidence. Notably, former Justice Minister and

Attorney General Irwin Cotler (2010) has advocated for the use of this type of model in earlier deliberations regarding what was eventually passed as the *Justice for Victims of Terrorism Act* in 2012:

I understand the government's desire to prevent frivolous or vexatious lawsuits against our democratic allies. While my bill removes immunity from perpetrators of terrorism and its state sponsors, it seeks to address this concern by providing a limited carve-out for countries with whom Canada has an extradition treaty – that is, those democracies that respect the rule of law, that have an independent judiciary and that provide due process. Accordingly, victims of terrorism could seek redress in those countries precisely because of their democratic character and provision for due process. Given that such recourses would be available to victims with respect to these countries, it is not imperative to remove state immunity entirely.⁶

The proposed *Hostage Accountability Act* accomplishes this same objective identified by Irwin Cotler, by excluding these countries and their nationals from the legislation's definitions of "foreign state" and "foreign national," respectively – see the Draft Language section below for details. Therefore, in short: Foreign states with which Canada has an extradition agreement – and foreign nationals from those states – could not be sanctioned pursuant to Part I of the proposed *Hostage Accountability Act*.

Pursuant to section 12 of the proposed act, Canada may also apply sanctions when nationals of other countries are taken hostage. This gives us reason to expect similar support when we face the same challenge.

Part II: Assistance to families

Part II of the *Hostage Accountability Act* provides a framework for consistent support for the families of hostages. This part imposes obligations on the government of Canada to communicate with the families of hostages and assist them in acquiring information.

Specifically, section 14 imposes an obligation on the minister of foreign affairs to communicate with the families of Canadian nationals, permanent residents, and/or eligible protected persons taken hostage, provide guidance, and direct the families to appropriate resources and support, including mental health support. This obligation specifically responds to family members' complaints of inadequate communication and access to specialized mental health support.

Section 15 imposes an obligation on the minister to assist the families of hos-

tages in acquiring relevant information from any foreign national or foreign state that is unwilling to share the information with the family directly.

Finally, section 16 imposes an obligation on the minister to facilitate, as soon as practicable, the creation of a “family liaison centre” – a specialized body that will liaise with families of hostages and provide guidance and referrals to mental health support.

Part III: Cooperation with foreign states and foreign nationals

Part III of the *Hostage Accountability Act* addresses cooperation with foreign states and foreign nationals. Section 17 addresses cooperation with foreign states, and sections 18-20 address cooperation with foreign nationals. These sections are designed to provide the government of Canada with a greater arsenal of tools to try to secure the release of Canadian hostages, recognizing that local partners are often instrumental in securing the release of hostages abroad.

Cooperation with foreign states

Section 17 allows the minister to communicate and collaborate with foreign states for the purpose of securing the release of a Canadian hostage – including but not limited to foreign states with which Canada has an extradition treaty. This section is designed to explicitly encourage multilateral collaborations with our allies, with the aim of securing the release of hostages.

Cooperation with foreign nationals

Section 18 allows the minister to communicate and collaborate with foreign nationals, for the purpose of securing the release of a Canadian hostage or acquiring information relevant to a Canadian hostage.

Sections 19-20 allow the minister to protect and reward foreign nationals who provide information leading to the release and repatriation of Canadian hostages. Section 19 holds that these foreign nationals, and their immediate families, may be granted refugee protection pursuant to the *Immigration and Refugee Protection Act*. Section 20 holds that such foreign nationals may be granted a monetary reward from the government of Canada, in an amount to be determined by the minister.

Draft Language - “*Hostage Accountability Act*”

An Act to address the taking of innocent civilians as hostages.

Preamble

Whereas human rights and the rule of law are integral to international law and Canada has repeatedly asserted its commitment to promoting international justice and respect for human rights;

Whereas signatory States to international human rights agreements have committed themselves to the obligations and responsibilities set out in those agreements;

Whereas Canada voted in favour of the *Universal Declaration of Human Rights*, and signed and ratified the International Covenant on Civil and Political Rights, which recognizes that everyone has the right to life, liberty, and security of person;

Whereas Canada signed and ratified the International Convention against the Taking of Hostages, adopted by the General Assembly in its resolution 34/146 of 17 December 1979;

Whereas Canada criminalizes hostage-taking in section 279.1 of the Canadian *Criminal Code*;

Whereas the United Nations Commission for Human Rights calls upon States to take all necessary measures, in accordance with relevant provisions of international law and international human rights standards, to prevent, combat, and punish acts of hostage-taking;

Whereas the detention of Canadian hostages in foreign jurisdictions, without justification or due process, has continued to persist;

And whereas Canadian hostages in foreign jurisdictions continue to be abused, tortured, and murdered by their captors;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short Title

1. This Act may be cited as the *Hostage Accountability Act*.

Interpretation

Definitions

2. The following definitions apply in this Act.

Canadian means a person who is a citizen within the meaning of the *Citizenship Act* or a corporation incorporated or continued by or under the laws of Canada or of a province. (Canadien)

permanent resident means a person who is a permanent resident within the meaning of the *Immigration and Refugee Protection Act*. (*résident permanent*)

eligible protected person means a person who is a protected person within the meaning of subsection 95(2) of the *Immigration and Refugee Protection Act* and who is not inadmissible under that Act on grounds of

(a) security, violating human or international rights, or serious criminality, or

(b) criminality and who have not been convicted of any offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed, or five years or more may be imposed (*personne protégée*)

entity means a corporation, trust, partnership, fund, an unincorporated association or organization, or a foreign state. (*entité*)

foreign national means an individual who is not

- (a) a Canadian citizen; or
- (b) a permanent resident under the *Immigration and Refugee Protection Act*; or
- (c) a national of a country with which Canada is party to an extradition agreement or whose name is set out in the schedule to the *Extradition Act*. (*étranger*)

foreign state means a country other than Canada, and includes

- (a) any of its political subdivisions;
- (b) its government and any of its departments, or the government or any department of any of its political subdivisions; and
- (c) any of its agencies or any agency of any of its political subdivisions.

It does not include a country with which Canada is party to an extradition agreement or whose name is set out in the schedule to the *Extradition Act*. (*État étranger*)

agency of a foreign state means any legal entity that is an organ of the foreign state but that is separate from the foreign state, including state-owned corporations. (*organisme d'un État étranger*)

Minister means the Minister of Foreign Affairs. (*ministre*)

person means an individual or an entity. (*personne*)

prescribed means prescribed by regulation. (*version anglaise seulement*)

hostage means a person who has been seized or detained in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or judicial 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.

Purpose

Purpose

3. The purpose of this Act is

(a) to permit Canada to impose sanctions on foreign states and foreign nationals who engage in the hostage-taking of Canadian nationals, permanent residents, and/or eligible protected persons;

(b) to provide a framework for consistent support for the families of hostages; and

(c) to permit cooperation with foreign states and foreign nationals to secure the release of Canadian hostages.

Her Majesty

Binding on Her Majesty

This Act is binding on Her Majesty in right of Canada or a province.

Part I. Sanctions

Orders and Regulations

Orders and Regulations

5. (1) The Governor in Council may, if the Governor in Council is of the opinion that any of the circumstances described in section (2) has occurred,

(a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to a foreign national or foreign state that the Governor in Council considers necessary; and

(b) by order, cause to be seized, frozen, or sequestered in the manner set out in the order any of the foreign national's or foreign state's property situated in Canada.

Circumstances

5. (2) The circumstances referred to in subsection (1) are the following:

(a) a foreign national or foreign state that knowingly orders, controls, or otherwise directs the taking of Canadian nationals, permanent residents, and/or eligible protected persons as hostages.

(b) a foreign national or foreign state that has materially assisted, sponsored, been complicit in, or provided financial, material, or technological support for, or goods or services in support of, an activity described in subparagraph (a).

Restricted or prohibited activities

5. (3) Orders and regulations may be made under paragraph (1) with respect to the restriction or prohibition of any of the following activities, whether carried out in or outside Canada:

(a) the dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the foreign national or foreign state;

(b) the entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a);

(c) the provision by any person in Canada or Canadian outside Canada of financial services or any other services to, for the benefit of, or on the direction or order of the foreign national or foreign state;

(d) the acquisition by any person in Canada or Canadian outside Canada of financial services or any other services for the benefit of or on the direction or order of the foreign national or foreign state; and

(e) the making available by any person in Canada or Canadian outside Canada of any property, wherever situated, to the for-

eign national or foreign state, or to a person acting on behalf of the foreign national or foreign state.

Determining hostage status – sources of information

5. (4) In determining whether or not a Canadian national, permanent resident, or eligible protected person is a hostage pursuant to the definition contained in section 2 of this Act, the Governor in Council may consider advice and intelligence from all relevant sources, including but not limited to:

(a) Canadian government and military officials;

(b) Canadian intelligence agencies; and

(c) officials and agencies of other Five Eyes countries, namely the United States, the United Kingdom, Australia, and New Zealand, and officials of other countries which whom Canada collaborates on security and intelligence issues.

Determining hostage status – relevant factors

(5) In cases of ambiguity regarding whether or not a Canadian national, permanent resident, or eligible protected person is a hostage pursuant to the definition contained in section 2 of this Act, the Governor in Council may consider all relevant factors, including but not limited to:

(a) timing of seizure or detention;

(b) public statements by the foreign state or non-state actor implicated in the seizure or detention; and

(c) past experience with a particular foreign state or non-state actor.

Tabling of order

6. A copy of each order or regulation made under section 5 must be tabled in each House of Parliament within 15 days after it is made. It may be sent to the Clerk of the House if the House is not sitting.

Termination of Order or Regulation

7. (1) A foreign national or foreign state who is the subject of an order or regulation made under section 5 may apply in writing to the Minister to cease being the subject of an order or regulation.

Recommendation

7. (2) On receipt of the application, the Minister must decide whether there are reasonable grounds to recommend to the Governor in Council that the order or regulation be amended or repealed, as the case may be, so that the applicant ceases to be the subject of it.

Criteria

7. (3) In determining whether there are reasonable grounds to recommend to the Governor in Council that the order or regulation be amended or repealed, as the case may be, the Minister shall consider:
 - (a) whether information exists that the foreign national or foreign state did not engage in the activity for which sanctions were imposed;
 - (b) whether the foreign national or foreign state has been prosecuted appropriately for the activity for which sanctions were imposed;
 - (c) whether the foreign national or foreign state has credibly demonstrated a significant change in behaviour, has paid an appropriate consequence for the activity for which sanctions were imposed, and has credibly committed to not engage in an activity described in subsection (a) in the future; or
 - (d) whether the termination of the sanctions is in Canada's national security interests.

Continuation of proceedings

7. (4) Notwithstanding the above, any legal action commenced on behalf of a hostage shall not be curtailed in the event that an order or regulation regarding a foreign national or foreign state is amended or repealed.

Continuation of sanctions until judgments are settled

7. (5) Notwithstanding the above, all sanctions provided in an order or regulation against a foreign national or foreign state shall continue until such time as all outstanding judgments against such entities have been settled.

Offences

Offence and punishment

8. Every person who knowingly contravenes or fails to comply with an order or regulation made under section 5
 - (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years; or
 - (b) is guilty of an offence punishable on summary conviction and is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

No civil liability

9. A person who, in relation to any property that is the subject of an order or regulation made under section 5, acts reasonably in taking, or omitting to take, measures to comply with the order or regulation is not liable in any civil action arising from having taken or omitted to take the measures if they took all reasonable steps to satisfy themselves that the property was not property that is the subject of the order or regulation.

Existing equities maintained

10. All secured and unsecured rights and interests in any property that is the subject of an order or regulation made under section 5 that are held by a person, other than the foreign national or foreign state who is the subject of the order or regulation, are entitled to the same ranking that they would have been entitled to had the order or regulation not been made.

Proceedings not precluded

11. The making of an order or regulation under section 5 does not preclude the commencement of proceedings under any Act of Parliament other than this Act, or any civil proceedings, in respect of any property that is the subject of the order or regulation.

Application to other hostages

Application to other hostages

12. The Governor in Council is permitted to apply any of the provisions of this Act in a situation where a citizen or permanent resident of another country is taken hostage by a foreign state or non-state actor.

Related amendments

Special Economic Measures Act

13. [Amendments]

Immigration and Refugee Protection Act

14. [Amendments]

[Section 35 of the IRPA should be amended to read:

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

...

(e) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 4 of the *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law).

(f) being a person, other than a permanent resident, who is currently the subject of an order or regulation made under section 5 of the *Hostage Accountability Act*.]

Part II. Assistance to families

Communication with families

15. The Minister or his/her designate shall communicate with the families of Canadian nationals, permanent residents, and/or eligible protected per-

sons taken hostage, provide guidance, and direct families to appropriate resources and support including mental health support.

Assistance in acquiring information

16. The Minister or his/her designate shall assist the families of Canadian nationals, permanent residents, and/or eligible protected persons taken hostage in acquiring relevant information from any foreign national or foreign state unwilling to share such information with the family directly.

Creation of a family liaison centre

17. The Minister or his/her designate shall facilitate, as soon as practicable, the creation of a specialized body or Office for liaising with the families of Canadian nationals, permanent residents, and eligible protected persons taken hostage, and for providing guidance and referrals to mental health support.

Part III. Cooperation with foreign states and foreign nationals

Cooperation with foreign states

Cooperation with foreign states

18. The Minister or his/her designate may communicate and collaborate with foreign states, including but not limited to foreign states with which Canada has an extradition treaty, for the purpose of partnering in multilateral efforts to secure hostages, and for other purposes.

Cooperation with foreign nationals

Cooperation with foreign nationals

19. The Minister or his/her designate may communicate and collaborate with foreign nationals for the purpose of securing the release of a Canadian hostage and/or acquiring information relevant to a Canadian hostage.

Incentivizing cooperation from foreign nationals – refugee protection

20. If a foreign national provides critical information leading to the release and repatriation of a Canadian hostage, the Minister or his/her designate may grant refugee protection to that foreign national, and to all members of his or her immediate family, pursuant to section 95 (1) of the *Immigration and Refugee Protection Act*.

Incentivizing cooperation from foreign nationals – monetary reward

21. If a foreign national provides critical information leading to the release and repatriation of a Canadian hostage, the Minister or his/her designate may grant a monetary reward to that foreign national, in a quantum and manner to be determined by the Minister.

Part IV. Miscellaneous

Regulations

Regulations

22. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act.

Review and report

Review

23. (1) Within five years after the day on which this section comes into force, a comprehensive review of the provisions and operation of this Act must be undertaken by the committees of the Senate and of the House of Commons that are designated or established by each House for that purpose.

Report

23. (2) The committees referred to in subsection (1) must, within a year after

a review is undertaken under that subsection or within any further time that may be authorized by the Senate or the House of Commons, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committees recommend.

Review

23.(3) Committees of the Senate and the House of Commons that are designated or established by each House for that purpose may conduct a review concerning the foreign nationals and foreign states who are the subject of an order or regulation made under this Act and submit a report to the appropriate House together with their recommendations as to whether those foreign nationals and foreign states should remain, or no longer be, the subject of that order or regulation.

Acknowledgements

I would like to offer thanks to David Matas, Brandon Silver, and David Mulroney for providing invaluable counsel and guidance in writing this paper. I would also like to acknowledge and offer my deepest thanks to Daniel Eisen, co-founder of the Canadian Coalition Against Terror, without whom this proposal would not have been possible.

About the author



Sarah Teich is a Canadian attorney and consultant based in Toronto, Canada and a Senior Fellow at the Macdonald-Laurier Institute. She holds a Juris Doctor degree from the University of Toronto, an MA (*magna cum laude*) in Counter-Terrorism and Homeland Security, and undergraduate degrees in Psychology and Sociology from McGill University. She has also studied law at the National University of Singapore. Sarah has held research positions at the Munk School of Global Affairs (Toronto) and the

International Institute for Counter-Terrorism (ICT) in Israel. She has led a Canadian National Security Working Group, delivering policy submissions to the Parliament of Canada. Sarah has also worked on classified projects for the International Criminal Court (ICC) in The Hague. Her current research focuses on international human rights law and national security law and policy.

References

Cotler, Irwin. 2010. "Hold Sponsors of Terror to Account." *Ottawa Citizen*, May 11.

———. 2020. *A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk*. International Bar Association, November 16. Available at <https://www.ibanet.org/Consular-Support-report-launch-2020.aspx>.

Potter, Mitch, and Michelle Shephard. 2016. "Rescue, Ransom, Escape or Death Are the Only Four Outcomes for Hostages." *Toronto Star*, December 6, 2016. Available at <https://www.thestar.com/news/canada/held-hostage/2016/12/06/rescue-ransom-escape-or-death-are-the-only-four-outcomes-for-hostages.html>.

———. 2018. "The RCMP Is Now Telling Canadian Hostages' Families They Won't Be Prosecuted for Negotiating with Kidnappers." *Toronto Star*, February 14. Available at <https://www.thestar.com/news/canada/2018/02/13/the-rcmp-is-now-telling-canadian-hostages-families-they-wont-be-prosecuted-for-negotiating-with-kidnappers.html>.

Shephard, Michelle, and Mitch Potter. 2016. "Canada's Hostage 'War Room' Is More Like a Leaderless Boardroom." *Toronto Star*, December 3. Available at <https://www.thestar.com/news/canada/held-hostage/2016/12/01/canadas-hostage-war-room-is-more-like-a-leaderless-boardroom.html>.

———. 2016b. "Mounties Who Liaise with Families of Hostages Face Scorn, Praise." *Toronto Star*, December 5. Available at <https://www.thestar.com/news/canada/held-hostage/2016/12/05/mounties-who-liaise-with-families-of-hostages-face-scorn-praise.html>.

Stewart, Lorinda. 2017. *One Day Closer: A Mother's Quest to Bring Her Kidnapped Daughter Home*. Toronto: Simon & Schuster.

Endnotes

- 1 The UN Hostages Convention can be found here: <https://www.treaty-accord.gc.ca/text-texte.aspx?id=104001&Lang=eng&wbdisable=true>.
- 2 See Article 18 of the International Convention for the Suppression of the Financing of Terrorism. The document can be found here: <https://www.un.org/law/cod/finterr.htm>.
- 3 See para 28 of the United Nations General Assembly resolution 68/276 at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/276&referer=/english/&Lang=E.
- 4 UN Security Council resolution 2133 is available at [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2133%20\(2014\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2133%20(2014)).
- 5 “Eligible protected person” is defined in the Definitions section of the *Hostage Accountability Act* as: a person who is a protected person within the meaning of subsection 95(2) of the *Immigration and Refugee Protection Act* and who is not inadmissible under that Act on grounds of
 - (a) security, violating human or international rights, or serious criminality, or
 - (b) criminality and who have not been convicted of any offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed, or five years or more may be imposed (*personne protégée*).This definition was taken from s. 30 (h) of the *Canadian Emergencies Act*.
- 6 Note that this article was in relation to an earlier version of the *Justice for Victims of Terrorism Act* that was based solely on a negative list model and brought forward by Cotler as a private member’s bill.

About the Macdonald-Laurier Institute

What Do We Do?

When you change how people think, you change what they want and how they act. That is why thought leadership is essential in every field. At MLI, we strip away the complexity that makes policy issues unintelligible and present them in a way that leads to action, to better quality policy decisions, to more effective government, and to a more focused pursuit of the national interest of all Canadians. MLI is the only non-partisan, independent national public policy think tank based in Ottawa that focuses on the full range of issues that fall under the jurisdiction of the federal government.

What Is in a Name?

The Macdonald-Laurier Institute exists not merely to burnish the splendid legacy of two towering figures in Canadian history – Sir John A. Macdonald and Sir Wilfrid Laurier – but to renew that legacy. A Tory and a Grit, an English speaker and a French speaker – these two men represent the very best of Canada’s fine political tradition. As prime minister, each championed the values that led to Canada assuming her place as one of the world’s leading democracies. We will continue to vigorously uphold these values, the cornerstones of our nation.



Working for a Better Canada

Good policy doesn’t just happen; it requires good ideas, hard work, and being in the right place at the right time. In other words, it requires MLI. We pride ourselves on independence, and accept no funding from the government for our research. If you value our work and if you believe in the possibility of a better Canada, consider making a tax-deductible donation. The Macdonald-Laurier Institute is a registered charity.

Our Issues

The Institute undertakes an impressive program of thought leadership on public policy. Some of the issues we have tackled recently include:

- Aboriginal people and the management of our natural resources;
- Making Canada’s justice system more fair and efficient;
- Defending Canada’s innovators and creators;
- Controlling government debt at all levels;
- Advancing Canada’s interests abroad;
- Ottawa’s regulation of foreign investment; and
- How to fix Canadian health care.

constructive

important

forward-thinking

insightful

high-quality

active

Celebrating 10 years

WHAT PEOPLE ARE SAYING ABOUT MLI

The Right Honourable Paul Martin

I want to congratulate the **Macdonald-Laurier Institute** for 10 years of excellent service to Canada. The Institute's commitment to public policy innovation has put them on the cutting edge of many of the country's most pressing policy debates. The Institute works in a persistent and constructive way to present new and insightful ideas about how to best achieve Canada's potential and to produce a better and more just country. Canada is better for the forward-thinking, research-based perspectives that the **Macdonald-Laurier Institute** brings to our most critical issues.

The Honourable Jody Wilson-Raybould

The **Macdonald-Laurier Institute** has been active in the field of Indigenous public policy, building a fine tradition of working with Indigenous organizations, promoting Indigenous thinkers and encouraging innovative, Indigenous-led solutions to the challenges of 21st century Canada. I congratulate **MLI** on its 10 productive and constructive years and look forward to continuing to learn more about the Institute's fine work in the field.

The Honourable Irwin Cotler

May I congratulate **MLI** for a decade of exemplary leadership on national and international issues. Through high-quality research and analysis, **MLI** has made a significant contribution to Canadian public discourse and policy development. With the global resurgence of authoritarianism and illiberal populism, such work is as timely as it is important. I wish you continued success in the years to come.

The Honourable Pierre Poilievre

The **Macdonald-Laurier Institute** has produced countless works of scholarship that solve today's problems with the wisdom of our political ancestors. If we listen to the **Institute's** advice, we can fulfill Laurier's dream of a country where freedom is its nationality.

M A C D O N A L D - L A U R I E R I N S T I T U T E



323 Chapel Street, Suite 300,
Ottawa, Ontario K1N 7Z2
613-482-8327 • info@macdonaldlaurier.ca



[@MLInstitute](https://twitter.com/MLInstitute)



facebook.com/MacdonaldLaurierInstitute



youtube.com/MLInstitute



linkedin.com/company/macdonald-laurier-institute