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STUDY ON ARBITRARY DETENTION
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I. Background

This Study provides an overview of the legal context and instruments to tackle State-sponsored arbitrary detention in State-to-State relations at the international and European level.

"State-sponsored arbitrary detention in State-to-State relations" is a form of arbitrary detention. Arbitrary detention has a relatively clear meaning under human rights law and several other branches of law. However, there is no uniform or accepted definition of what constitutes "State-sponsored arbitrary detention in State-to-State relations." Part of the purpose of the study is to identify what elements can be consistently applied to the factual scenarios that comprise this subset of arbitrary detention, drawing from relevant sources of law and practice.

II. State-sponsored arbitrary detention in State-to-State relations: elements of a definition

II.1 Branches of law relevant to defining arbitrary detention

The main branches of law that are relevant to the study are as follows:

i) International human rights law

The right to liberty and security of the person is a fundamental human right recognised by most relevant international human rights treaties and declarative texts.[3] It is intrinsically connected to human dignity and constitutes an essential component of many countries' constitutional systems.[4] The prohibition of all forms of arbitrary deprivation of liberty 'forms a part of international customary law and constitutes a peremptory or jus cogens norm.'[5]

[3] *Universal Declaration of Human Rights* Art. 9; *International Covenant on Civil and Political Rights* Art. 9(1); *American Convention on Human Rights* Art. 7; *African Charter on Human and Peoples' Rights* Art. 6; *European Convention on Human Rights* Art. 5; *Arab Charter* Art. 14; *ASEAN Human Rights Declaration* Art. 12; *Convention on the Rights of Persons with Disabilities* Art. 14(1); *Convention on the Rights of the Child* Art. 37(b); *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* Art. 16

[4] UN Commission on Human Rights, 'Study of the right of everyone to be free from arbitrary arrest, detention, and exile' (1964) UN Doc E/CN.4/826/Rev.1, para 54

[5] WGAD, 'Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law' UN Doc A/HRC/22/44 (24 December 2012) para 75. See also, HRC, 'General Comment No. 29: States of Emergency (Article 4)' UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention and their connection with other human rights' UN Doc CMW/C/GC/5 (21 July 2022) para 16; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, para 91; ICRC, 'Customary International Law Database' (undated) <www.icrc.org/customary-ihl/eng/docs/home> accessed 11 July 2023, Rule 99: Arbitrary deprivation of liberty is prohibited

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Following on from the adoption of the Universal Declaration of Human Rights (UDHR) and its article 9, in 1956, the (then) UN Commission on Human Rights established a committee to study the right of everyone to be free from arbitrary arrest, detention and exile.[6] Attesting to the importance the Commission placed on the issue, it was the first ever subject it selected for special study.[7] In defining "arbitrary", the Commission had regard to the *travaux préparatoires* on article 9 UDHR, as well as article 9 of the (then) draft Covenant on Civil and Political Rights.[8] It understood that 'an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.'[9] Thus, there was a clear concern about laws that were properly enacted but nevertheless unnecessarily oppressive or unfair.

The right to detain in certain circumstances is well-recognised; detention is illegitimate when it meets the conditions for arbitrariness. This has been taken to include elements of inappropriateness, injustice, lack of predictability or due process of law, unreasonableness, or is otherwise unnecessary or disproportionate.[10]

ii) Hostage-taking

The 1979 International Convention against the Taking of Hostages[11] refers to the offence of 'hostage-taking' as: [a]ny person who:

- 'seizes or detains and threatens to kill, to injure or to continue to detain another person' (detention pursuant to a fabricated, bad-faith or ulterior purpose criminal proceeding and court process would suffice).
- '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 person' (the purpose of the detention may be inferred from the wider facts).
- Further, 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'.[12] This implies that the Convention only applies to hostage-taking which has a transnational element and does not apply to purely domestic acts. (The applicability of hostage-taking to dual nationals taken on the territory of one of their nationalities is therefore contentious, though it can be argued by reference to theories of predominant nationality, and connection to patterns of hostage-taking involving multiple nationalities).

[6] UN Commission on Human Rights, Report of the 12th session, (5-29 March 1956) UN Doc E/CN.4/731, particularly paras 72-83
[7] Ibid
[8] UN Commission on Human Rights, 'Study of the right of everyone to be free from arbitrary arrest, detention, and exile' (1964) UN Doc E/CN.4/826/Rev.1, paras 24-27
[9] Ibid, para 27
[10] *Mukong v Cameroon*, Comm. No. 458/1991, UN Doc CCPR/C/51/D/458/1991 (21 July 1994) para 9.8. See also, UN HRC, General Comment no. 35, Article 9 (Liberty and security of person) (16 December 2014) UN Doc CCPR/C/GC/35 para 12; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention and their connection with other human rights', UN Doc CMW/C/GC/5 (21 July 2022) para 19
[11] Art. 1 *International Convention Against the Taking of Hostages* (adopted 19 December 1979, entered into force 3 June 1983) 1316 UNTS 205
[12] Art. 13, Hostages Convention, ibid

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As primarily a criminal law Convention identifying individual criminal responsibility, the Hostages Convention does not explicitly cover "State-sponsored" hostage-taking though its reference to "any person" in the definition of the taking of hostages in article 1 may refer to both natural and legal persons. However, certain States have been wary to term State-sponsored hostage-taking as hostage-taking under the Hostages Convention.[13] Scholars which have researched the *travaux* of the Hostages Convention such as Lambert[14] and Aust[15] have concluded that "any person" includes State actors. In a similar sense, State engagement in hostage-taking is a recognised though prohibited feature of armed conflict.[16] Responsibility for hostage-taking has also been attributed to States when they maintain and support as their own, acts initially undertaken by non-State actors.[17] In the *Iran Hostages case*, Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[18]

The Hostages Convention requires criminalisation of any seizure or detention and threat to kill, injure or continue to detain any hostage, not merely diplomatic agents, in order to compel any State, international organization or person to do or abstain from doing any act.[19]

iii) IHL and ICL

Arbitrary detention (termed "unlawful confinement" in certain IHL texts) is prohibited in situations of armed conflict, both in international and non-international armed conflicts.[20] The ICRC has noted that 'State practice establishes this rule [on the prohibition of arbitrary detention] as a norm of

[13] See, UK Foreign Affairs Committee, 'Stolen years: combatting state hostage diplomacy Sixth Report of Session 2022–23,' HC 166, 4 April 2023, para. 11: 'The FCDO is equally wary of using the term, arguing that the Hostage Convention refers to individual, rather than state, liability.' Similarly, the US *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* [22 USC 1741 (27 December 2020)], does not define hostage-taking or other wrongful detentions *per se*, though subsidiary texts define a hostage as a person held by a non-state actor against their will in order to compel a third person or governmental organization to do or abstain from doing any act as a condition for the release of the person detained [US Department of State, 'Resource Guide for Families of Wrongful Detainees' (26 July 2021) Glossary of Acronyms and Terms, 45. See also *Presidential Policy Directive PPD-30* (24 June 2015) para 7]. Note, however, that in the *Iran Hostages case* (n 5), Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them [ICJ Rep 1980, p. 3, pp 31–33]

[14] Joseph Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Grotius, 1990) 79-80: the words "any person" 'make it clear that the Convention is directed towards individual liability, rather than State action. This is not to say, however, that the Convention does not apply to acts committed by a person acting at the behest of a State. No exception for State agents can be implied from this wording. Indeed, the draftsmen made it clear that this definition includes acts by such persons. […] it may be assumed that the words "Any person", unconditional as they stand, cover acts committed by State agents as well as those committed by private persons.'

[15] Anthony Aust, 'Implementation Kits for the International Counter-Terrorism Conventions' (Legal and Constitutional Affairs Division, Commonwealth Secretariat, London 2002) 142: 'the act can be committed by a private individual or by the agent of a State.'

[16] See, *United States v Wilhelm List, et al,* 'The Hostages Case', US Military Tribunal at Nuremberg, 15 ILR 632 (19 February 1948). See also, ICRC, 'Customary International Law Database' (undated) Rule 96 <www.icrc.org/customary-ihl/eng/docs/home> accessed May 2023; UNSC Resolution 687 (8 April 1991) UN Doc. S/RES/687 concerning the invasion by Iraq of Kuwait

[17] *US Diplomatic and Consular Staff in Tehran case* (n 5) para 74

[18] Ibid, pp 31-33

[19] Art. 5 Hostages Convention

[20] ICRC, 'Customary International Law Database' (undated) Rule 99 <www.icrc.org/customary-ihl/eng/docs/home>

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customary international law applicable in both international and non-international armed conflicts.'[21]

In international armed conflicts, all four 1949 Geneva Conventions incorporate safeguards from unlawful and arbitrary detention by stipulating the grounds on which persons may be detained by a party to the conflict,[22] as well as the procedural guarantees that detainees must be afforded. The rules and procedures are status-based and depend on whether the detainees are combatants or civilians.

Arbitrary detention will arise in international armed conflicts when prisoners of war are maintained in detention unjustifiably after the end of hostilities.[23] An unjustifiable delay in their release and repatriation would constitute a grave breach under Additional Protocol 1,[24] and continued detention would constitute arbitrary detention.[25] The Fourth Geneva Convention specifies that a civilian may only be interned or placed in assigned residence if 'the security of the Detaining Power makes it absolutely necessary'[26] or, in occupied territory, on an exceptional basis,[27] for 'imperative reasons of security'.[28] The unlawful confinement of civilians is a grave breach of the Geneva Conventions.[29] Detention of civilians pursuant to the fourth Geneva Convention must cease as soon as the reasons for it cease,[30] otherwise the continued detention would be arbitrary. Arbitrary detention of groups of persons as a form of punishment, unconnected to individual determinations of the legitimacy of their detention may also constitute collective punishment, a violation of IHL.[31] In the *Delalić case*, the ICTY underscored that 'internment or assigned residence under article 78 of the Fourth Geneva Convention is an exceptional measure that may never be taken on a collective basis.'[32]

In non-international armed conflicts (NIACs), detention is generally accepted as a matter of State practice, though IHL standards related to detention are less specific.[33] Detentions occurring in NIACs are permissible when carried out by the State, in accordance with applicable human rights pertaining to liberty and security of the person operable within the State, accommodating for the circumstances of the conflict. ICRC explains:

> In a "traditional" NIAC occurring in the territory of a State between government armed forces and one or more non-State armed groups, domestic law, informed by the State's human rights obligations, and IHL, constitutes the legal framework for the possible internment by States of persons whose activity is deemed to pose a serious security threat.

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[21] Ibid

[22] GC1, Arts. 28, 30, 32 [regarding the detention of medical and religious personnel]; GC2, Arts. 36, 27 [regarding the detention of medical and religious personnel of hospital ships]; GC3, Arts. 21, 90. 95, 103, 109, 118 [regarding the internment of prisoners of war for the duration of active hostilities]; GC4, Arts. 27(4), 42, 78 [regarding the internment or placement in an assigned residence of civilians]

[23] GC3, Art. 21

[24] AP1, Art. 85(4)(b)

[25] ICRC, Official Commentary to GC3, (2020) <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary> para 4464

[26] GC4, Art. 42

[27] *Prosecutor v Delalić, Mucić, Delić and Landžo (Čelebići case)*, Trial Chamber Judgment, No. IT-96-21-T (16 November 1998) paras 578, 583

[28] GC4, Art. 78

[29] GC4, Art. 147

[30] GC4, Art. 132; API, Art. 75(3)

[31] UN Sub-Commission on Human Rights, Res. 1988/10 (31 August 1988) para 3; UN Sub-Commission on Human Rights, Res. 1989/4 (31 August 1989) para 3

[32] *Delalić* (n 27) para 578

[33] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force,' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 80, 84

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A careful examination of the interplay between national law and the applicable international legal regimes will be necessary.[34]

In the case of the ECHR which provides an exhaustive basis for lawful detention (and without mentioning military or security detention), such military or security detention may be recognised as an additional exception if there is another accepted international law basis to detain such as a clear ability to detain pursuant to the Geneva Conventions in an IAC,[35] or on some readings, pursuant to a binding UN Security Council resolution which requires detention.[36] Such detention would nevertheless still be arbitrary unless it could be shown that there was a present, direct, and imperative threat to justify the detention and there were no other effective measures to address that threat, and that the detention lasted no longer than necessary.[37]

The war crimes of unlawful confinement and the taking of hostages are set out in articles 8(2)(a)(vii)-2 and article 8(2)(a)(viii) respectively (related to an international armed conflict) and the war crime of taking hostages in a non-international armed conflict in article 8(2)(c)(iii) of the ICC Statute. Most other international, internationalised, or ad hoc criminal tribunals adopt the language of grave breaches (which relate to international armed conflicts), within which there is recognition of unlawful confinement,[38] hostage-taking,[39] and collective punishments.[40] It is thus unclear from the statutes themselves whether arbitrary detention (or unlawful detention or confinement) in a non-international armed conflict is recognised as a war crime. Given the limited treatment of arbitrary detention in non-international armed conflicts under IHL, as set out above in this section, it is questionable whether arbitrary detention in a NIAC can constitute a war crime as a matter of customary international law, though the ICRC in its study on customary international law suggests that 'the prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law.'[41] This customary international law basis for the prohibition of arbitrary detention as a war crime in the non-international armed conflict during the 1998-1999 armed conflict in Kosovo has been subject to pleadings and ruling at the Kosovo Specialist Chambers, with the Chambers determining that arbitrary detention constituted a war crime in a non-international armed conflict.[42]

'Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' is recognised as one of the possible underlying offences of crimes against humanity in accordance with article 7(1)(e) of the ICC Statute and is reflected in many other statutes and principles setting out crimes against humanity.[43] An act of imprisonment or severe deprivation

[34] ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges' (Opinion Paper, November 2014) 7 <www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf>
[35] *Hassan v United Kingdom* App no 29750/09 (16 September 2004)
[36] See also *Al-Jedda v United Kingdom (Grand Chamber)* App no 27021/08 (7 July 2011)
[37] HRC, General Comment No. 35 (n 10) para 15
[38] See, e.g., Art. 2(g) of the ICTY Statute
[39] See, e.g., Art. 2(h) ICTY Statute; Art. 3(c) ICTR Statute; Art. 3(c) Special Court for Sierra Leone Statute; Art. 14(1)(a)(viii) Law on the Kosovo Specialist Chambers; Art. 6 Law on the Establishment of the Extraordinary Chambers; *Prosecutor v Karadžić,* Appeal Judgement, MICT-13-55-A (20 March 2019) para 777
[40] See, e.g., Art. 3(b) ICTR Statute
[41] ICRC, 'Customary International Law Database' (undated) <www.icrc.org/customary-ihl/eng/docs/home> Rule 99
[42] See e.g., *Prosecutor v Salih Mustafa* Judgment (Kosovo Specialist Chamber, 16 December 2022) KSC-BC-2020-05 paras 640-659
[43] See, e.g., Art. II(1)(c) of the 1945 Allied Control Council Law No. 10; Art. 5(e) ICTY Statute; Art. 3(e) ICTR Statute; Art. 2(e) Special Court for Sierra Leone Statute; Art. 5 Law on the Establishment of the Extraordinary Chambers, as amended; Art. 13(1)(e) Law No.05/L-053 on Kosovo Specialist Chambers and Specialist Prosecutor's Office. See also, Art. 2(1)(e) ILC, Draft articles on prevention and punishment of crimes against humanity (2019)

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of physical liberty will violate the fundamental rules of international law when it is imposed arbitrarily, or without due process of law.[44] Where the abuses take place under the cover of law, this may exacerbate the gravity of the crimes.[45] In addition, the crime of persecution can be made out on the basis of the intention and severe deprivation of fundamental rights by way of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, by reason of the identity of the group or collectivity.[46]

Furthermore, the procedural law of the ICC and other international criminal tribunals pertaining to the treatment of accused persons before those tribunals outlaws arbitrary arrest or detention.[47]

II.2 The meaning of detention

Whether a measure will be considered a deprivation of liberty (as opposed to a restriction on liberty or movement or any other restriction) will depend on the particular facts, and the starting point must be the concrete situation of the individual who is suffering from the measure. Account must be taken of a whole range of criteria such as the type, duration, effects, and manner of implementation of the measure in question,[48] and the classification 'is merely one of degree or intensity, and not one of nature or substance.'[49] According to the Working Group on Arbitrary Detention (WGAD),

> without prejudging the arbitrary character or otherwise of the measure, house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave. In all other situations, it will devolve on the Working Group to decide, on a case-by-case basis, whether the case in question constitutes a form of detention, and if so, whether it has an arbitrary character.[50]

In respect of quarantine lockdowns, the WGAD has indicated: 'if the person concerned is not at liberty to leave a premise, that person is to be regarded as deprived of his or her liberty.'[51] The WGAD has indicated that 'mandatory quarantine in a given premise, including in a person's own residence that the quarantined person may not leave for any reason, is a measure of de facto deprivation of liberty.'[52]

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[44] *Prosecutor v Kordic and Cerkez* (IT-95-14/2-T), TC Judgment (ICTY, 26 February 2001) para 302: 'the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question …' See also *Prosecutor v Krnojelac,* ICTY, Trial Judgment (15 March 2002) IT-97-25-T para 114; *Prosecutor v Ntagerura* (ICTR-99-46-T) Trial Judgment (25 February 2004) para 702

[45] *USA v. Alstotter et al* ('The Justice case') (1948), 3 TWC 954

[46] Art. 7(1)(h) ICC Statute; UN Human Rights Council, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea', UN Doc A/HRC/25/CRP.1 (7 February 2014) para 1058

[47] ICC Statute, Art. 55(1)(d); Art. 85(1)

[48] *Guzzardi v Italy* App no 7367/76 (6 November 1980) para 92

[49] Ibid para 93

[50] WGAD, 'Deliberation No. 01 on house arrest', UN Doc E/CN.4/1993/24 (12 January 1993) 9

[51] WGAD, 'Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies,' UN Doc A/HRC/45/16 (24 July 2020) Annex II, para 8; UNGA, 'Report of the Working Group on Arbitrary Detention,' UN Doc A/HRC/36/37 (19 July 2017) para 56

[52] WGAD, Deliberation No. 11, ibid, para 8

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House arrest, in view of its degree and intensity, has often been considered by the ECtHR to amount to a deprivation of liberty,[53] as it has by the Inter-American Court of Human Rights,[54] the African Commission on Human and Peoples' Rights,[55] the UN Human Rights Committee,[56] and the WGAD.[57] Similarly, the ECtHR has considered as detention, the confinement of crew members under military guard, on a merchant ship,[58] and the confinement of an individual to a hotel room for 23 days under the constant supervision of an armed guard.[59]

II.3 Arbitrary detention

The meaning of "arbitrary detention" is relatively consistent across international human rights treaties. However, the European Convention on Human Rights' approach stands apart in enumerating an exhaustive list of lawful forms of detention; the test for non-arbitrariness differs depending on the category of lawful detention at issue.[60] As most instances of State-sponsored arbitrary detention in State-to-State relations will engage article 5(1)(a)[61] or 5(1)(c)[62] read together with article 18[63] as appropriate, scrutiny in this report will focus on those sub-provisions. The analysis of ECtHR jurisprudence is compared with the equivalent jurisprudence at the UN level (mainly Human Rights Committee and Working Group on Arbitrary Detention) and in other regional systems (principally, African Commission and Court, Inter-American Commission and Court). This is not an exhaustive analysis but focuses on cases which are most relevant to the factual circumstances of State-sponsored arbitrary detention in State-to-State relations, whether directly or for analogous reasons. Further, treaty body general comments, state party reports and special rapporteur reports will be consulted as relevant.

The detention must be proportional to the aim sought, reasonable and necessary. In *A and others v United Kingdom* the ECtHR indicated that 'to avoid being branded as arbitrary, detention […] must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of detention should not exceed that reasonably required for the purpose pursued.'[64] Any decision to

[53] *Buzadji v the Republic of Moldova (Grand Chamber)* App no 23755/07 para 103-110
[54] *García Rodríguez et al. v Mexico* (Precautionary Measures, Merits, Reparations and Costs) Series C No. 482 (25 January 2023)
[55] *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*, Comm. No. 39/90 (African Commission on Human and Peoples' Rights, 1997)
[56] UN HRC, *Madani v Algeria*, Comm No. 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (21 June 2007) para 8.3; *Gorji-Dinka v Cameroon*, Comm No. 1134/2002, UN Doc CCPR/C/83/D/1134/2002 (15 March 2005) para 5.4; *Monja Jaona v Madagascar,* Comm No. 132/1982 (1 April 1985) paras 13-14
[57] WGAD, *Opinion No. 50/2021 concerning Raman Pratasevich (Belarus)*, UN Doc A/HRC/WGAD/2021/50 (9 December 2021) paras 60, 61; *Opinion No. 24/2021 concerning Steven Donziger (USA),* UN Doc A/HRC/WGAD/2021/24 (30 September 2021) paras 65-68
[58] *Medvedyev and Ors v France (Grand Chamber)* App no 3394/03 (29 March 2010) para 75
[59] *El-Masri v The Former Yugoslav Republic of Macedonia (Grand Chamber)* App no 39630/09 (13 December 2012) paras 234-40
[60] Art. 5(1)(a)-(f) ECHR
[61] The lawful detention of a person after conviction by a competent court
[62] The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.
[63] The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.
[64] *A and others v United Kingdom (Grand Chamber) App no 3455/05* (ECtHR, 19 February 2009) para 164

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detain must consider all relevant factors including the availability of less invasive options to achieve ends which are determined to be legitimate on a case-by-case basis and not be based on a mandatory rule for a broad category of persons. Similar approaches to arbitrary detention have been affirmed in judgments of the Inter-American Court of Human Rights[65] and reports of the Inter-American Commission on Human Rights,[66] and by the African Commission on Human and Peoples' Rights.[67]

i) Criminal law detention

For a deprivation of liberty to avoid being arbitrary, the decision to detain must be lawful: it must be taken in accordance with the applicable law and procedure (and the applicable law must satisfy the requirements of legality and must itself be consistent with international law standards on arrest and detention, including the principle of the rule of law[68] and be non-discriminatory). According to the UN Human Rights Committee the legal basis justifying the detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally.[69] The WGAD has further clarified that 'a detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds. An overly broad statute authorizing automatic and indefinite detention without any standards or review is by implication arbitrary.'[70]

A detention will be considered arbitrary where the person was arrested outside of procedures required by law. An example of an arrest or detention which is not implemented in accordance with law is the failure to present an arrest warrant in a situation which was not a *flagrante delicto*; the arrest by persons/authorities without a lawful mandate to carry out arrests; the failure to provide reasons for the arrest and to be informed formally of the charges;[71] where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to attempt to apply the relevant legislation correctly;[72] or where the arrest or detention is effectuated without a criminal charge, such as where family members of individuals who are wanted for some reason by the authorities are arrested, as a form of indirect pressure.[73]

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[65] See, *Chaparro Alvarez and Lapo Iniguez v Ecuador* (Preliminary Objections, Merits, Reparations, & Costs) Series C No 170 (21 November 2007) para 93; *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Series C No 114 (7 September 2004) paras 94-98; *Case of Gangaram Panday v Surinam* (Merits, Reparations and Costs) Series C No. 16 (21 January 1994) para 47; *Vélez Loor v Panama* ((Preliminary Objections, Merits, Reparations and Costs) Series C No. 218 (23 November 2010) para 139

[66] See, e.g., IACommHR, *Toward the Closure of Guantánamo* (3 June 2015) OAS/Ser.L/V/II. Doc 20/15

[67] *Jean-Marie Atangana Mebara v Cameroon*, Comm No. 416/12 (ACommHPR, 8 August 2015); *Amnesty International and others v Sudan*, Comm Nos 48/90, 50/91, 52/91, & 89/93 (ACommHPR, 15 November 1999)

[68] *Ilaşcu and Others v Moldova and Russia (Grand Chamber)* App no 48787/99 (ECtHR, 8 July 2004) para 461

[69] *Madani v Algeria* (n 56) para 8.4

[70] WGAD, 'Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law' UN Doc A/HRC/22/44 (24 December 2012) para 63

[71] WGAD, *Opinion No. 51/2019 concerning Nizar Zakka (Islamic Republic of Iran)* UN Doc A/HRC/WGAD/2019/51 (8 October 2019) paras 55-57; *Opinion No. 51/2021 concerning Mehmet Ali Öztürk (United Arab Emirates)* UN Doc A/HRC/WGAD/2021/51 (8 February 2022) paras 64-67

[72] *Yaroshovets and Ors v Ukraine* App nos 74820/10, 71/11, 76/11, 83/11, and 332/11 (ECtHR, 3 December 2015) para 141

[73] See, e.g., UN Human Rights Council, 'Detailed findings of the independent international Fact-finding Mission on the Bolivarian Republic of Venezuela: Crimes against humanity committed through the State's intelligence services: structures and individuals involved in the implementation of the plan to repress opposition to the Government,' UN Doc A/HRC/51/CRP.3 (20 September 2022) para 221

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Pre-Trial

Article 9 (2) ICCPR provides that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest and must be promptly informed of the charges. The requirement to give prompt notice of charges is intended to help to determine whether provisional detention is appropriate.[74] The right to be informed formally of the charges 'applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.'[75] Notification of the charges must be prompt. For example, the WGAD noted in its opinion concerning Andrew Brunson that while his arrest by Turkish authorities was authorised by a warrant, he was not notified of any charges against him until two months after the warrant had been issued, during which time his lawyer had no access to his file, which impeded efforts to seek review the legality of the detention,[76] and consequently rendering his detention arbitrary.

Detention will equally be arbitrary if the charge does not correspond with a known crime in the criminal code, or is so vaguely framed that it is incapable of enabling individuals to understand the law and regulate their conduct accordingly (legal certainty).[77] An example of this phenomenon is mass arrests by military or security forces on vague security-related charges.[78] Vaguely framed laws make it difficult to ensure the lawful basis upon which an individual is detained, and ultimately may lead to situations where individuals are detained for reasons unrelated to the reasons stipulated for the arrest, such as to proscribe the peaceful exercise of rights.[79]

Article 5(1)(c) of the ECHR provides that an arrest or detention can be lawfully undertaken 'for the purpose of bringing her/him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent her/his committing an offence or fleeing after having done so.' In accordance with ECtHR caselaw, where there is no "reasonable suspicion" that the detainee committed an offence, but this is the rationale provided by the authorities to detain, the detention will be considered arbitrary. A "reasonable suspicion" that a criminal offence has been committed 'presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. As a rule, problems in this area arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a "reasonable

[74] UN HRC, General Comment No. 35 (n 10) para 30

[75] Ibid para. 29; WGAD, *Opinion No. 28/2016 concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran)* UN Doc A/HRC/WGAD/2016/28 (21 September 2016) paras 44, 45

[76] WGAD, *Opinion No. 84/2018 concerning Andrew Craig Brunson (Turkey)*, UN Doc A/HRC/WGAD/2018/84 (15 February 2019) paras 58-62

[77] WGAD, *Opinion concerning Mehmet Ali Öztürk* (n 71) paras. 95-97

[78] See, e.g., UN Human Rights Council, 'Report of the independent international commission of inquiry on the Syrian Arab Republic,' UN Doc A/HRC/S-17/2/Add.1 (23 November 2011) para 90. See also, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Comm No. 368/09 (ACommHPR, 5 November 2013) para 80 (involving mass arrests by Sudanese police and military at an internally displaced persons camps outside Khartoum, following a failed attempt to forcibly relocate the inhabitants: 'The victims were indiscriminately arrested *en masse* without any measures taken to ascertain the likelihood that they had individually been involved in the commission of an offence. The Commission considers that arresting a large number of individuals as was the case in the present communication, in disregard of domestic legislation and without taking any measures to ascertain the likelihood of individual wrongdoing amounts to arbitrary arrest in contravention of the Charter.'

[79] WGAD, *Opinion No. 29/2021 concerning Aras Amiri (Islamic Republic of Iran)*, UN Doc A/HRC/WGAD/2021/29 (1 October 2021) paras 52, 53

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suspicion" that the facts at issue had actually occurred.'[80] While it is always relevant to take account of the exigencies of the case, the challenges inherent in the investigation and prosecution of terrorism or security-related offences, 'cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) of the Convention is impaired.'[81] In order to assess the presence of a "reasonable suspicion", the Court must assess whether the measure in question was justified based on information and facts available at the relevant time which had been submitted to the scrutiny of the judicial authorities that ordered the measure. While "reasonable suspicion" must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained "reasonable" throughout the detention.[82]

It should be noted, however, that "reasonable suspicion" is not all that is required to justify pre-trial detention. The "reasonable suspicion" that the individual has committed a crime is simply one of the exceptional bases under the European Convention for which an individual may be detained. If there is no "reasonable basis" then this exceptional basis is foreclosed under the Convention. If there is such a "reasonable basis," it will still be necessary to determine, as is required for all regional and international human rights jurisdictions, that the detention was appropriate in the circumstances.

Thus, a finding of arbitrary detention will often be made where no assessment has been made by a court of the lawfulness, necessity, and proportionality of the detention,[83] or the justification for detention in advance of any finding of guilt is not clear or convincing. This would occur where alternatives to detention are not explored or the rationale for not using them is not convincing. For instance, if an individual has been denied bail simply because they are a non-national in the jurisdiction of the detaining State, this would not constitute a sufficient rationale to detain.[84] It may also occur when a court appears to have simply rubber-stamped a detention order without verifying in detail the basis for it; this would not be considered a genuine review of the lawfulness of detention.[85] Or, where alternatives to detention are unrealistic and do not afford the detained individual with the possibility of making use of them. For example, in the matter of the detention of dual Austrian/Iranian national Kamran Ghaderi by Iran, it was reported and not contradicted by Iran that 'having deprived Mr. Ghaderi of his liberty, the authorities informed him that he could be released on bail in the amount of 200 million rials. However, Mr. Ghaderi was not allowed to contact anyone to arrange this payment. Formally, therefore, there are documents concerning the possibility of releasing Mr. Ghaderi on bail, but in practice, Mr. Ghaderi was not afforded that possibility.'[86] The WGAD found in Mr. Ghaderi's case that to be first granted bail but then not

[80] *Wloch v Poland* App no 27785/95 (ECtHR, 19 October 2000) para 108. See also, *Fox, Campbell and Hartley v United Kingdom* App nos 12244/86, 12245/86, 12383/86 (ECtHR, 30 August 1990) paras 32-24; *Başer and Özçelik v Türkiye* App nos 30694/15, 30803/15 (ECtHR, 13 September 2022) para 202

[81] Fox, Campbell and Hartley v UK, ibid, para 32

[82] *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 22 May 2014) para 90; *Merabishvili v Georgia (Grand Chamber)* App no 72508/13 (ECtHR, 28 November 2017)

[83] WGAD, *Opinion concerning Nazanin Zaghari-Ratcliffe* (n 75) para 46

[84] *Michael and Brian Hill v Spain*, Comm No. 526/1993, UN Doc CCPR/C/59/D/526/1993 (2 April 1997) para 12.3 ['… pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. … The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant.']

[85] *Savalanli and Ors v Azerbaijan* App nos 54151/11 76631/14 et al (ECtHR, 15 December 2022) para 102

[86] WGAD, *Opinion 27/2021 concerning Kamran Ghaderi (Islamic Republic of Iran)*, UN Doc A/HRC/WGAD/2021/27 (8 October 2021) para 9

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allowed to fulfil the bail requirements 'is to disregard the requirement to make pretrial detention an exception and is therefore a breach of article 9 (3) of the Covenant.'[87]

Pre-trial detention may also constitute arbitrary detention where the person has not been brought promptly before a judge or similar authority to have the legality of the detention evaluated and where appropriate, confirmed, and for any confirmation to be thereafter evaluated at regular intervals.[88] According to the UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[89] As the UN Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorised by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.[90] Detention which is initially considered lawful may become "arbitrary" if it is unduly prolonged or not subject to periodic review.[91] In the case of *Castillo Petruzzi et al v Peru*, the Inter-American Court found a violation of both article 7(6) and article 25 of the American Convention on Human Rights, because the individuals (who were ultimately convicted of treason by a "faceless" military tribunal) had no opportunity to challenge the lawfulness of their detention (such an opportunity was denied to persons charged with terrorism or treason, among other reasons).[92]

This is further underscored by the Inter-American Court in its Advisory Opinion on Habeas Corpus in Emergency Situations, where it determined that the right to challenge the legality of one's detention cannot be suspended during an emergency, because they are judicial guarantees essential for the protection of non-derogable rights.[93] It held that:

> in order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[94]

In order to effectively exercise the right to challenge the legality of detention as well as the right to an effective remedy pursuant to article 8 UDHR and article 2(3) ICCPR, as well as fair trial rights

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[87] Ibid, para 39. See, similarly, WGAD, *Opinion concerning Aras Amiri* (n 79) paras 40, 41 [where bail was set and paid, but the detainee was not released because the amount set had been in "error"]

[88] WGAD, *Opinion concerning Nizar Zakka* (n 71) para 59

[89] WGAD, 'UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,' UN Doc A/HRC/30/37 (6 July 2015) paras 2–3

[90] UN HRC, General Comment No. 35 (n 10) paras 32–33. See also, *Stephens v Jamaica*, UN Doc CCPR/C/55/D/373/1989 (18 October 1995) para 9.6; *International Pen and Ors v Nigeria* Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (African Commission on Human and Peoples' Rights, 1998); *Huri-Laws (on behalf of Civil Liberties Organisation) v Nigeria* Comm. No. 225/98 (African Commission on Human and Peoples' Rights, 2000) para 45; *Castillo Páez v Peru* (Merits) Series C no 34 (IACtHR, 3 November 1997) paras 56-58; *Brogan and Others v United Kingdom* App nos 11209/84; 11234/84; 11266/84; 11386/85 (ECtHR, 29 November 1988) para 58

[91] UN HRC, General Comment no. 35, Article 9 (n 10) para 12

[92] *Castillo Petruzzi et al. v. Peru* (Merits, Reparations and Costs) Series C No. 52 (IACtHR, 30 May 1999) paras 184-188. See also, *Suárez Rosero v Ecuador* (Merits) Series C No. 35 (IACtHR, 12 November 1997) paras 61-66

[93] *Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations* (IACtHR, 30 January 1987) para 44

[94] Ibid, para 35

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pursuant to article 14(3)(b) ICCPR,[95] detained persons should have access, from the moment of arrest, to legal assistance of their own choosing.[96] Principle 18 (3) of the Body of Principles[97] and rule 61 (1) of the Mandela Rules[98] stipulate that defendants must have access to their legal counsel without delay.

Furthermore, the UN Human Rights Committee has recognised in its General Comment 36 on the Right to Life, that 'the deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.' This results in a violation of the right to life, prohibition of torture or cruel, inhuman, or degrading treatment or punishment, right to liberty and security of person and right to recognition as a person before the law.[99]

Trial and Post-Trial

Detention is a common feature of sentencing. However, if the trial that led to a conviction and sentence of imprisonment fell short of the most basic of fair trial guarantees,[100] where the "conviction" was the result of a flagrant denial of justice,[101] or the individuals were sentenced to imprisonment without having had a trial, the persons may be considered to be victims of arbitrary detention.[102] Examples of this phenomenon would include, the failure to hold a trial in public when none of the prescribed exceptions to the general obligation of public trials under article 14 (1) of the ICCPR apply to justify a closed trial,[103] the failure to provide to the detainee and/or their counsel the indictment and case particulars so that they can respond effectively to the charges,[104] the absence of a fair hearing by an independent and impartial tribunal,[105] the resort to torture or other cruel, inhuman or degrading treatment or punishment to coerce a confession,[106] the failure to produce a duly reasoned written judgment of the findings of the trial,[107] and the denial of consular

[95] In Kamran Ghaderi's case, the WGAD considered that 'the failure to provide Mr. Ghaderi with access to his lawyer from the outset, and the subsequent limitation of his meetings with counsel to mere minutes, violated his right to adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing under article 14 (3) (b) of the Covenant' [(n 86) para 44]

[96] WGAD, 'United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,' (n 89) principle 9, paras 12–15. See also, WGAD, Opinion concerning Aras Amiri (n 79), paras 55-58; WGAD, *Opinion concerning Nizar Zakka* (n 71) para 63; *Opinion concerning Mehmet Ali Öztürk* (n 71) paras 75-80

[97] *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, UNGA resolution 43/173 (9 December 1988)

[98] UN *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules), UNGA resolution 70/175, annex (17 December 2015)

[99] UN HRC, General comment No. 36 (Article 6: right to life) UN Doc CCPR/C/GC/36 (3 September 2019) para 58

[100] WGAD, *Opinion concerning Nazanin Zaghari-Ratcliffe* (n 75) para 52. See also, *Yeğer v Turkey* App no 4099/12 (ECtHR, 7 June 2022) para 46

[101] *Ilaşcu and Others v Moldova and Russia (Grand Chamber)* (n 68) para 461

[102] See, e.g., UN Human Rights Council, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea,' UN Doc A/HRC/25/CRP.1 (7 February 2014) paras 793, 820, 844

[103] WGAD, *Opinion re Kamran Ghaderi* (n 86) para 51

[104] WGAD, *Opinion concerning Aras Amiri* (n 79) para 66; *Opinion concerning Nizar Zakka* (n 71) paras 64, 65; *Opinion concerning Andrew Craig Brunson* (n 76) paras 63-64

[105] WGAD, *Opinion concerning Aras Amiri*, ibid

[106] WGAD, *Opinion concerning Nizar Zakka* (n 71) para 67

[107] WGAD, *Opinion re Kamran Ghaderi* (n 86) paras 52, 53

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assistance for foreign[108] (including dual[109]) nationals. Similarly, if the individual's sentence was excessively long taking into account the offence for which the individual was convicted, or the person was maintained in detention after the expiry of the sentence,[110] then these circumstances may also give rise to arbitrary detention. Similarly, giving a custodial sentence when a non-custodial one would have sufficed to meet the sentencing objectives, simply because the offender did not have a habitual residence in the region where the offence was committed, would be discriminatory.[111]

ii) Non-criminal law detention

It should be noted that non-criminal law detention appears to be rarer than criminal law detention within the phenomenon of State-sponsored arbitrary detention in State-to-State relations. There are instances in which persons are detained without any criminal charge accompanying the arrest or detention nevertheless the context of such detentions (the types of State agencies that are involved; where the persons are ultimately held; the public rhetoric that accompanies the detentions) lends a criminal character to such detentions, even with the absence of a criminal charge.

Non-criminal law detentions may become a more common part of the phenomenon in future. Forms of non-criminal law detention which are likely to become more prevalent include: the arbitrary deprivation of liberty for purposes of mandatory re-education or training provision (which some countries use to send persons believed to have participated in protests or who affiliate with human rights defenders or are targeted groups within the society);[112] detention for persons suspected of using drugs or alcohol (to which foreign nationals may be subjected to);[113] detention of persons in mental health institutions and other health care facilities;[114] which in certain countries have been used to involuntarily detain persons for a variety of non-health-related reasons;[115] breach of border regulations (at times these are framed as criminal law breaches including breach of smuggling protocols, at other times they are breaches of regulatory frameworks) which have been used to detain staff of humanitarian and relief organisations;[116] the targeting of aid workers in conflict zones,

[108] WGAD, *Opinion concerning Nizar Zakka* (n 71) paras 68-73; *Opinion concerning Mehmet Ali Öztürk* (n 71) para 90; *Opinion concerning Andrew Craig Brunson* (n 76) paras 68-69

[109] WGAD, Opinion re Kamran Ghaderi (n 86). It should be highlighted that in this case the WGAD commented on the failure to comply with the obligation to provide consular assistance in respect of a dual national who was detained in one of the countries of his nationality.

[110] See, e.g., UN Human Rights Council, 'Detailed findings of the independent international Fact-finding Mission on the Bolivarian Republic of Venezuela: Crimes against humanity committed through the State's intelligence services: structures and individuals involved in the implementation of the plan to repress opposition to the Government,' UN Doc A/HRC/51/CRP.3 (20 September 2022) para 393

[111] *Aleksandr Aleksandrov v Russia* App no 14431/06 (ECtHR, 27 March 2018) paras 25-27

[112] OHCHR, 'OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China,' (31 August 2022); OHCHR, 'Iran: End killings and detentions of children immediately, UN Child Rights Committee urges,' Statement (17 October 2022)

[113] WGAD, 'Arbitrary detention relating to drug policies,' UN Doc A/HRC/47/40 (18 May 2021)

[114] HRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez,' UN Doc A/HRC/22/53 (1 February 2013)

[115] Richard Bonnie, 'Political Abuse of Psychiatry in the Soviet Union and in China: Complexities and Controversies', (2002) 30 *J Amer Acad Psychiatry & L* 136

[116] Carla Ferstman, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States* CONF/EXP(2019)1 (Expert Council on NGO Law, December 2019); International Commission of

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including by resorting to state-sponsored detentions and kidnappings;[117] and security or public order detentions associated with armed conflicts and other types of emergencies which may align with criminal law frameworks but follow their own procedures.

While some non-criminal law detention frameworks appear on the surface to have a less punitive detention framework, this is not necessarily the case in practice. At least in standard/typical cases, the criminal law has far greater in-built checks and balances than many administrative detention frameworks, particularly in respect of security-related detention and in the spheres of re-education facilities, mental health, social care, and drug treatment centres. In such contexts, the risks of lengthy, or indefinite detention can be high because of the limited procedural safeguards in many domestic legal frameworks, and less scrutiny by international monitoring bodies and courts though this is slowly changing.

II.4 State-sponsored

The phrase "State-sponsored" is not defined at the international level though it implies the commission of acts with the active support of a State. Other phrases which have similar though not identical meanings include "State-organised," or "State-supported". State-sponsored or similarly phrased references in the commission of wrongful acts, are used in a variety of contexts including (but not limited to):

i) ***allegations pertaining to the role of States in acts of terrorism*** (such as financing acts of terrorism, providing training, supplying weapons, providing logistical and intelligence assistance, providing a base)

For instance, following the bombing of Pan Am Flight 103 while the aircraft was in flight over the Scottish town of Lockerbie, which resulted in the destruction of the plane killing all 243 passengers and 16 crew, and causing further deaths and destruction to the town of Lockerbie, UN Security Council resolution 748 (1992) of 31 March 1992 referred to 'the suppression of acts of international terrorism, including those in which States are directly or indirectly involved' as essential for the maintenance of international peace and security. It further reaffirmed that 'every State bas the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force…'. It determined that the 'Libyan Government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism' [para. 2]

Following the assassination attempt against Egyptian President Hosni Mubarak in Ethiopia in 1995, the Organization of African Unity requested Sudan to hand over three suspects to Ethiopia for prosecution. The Sudanese government failed to meet these requests, which prompted the UN Security Council to call upon Sudan to comply fully with the demands of the OAU, and ultimately the Security Council issued sanctions in 1996. UN Security Council resolution 1044 (1996) of 31 January 1996 expressed that it was 'convinced that the suppression of acts of international terrorism,

Jurists, 'Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU' Briefing paper (22 April 2022)

[117] See, UK Parliament, International Development Committee, 'Oral evidence: Violence against aid workers,' HC 2008 (Wednesday 3 April 2019) < https://committees.parliament.uk/oralevidence/9210/pdf/>

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including those in which States are involved, is an essential element for the maintenance of international peace and security' and called on Sudan, inter alia, to 'Desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements …' [para. 4(b)]

In the context of the Russian aggression in Ukraine, the EU Parliament has called on the EU and its Member States to 'develop an EU legal framework for the designation of States as sponsors of terrorism and States which use means of terrorism, which would trigger a number of significant restrictive measure against those countries and would have profound restrictive implications for EU relations with those countries; calls on the Council to subsequently consider adding the Russian Federation to such an EU list of State sponsors of terrorism; calls on the EU's partners to adopt similar measures.'[118] [para. 4]

ii) ***the involvement of States as aggressors or as proxies or in other capacities in national or international armed conflicts*** (by providing finances, weapons, logistics, training, personnel, intelligence support or assistance to a party to a conflict)

For example, the UN Security Council has imposed sanctions against the Taliban, with impacts on Afghanistan on other States. UN Security Council resolution 1193 (1998) of 28 August 1998 provides that 'any outside interference in the internal affairs of Afghanistan should cease immediately and calls upon all States to take resolute measures to prohibit their military personnel from planning and participating in military operations in Afghanistan and immediately to end the supply of arms and ammunition to all parties to the conflict' [para. 3]

The government of Nicaragua's communication to the ICJ dated 25 June 1984 requested the indication of further measures in respect of actions complained of which consisted of the USA continuing 'to sponsor and carry out military and paramilitary activities in and against Nicaragua.'[119] Ultimately the majority of the ICJ decided that the USA, 'by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.'[120]

iii) ***the involvement of States in cyber-warfare, either directly or by supporting other States or non-State actors in a variety of ways***

The report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, which was established pursuant to General Assembly resolution 66/24, provides that 'States must meet their international obligations regarding internationally wrongful acts attributable to them. States must not use proxies to commit internationally wrongful acts. States should seek to ensure that their territories are not used by non-State actors for unlawful use of ICTs.'[121] [para. 23]

[118] European Parliament, 'Recognising the Russian Federation as a state sponsor of terrorism', European Parliament resolution of 23 November 2022 on recognising the Russian Federation as a state sponsor of terrorism (2022/2896(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0405_EN.pdf>

[119] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Rep 14, para 287

[120] Ibid, para 292

[121] UNGA, UN Doc A/68/98 (24 June 2013)

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According to the Principle 14 of the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, 'A State bears international responsibility for a cyber-related act that is attributable to the State and that constitutes a breach of an international legal obligation.'[122]

iv) ***the involvement of States in acts of nuclear proliferation in contravention of relevant treaty frameworks***

For example, in a statement by the President of the UN Security Council, the President on behalf of the Council 'strongly condemns the August 28 2017 (local time) ballistic missile launch by the Democratic People's Republic of Korea (DPRK) that flew over Japan, as well as the multiple ballistic missile launches it conducted on 25 August 2017. The Security Council further condemns the DPRK for its outrageous actions and demands that the DPRK immediately cease all such actions. The Security Council stresses that these DPRK actions are not just a threat to the region, but to all UN Member States. The Security Council expresses its grave concern that the DPRK is, by conducting such a launch over Japan as well as its recent actions and public statements, deliberately undermining regional peace and stability and have caused grave security concerns around the world.' [S/PRST/2017/16, 29 August 2017]. UN Security Council resolution 2321 (2016) 'condemns in the strongest terms the nuclear test conducted by the DPRK on 9 September 2016 in violation and flagrant disregard of the Security Council's resolutions' [para. 1]

v) ***the involvement of States in acts of aggression, piracy, arms smuggling or other forms of transnational crime***

Where a State is alleged to be directly responsible for acts of aggression and other crimes, the language in resolutions simply refers to the alleged commission by the State of those acts; there is no reference to the State "sponsoring" or "contributing" to those acts as this is implied. For instance, in the UNGA resolution A/RES/ES-11/5 of 14 November 2022 on the establishment of a register of damages in respect to the Russian aggression in Ukraine, 'Furtherance of remedy and reparation for aggression against Ukraine,' the resolution: recognises 'that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.' [para. 2]

The concept of "State-sponsored" has also been used in certain domestic sanctions regimes, such as "Magnitsky"- style legislation[123] and other legislation which affords an exception to foreign sovereign immunity for certain States designated as State-sponsors of terrorism or related offences by the legislating States.[124]

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[122] Michael Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017) Principle 14

[123] For a brief summary see, European Parliament,' Global human rights sanctions: Mapping Magnitsky laws: The US, Canadian, UK and EU approach,' EPRS PE 698.791 (November 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS_BRI(2021)698791_EN.pdf>

[124] For example, in the USA, countries determined by the US Secretary of State to have repeatedly provided support for acts of international terrorism are designated pursuant to three laws: section1754(c) of the National Defense Authorization Act for Fiscal Year 2019, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act of 1961). Currently there are four countries designated under these authorities: Cuba, the Democratic People's Republic of Korea (North Korea), Iran, and Syria. In addition, foreign States and certain State agencies and companies are presumptively immune under the FSIA from State and federal court jurisdiction, meaning that American courts generally cannot hear cases brought against them. But the FSIA contains several enumerated exceptions. The

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"State-sponsored" acts may be committed directly by officials of the State carrying out an order or instruction of that State and acting in the performance of their official duties as part of the implementation of domestic or foreign policy goals. Or the degree of involvement of the State in the acts may be more diffuse. The State may be "sponsoring" non-State actors who then go on to commit the said acts, or the officials of a State may be acting on their own initiative outside of any order or direction emanating from the State. Attribution of responsibility to the State will therefore depend on the role of the State (and its officials) and would follow the international law on State responsibility as set out in the ILC 'Articles on the Responsibility of States for Internationally Wrongful Acts.'[125] These Articles make clear that 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'[126] The Articles identify a range of scenarios in which wrongful conduct would be attributed to the State (beyond the straight-forward scenario where a State commits wrongful acts through its officials in furtherance of a State policy or objective).

Some scenarios which may be particularly relevant to State-sponsored arbitrary detention in State-to-State relations include:

- The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority (Art. 5 ARS). This scenario would include when a State uses (by paying a person or entity for the service or using other forms of consideration to secure the fulfilment of the tasks) non-State security forces or private security contractors to carry out the arrest or detention. In such circumstances, the persons or groups carrying out the arrest or detention are acting at the behest of the State and the State will incur responsibility for any breach of an international obligation.

- The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the receiving State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed (Art. 6 ARS). This scenario may involve one State providing a contingent of security forces for the benefit of another State and in that context, the contingent becomes involved in arrests or detentions. When an organ is 'placed at the disposal of' the receiving State it implies that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Where the sending State continues to direct or control the conduct of the organ (or contingent) operating in the receiving State, the sending State will retain responsibility (Art. 8 ARS).

"terrorism exception" to the FSIA is set out in Section 1605A FSIA. On the defendant's side, Section 1605A applies *only* if the State was designated as a State sponsor of terrorism at the time of the alleged act of terrorism or if it was designated as a result of that act. At present, the US State Department has designated as State sponsors of terrorism—Cuba, Iran, North Korea, and Syria—but past designees have included Iraq, Libya, and Sudan. See summary, <https://crsreports.congress.gov/product/pdf/IF/IF10341>

For Canada, Art. 6.1(1) of the State Immunity Act provides an exception to the immunity that States would usually hold from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985. Section 12 (l)(d) of the SIA removed the immunity from enforcement of the property of a foreign State. Both Iran and Syria appear on the List of Foreign State Supporters of Terrorism

[125] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, 'Report of the International Law Commission on the work of its 53rd session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [ARS]

[126] Art. 4(1) ibid

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- Conduct which is not attributable to a State shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own (Art. 11 ARS). Thus, where private actors carry out an arrest but subsequently the relevant State takes over the arrest and detention and takes over the decisions regarding the fate of the detainees.[127]

II.5 State-to-State relations

The phrase "State-to-State relations" has a neutral connotation in international relations theory but is used in the Declaration on State-sponsored arbitrary detention in State-to-State relations in a particularised way as a form of seeking an advantage or benefit in the negotiation or relationship with another State. State-sponsored arbitrary detention in State-to-State relations implies that certain States are committing the human rights violation (and internationally wrongful act) of arbitrary detention with a view to obtaining some kind of leverage against the (other) State of nationality. Consequently, there is a need to understand more fully and set out clearly what standards of conduct exist in respect of coercive international relations and to demonstrate the extent to which such standards prohibit the commission of the human rights violation of arbitrary detention as a form of diplomatic leverage, and the consequences of such conduct.

i) Non-interference, coercion, and internationally wrongful acts

State-sponsored arbitrary detention in State-to-State relations may engage the principles of international law concerning friendly relations and co-operation among States.[128] The Friendly Relations Declaration underscores that 'States shall refrain in their international relations from the threat or use of force […] or in any other manner inconsistent with the purposes of the United Nations.'[129] The purposes of the United Nations are set out in article 1 of the UN Charter, and most relevant to this study, include the need to develop friendly relations among nations (Art. 1(2)) and to achieve international co-operation in solving international problems … and promoting and encouraging respect for human rights and for fundamental freedoms for all (Art. 1(3)). The ICJ has observed that '[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations.'[130]

The Friendly Relations Declaration provides that no State or group of States can intervene 'directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.'[131] Further it makes clear inter alia that no State can 'use or encourage the use of economic, political

[127] *Iran Hostages case* (n 5)

[128] UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,' UN Doc A/RES/2625(XXV) (24 October 1970). See also, UNGA, 'The Essentials of Peace,' UNGA Res 290 [V] (1 December 1949); UNGA, 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty' UNGA Res 2131 [XX] (21 December 1965); UNGA, 'Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,' UNGA Res 42/22 (18 November 1987)

[129] *Friendly Relations declaration*, ibid, Principle 1

[130] *Iran Hostages case* (n 5) para 91

[131] *Friendly Relations declaration* (n 128) Principle 3 (explanatory text)

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or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'[132] The reference to 'economic, political or other types of measures' clearly references to forms of coercion beyond simply and below the threshold of the use or the threat of the use of force. The importance of friendly relations is underscored, inter alia in the preamble of the Hostages Convention and the Vienna Convention on Consular Relations.

The inter-State principle of non-intervention, outlawed in the Friendly Relations Declaration and also constituting a rule of customary international law reflected in Art 2(7) of the UN Charter, is relevant when considering whether any particular form of coercive diplomacy reaches beyond lawful or permissible forms of persuasion.[133] The principle of non-intervention entails the right of every State to conduct its internal affairs without outside interference, which is a reflection of State sovereignty.[134] Beyond the universal level, the principle of non-intervention is reflected in key regional agreements,[135] as well as bilateral cooperation and friendship agreements.

In the *Nicaragua case*, the ICJ determined that the principle of non-intervention (outside the specific context of the use of force) applies to one State's actions in relation to another, where:

i) one State exercises coercion against the other State (what actions might be considered coercive will depend on the particular facts of a matter and the context; but the pressure must be such that it is difficult to resist; 'Only acts of a certain magnitude are likely to qualify as coercive'.[136] Principle 3 of the Friendly Relations Declaration provides: 'No State may ... coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind');

ii) in relation to or in a manner to influence 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social, and cultural system, and the formulation of foreign policy'.[137]

With respect to interventions in the area of foreign policy, examples of prohibited interventions include compromising 'the integrity of a State's external affairs to the extent such relations are the sole prerogative of the State. Accordingly, matters protected by this Rule include the choice of extending diplomatic and consular relations, recognition of States or governments, membership in

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[132] Ibid

[133] The point at which tactics reach beyond lawful persuasion into the domain of prohibited intervention may be difficult to ascertain given the variety of factors involved. For this reason, Helal argues that unlawful intervention 'is a "composite breach" of international law. Composite breaches, […] are a category of breaches of international law the defining characteristic of which is that they consist of separate acts that are undertaken in the furtherance of a single overarching purpose. Therefore, the use of lawful measures, such as offers, benefits, or inducements, in combination with unlawful measures as part of an overall coercive strategy that is designed to interfere in a state's *domaine réservé* would constitute a composite breach of the prohibition on intervention.' [Mohamed Helal, 'On Coercion in International Law,' (2019) 52 *NYU J Intl L & P* 1, 7]

[134] See, *Nicaragua v USA* (n 119) para 202. See also, Art. 2(1) of the UN Charter; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 162

[135] See, e.g., Arts. 16, 18, and 19 *Charter of the Organization of American States*; Art. 4 *Constitutive Act of the African Union*; Art. 2(2)(e) and (f) *Charter of ASEAN*; Art. 8 *Treaty of Friendship, Co-operation and Mutual Assistance (Pact of the Warsaw Treaty Organization)*. The *Final Act of the Conference on Security and Co-operation in Europe* (the Helsinki Final Act, 1 August 1975) includes a detailed statement of the principle (Principle VI). See also, the *Bandung Principles* (agreed between 29 countries from Asia and Africa in 1955 at the Bandung Conference), and China's Five Principles of Peaceful Co-Existence.

[136] Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention,' (2009) 22(2) *Leiden J Intl L* 2009 345, 248

[137] *Nicaragua v USA* (n 119) para 205. See Harriet Moynihan, 'The Application of International Law to State Cyberattacks: Sovereignty and Non-Intervention' (Chatham House, 2 December 2019) para 81

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international organisations, and the formation or abrogation of treaties.'[138] Other examples might include, one State demanding that another abandon ambitions to join an international security alliance, or one State imposing a crippling trade embargo to coerce another to change its form of government or associated political alliances. Or there may be examples in which the victim State is coerced into taking specific actions (such as to repay debts or release frozen assets), where the timing and modalities of such actions would involve questions of policy involving autonomous decision-making which are part of the victim State's *domaine réservé*.

On economic forms of coercion, there is the example of the proposed EU Anti-Coercion Instrument, which would be triggered if a third country: 'interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State - by applying or threatening to apply measures affecting trade or investment.'[139] In determining whether the conditions for economic coercion are met, the proposal refers to the following criteria to be taken into account:

(a) the intensity, severity, frequency, duration, breadth, and magnitude of the third country's measure and the pressure arising from it;

(b) whether the third country is engaging in a pattern of interference seeking to obtain from the Union or from Member States or other countries particular acts;

(c) the extent to which the third-country measure encroaches upon an area of the Union's or Member States' sovereignty;

(d) whether the third country is acting based on a legitimate concern that is internationally recognised;

(e) whether and in what manner the third country, before the imposition of its measures, has made serious attempts, in good faith, to settle the matter by way of international coordination or adjudication, either bilaterally or within an international forum.[140]

ii) For leverage

An ulterior purpose

Where the courts are used for purposes that are different from the administration of justice in accordance with domestic (and international) law, it may be said that the justice system is being deployed for an ulterior purpose. This may occur when certain prosecutorial and judicial actors fail to ensure that the rights of detainees are observed throughout the various steps of the legal process.

[138] Michael Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (n 122) 'Rule 66 – Intervention by States: A State may not intervene, including by cyber means, in the internal or external affairs of another State,' para 16

[139] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM/2021/775 final (Brussels 8 December 2021) Art. 2(1). See also, European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries' (13 October 2022) (COM(2021)0775 – C9-0458/2021 – 2021/0406(COD))

[140] EC, Proposal for a regulation on economic coercion, Ibid, Art. 2(2)

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Failure of such actors to fulfil these responsibilities may directly contribute to arbitrary detention and prevent victims of arbitrary detention from having effective legal recourse and judicial remedies.[141]

In some though not all cases, the characteristics of the detainee may be relevant for the purposes of demonstrating that the detainee was detained for reasons pertaining to "State to State relations". The WGAD, for instance, has considered the characteristics of the detainee when assessing whether any pattern exists that an individual's detention forms a part of. Thus, the WGAD will consider the past practise of the detaining State with respect to the detention of persons who hold the same or similar characteristics as the person whose detention is under consideration by the WGAD, including nationality or residence status. It has determined in this way that the only plausible explanation for the arrest, detention, and imprisonment of an individual was discrimination stemming from systematic bias, arriving at this conclusion from reviewing the past practice of a government.[142]

The WGAD has also considered as relevant, reports and statements made by a government which draw attention to the characteristics of the detainee as a justification for the arrest or detention, when assessing whether a detention has been made for a discriminatory purpose,[143] as well as the absence of any relevant indicia that the detainee did what the detaining State alleged that they had done,[144] or the absence of a "reasonable suspicion" that the individual has committed an offence.[145] In its opinion concerning Mehmet Ali Öztürk, the WGAD affirmed its opinion that Mr Öztürk's nationality has been a motivating factor in his detention and that he has been targeted because he is a Turkish national.[146] In arriving at this conclusion it took into account that the trial and conviction 'were devoid of any plausible legal basis,' also stemming from the application of vaguely worded and overly broad laws.[147]

ECtHR jurisprudence has evaluated whether the arrest and detention were based on sufficient objective elements to justify a "reasonable suspicion" that the facts at issue had actually occurred,[148] and that the facts constituted a crime.[149] The ECtHR has recognised instances involving mainly human rights defenders and political opponents in which detentions have been carried out for an ulterior, bad faith purpose or as part of a misuse of power which is unconnected to the rationale for detention relied upon by the Government.[150] Similarly, the WGAD has established a prima facie case that the arrest and detention of certain individuals was motivated by a discriminatory purpose,[151]

[141] UN Human Rights Council, 'Detailed findings of the independent international factfinding mission on the Bolivarian Republic of Venezuela, UN Doc A/HRC/48/CRP.5 (16 September 2021) para 253
[142] WGAD, *Opinion re Kamran Ghaderi* (n 86) para 58; WGAD, O*pinion concerning Nazanin Zaghari-Ratcliffe* (n 75) para. 48; WGAD, *Opinion concerning Nizar Zakka* (n 71) paras 76-79
[143] WGAD, *Opinion concerning Nazanin Zaghari-Ratcliffe* (n 75) para. 47; *Opinion concerning Aras Amiri* (n 79) para 67-69
[144] WGAD, *Opinion concerning Nazanin Zaghari-Ratcliffe* (n 75) para 49; *Opinion concerning Aras Amiri* (n 79) para 70
[145] 'having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence'; however, what 'may be regarded as "reasonable" will ... depend upon all the circumstances.' [*Fox, Campbell and Hartley v United Kingdom* (n 80) para 32]
[146] Opinion concerning Mehmet Ali Öztürk (n 71) para 94
[147] Ibid paras 95-98
[148] *Wloch v Poland* (n 80) paras 108, 109
[149] *Kavala v Turkey* App no 28749/18 (10 December 2019) para 128
[150] *Merabishvili v Georgia* (n 82); *Kavala v Turkey* ibid; *Mammadli v Azerbaijan* App no 47145/14 (19 April 2018); *Navalnyy v Russia (Grand Chamber)* App nos 29580/12 and four others (15 November 2018)
[151] See, Report of the WGAD, UN Doc A/HRC/36/37 (19 July 2017) para 48

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including in some instances, citizenship (particularly foreign or dual nationality) status or persons with permanent residence in another country.[152]

The purpose behind the ulterior purpose

If a person is detained for an ulterior purpose, this not only gives rise to arbitrary detention (as the right to liberty and security of the person allows for persons to be detained only on legitimate, lawful grounds, as explored in early sections); it also demonstrates an element of bad faith on the part of the detaining authority.

To demonstrate that this arbitrary detention carried out with bad faith was undertaken as a form of leverage in State-to-State relations, the measure (the arbitrary detention) must not only be undertaken for a bad faith ulterior purpose, but it would need to be shown that this ulterior purpose was to coerce the State of nationality (or some other entity) to do or refrain from doing something in contravention of the principle of non-intervention.

Thus, there would need to be:

i) **The demand on the victim State** (the demand could be implicit)

Taking the analogy from hostage-taking, there is nothing in the Hostages Convention to suggest that the intention of those carrying out the hostage-taking must be articulated openly by those persons or entities to which they are connected. According to Lambert,

> the words "in order to compel" seem to relate to the motivation of the hostage-taker, rather than to any physical acts which he might take. Thus, while the seizure and threat will usually be accompanied or followed by a demand that a third party act in a certain way, there is no actual requirement that a demand be uttered. Thus, if there is a detention and threat, yet no demands, there will still be a hostage-taking if the offender is seeking to compel a third party.[153]

In accordance with international law jurisprudence on the assessment of intent, intent may be established by way of inference from the circumstances of other facts in evidence. For example, as the Special Court for Sierra Leone held in *Sesay*, 'the communication of the threat to a third party is, then, a means by which to evidence an element of the offence, but does not comprise an element itself in need of proof.'[154]

This is also consistent with the ECtHR's evidential assessment of "ulterior purpose." To address the challenges associated with proving that a government had an ulterior purpose when carrying out an arrest or detention, the ECtHR has not restricted itself to obtaining direct proof of an ulterior purpose; it applies a variety of evidential approaches, which the Grand Chamber has set out in *Merabishvili v Georgia*, summarised as follows:

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[152] See, e.g., WGAD opinions Nos. 85/2021 (Ashoori/Iran); 51/2021 (Öztürk/UAE); 51/2019 (Zakka/Iran); 32/2019 (Malekpour/Iran); 52/2018 (Wang/Iran); 49/2017 (Namazi/Iran); 7/2017 (Foroughi/Iran); 28/2016 (Zaghari-Ratcliffe/Iran); 89/2017 (al Baluchi/USA). See also WGAD, UN Doc A/HRC/39/45 (Consular assistance and diplomatic protection for persons deprived of liberty) (2 July 2018)

[153] Lambert (n 14) 85

[154] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-A), Appeals Judgment (26 October 2009) para 580

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> i) The burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion.
>
> ii) Drawing inferences from the respondent Government's conduct is especially pertinent in situations – for instance those concerning people in the custody of the authorities – in which the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations ... That possibility is likely to be particularly relevant to allegations of ulterior purpose.
>
> iii) The standard of "beyond reasonable doubt" is not co-extensive with that of the national legal systems and can follow from the coexistence of sufficiently strong, clear, and concordant inferences or similar unrebutted presumptions of fact. The level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake.
>
> iv) The Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. When assessing evidence, it is not bound by formulae and adopts the conclusions supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. It is sensitive to any potential evidentiary difficulties encountered by a party.
>
> v) Circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts, and may include reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts.[155]

In *Demirtaş v Turkey*, after having found an absence of reasonable suspicion, the Grand Chamber identified an ulterior purpose by referring to a variety of mainly circumstantial evidence and using inferences. It determined that 'the concordant inferences drawn from this background support the argument' that the applicant was detained for an ulterior political purpose,[156] in that case 'of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society.'[157]

ii) The demand would need to be about a matter which involves the State taking (or refraining from taking) a particular course of action which falls within its *domaine réservé*[158] (thus breaching the principle of non-intervention, as set out in Section II.5(i) above).

iii) There would need to be a threat of harm if the victim State does not comply (or, as in the case of an arbitrary detention already implemented, or another measure in breach of the principle of non-intervention (such as an international act of aggression) this threat of harm could be a threat to maintain the situation of harm, unless the victim State agrees to undertake or refrain from undertaking specific action as required by the detaining State – *we will maintain the harmful status quo unless you do what we require*.

[155] Summarised from *Merabishvili v Georgia* (n 82) paras 309-317
[156] *Selahattin Demirtaş v Turkey (No. 2) (Grand Chamber)* App no 14305/17 (22 December 2020) paras 423, 436, 437
[157] Ibid, para 437
[158] Helal (n 133) 88

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III. Obligations related to the commission of State-sponsored arbitrary detention in State-to-State relations

The nature of State obligations related to State-sponsored arbitrary detention in State-to-State relations derive from a mixture of customary international law and treaty law, supplemented by domestic law. It is beyond the scope of the study to consider which aspects of these obligations have acquired the status of customary international law, and/or to engage with domestic law.

In accordance with article 26 of the Vienna Convention on the Law of Treaties, every treaty in force is binding upon the parties to it and must be performed by them in good faith.[159] All States are required to give effect to their treaty obligations in good faith. They must ensure that their treaty obligations are duly implemented and reflected in the domestic order,[160] including in national legal frameworks and practice.[161]

III.1 Negative obligations

In sum, the obligation on States to respect the prohibition on State-sponsored arbitrary detention in State-to-State relations requires them to refrain from engaging in the practice:

- The absolute prohibition of arbitrary detention, regardless of the circumstances (whether in times of peace or conflict, irrespective of the existence of a state of emergency threatening the life of the nation, regardless of who the person to be detained is or what they may be accused of, is reflected in all major universal and regional human rights treaties pertaining to civil and political rights. It is also reflected in international humanitarian law, and international criminal law.

- The absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and enforced disappearances to the extent that State-sponsored arbitrary detention in State-to-State relations involves torture or other prohibited ill-treatment (e.g., the resort to prolonged solitary confinement; physical and/or psychological forms of torture as part of the interrogation process, the use of confessions coerced through torture in legal proceedings, the denial of necessary medical treatment, inhuman conditions of detention) or enforced disappearances (failure to confirm the whereabouts of the detainee; failure to allow the person to communicate with the outside world, including lawyers, consular officials, family). The torture and cruel, inhuman, or degrading treatment or punishment prohibition forms part of the UDHR, ICCPR, UN Convention against Torture, and relevant regional treaties. The prohibition on enforced disappearances is prohibited by the International Convention for the Protection of All Persons from Enforced Disappearance and the acts which make up enforced disappearances (liberty and security of the person; freedom from torture; recognition as a person before the law) are equally prohibited by the ICCPR and relevant regional human rights treaties.

[159] Art. 26 VCLT (adopted 23 May 1969, entered into force 27 January 1980)
[160] Art. 27 VCLT ibid
[161] UN HRC, 'General Comment No. 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 13

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- The prohibition (applicable to any person including State officials) of hostage-taking, understood in the Hostages Convention as seizing or detaining and threatening to kill, to injure or to continue to detain a hostage in order to compel 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.

- The prohibition on States and groups of States from intervening directly or indirectly, for any reason whatever, in the internal or external affairs of any other State is recognised in the Friendly Relations Declaration and derives from the principles of non-intervention and respect for the sovereign equality of States which underpins the UN Charter.

III.2 Positive obligations

i) The obligation to protect and fulfil

States' positive obligations to protect and fulfil human rights requires them to protect individuals and groups against human rights abuses and to take positive action to facilitate the enjoyment of human rights. States are positively obligated to adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfil their legal obligations.[162] They generally have an obligation of means; they must adopt reasonable and suitable measures and deploy their best efforts that adequately account for the risks, the underlying context, and their capacity to act.[163]

Legal and procedural safeguards must be put in place to prevent unlawful and arbitrary detention, and to prevent its continuance and recurrence. Fundamental among these are the obligations to put in place an adequate legal framework to ensure that there is a lawful basis to detain which aligns with the right to liberty and security of the person and which clarifies the boundaries of who can be arrested, by whom and on what basis and to ensure that adequate measures are in place to prevent persons from being detained outside of those boundaries.[164] Additionally, procedures must be in place to inform detainees of the reasons for their arrest and of the charges proffered, to comply fully with consular rights and respect for the right to counsel, and to ensure that detainees are promptly brought before the competent judicial authorities so that they can challenge the legality of their detention as appropriate.[165]

States have an obligation to investigate with a view to prosecuting those elements of State-sponsored arbitrary detention in State-to-State relations that amount to torture,[166] enforced disappearances,[167] hostage-taking[168] or when satisfying the conditions for a crime against humanity[169] (when committed as part of a widespread or systematic attack directed against any

[162] UN HRC, 'General Comment 31' ibid para 7
[163] *Velásquez-Rodríguez v Honduras*, Series C No. 4 (29 July 1989) para 172
[164] UN HRC, General Comment no. 35, Article 9 (Liberty and security of person) (n 10) paras 14-23
[165] Ibid paras 24 et seq
[166] Arts. 4, 5 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted
[167] Arts. 3, 4, 6 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010)
[168] Arts. 2, 5, 6 Hostages Convention (n 11)
[169] E.g., Art. 7(1)(e) ICC Statute

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civilian population, with knowledge of the attack) or a war crime[170] (somewhat analogous crimes of unlawful confinement, or hostage-taking when committed in the context of an international armed conflict). The obligation to investigate or prosecute may extend to additional forms of State-sponsored arbitrary detention in State-to-State relations if adjudged to be the most appropriate way to protect and fulfil the right to liberty and security of the person in the particular context.

With respect to the Hostages Convention, the detaining State is also required to take all practicable measures to prevent preparations for the commission of those offences within or outside their territories, and to exchange information and coordinate in respect of the taking of administrative and other measures to prevent the commission of such offences.[171] It must also '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'[172] and to return as soon as possible any objects obtained from the hostage.[173]

ii) Cessation of internationally wrongful acts

The obligation of cessation applies to continuing wrongful acts and is reflected in article 30(a) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARS).[174] The obligation of cessation also constitutes one of the recognised measures of reparation (both as a form of restitution of the right to liberty, and cessation as a form of satisfaction).[175] Cases of ongoing arbitrary detention such as 'unlawful detention of a foreign official or unlawful occupation of embassy premises' have been recognised in the commentaries to the ARS as examples of continuing wrongful acts.[176] In cases of arbitrary detention, the obligation of cessation has been taken to mean the immediate release of the detainee from detention[177] and under the Hostages Convention, the additional requirement to facilitate the detainee's departure from the territory, where relevant,[178] which may involve the return of travel documents, authorizing the departure, and securing or facilitating appropriate means of transport. The WGAD has explained: 'In the case of arbitrary deprivation of liberty, restitution must be in its most direct form, which is the restoration of the liberty of the individual, including in the context of health detention policies. In addition to releasing the individual, competent authorities should review the reasons for the deprivation of liberty or retry the case.'[179]

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[170] E.g., Arts. 8(2)(a)(vii); 8(2)(a)(viii); 8(2)(c)(iii) ICC Statute
[171] Art. 4(a) and (b) Hostages Convention (n 11)
[172] Art. 3(1) Hostages Convention ibid
[173] Art. 3(2) ibid
[174] Art. 30 ARS (n 125)
[175] See, UN HRC, 'General Comment 31' (n 161) para 15. See also, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* UNGA resolution 60/147 (15 December 2005) Principle 22(a)
[176] ARS (n 125) Commentary to Art 14, para 3
[177] See, e.g., *Assanidze v Georgia (Grand Chamber)* App no 71503/01 (ECtHR, 8 April 2004) para 203: 'by its very nature, the violation found in the instant case did not leave any real choice as to the measures required to remedy it. In these conditions, considering the particular circumstances of the case and the urgent need to put an end to the violation of Article 5, para.1 …, the Court considers that the respondent State must secure the applicant's release at the earliest possible date.' See also, *Loayza Tamayo v Peru* (Merits) Ser C no 33 (IACtHR, 17 September 1997) para 84; *Fermín Ramírez v Guatemala* (Merits, Reparations, Costs) Ser C no 126 (IACtHR, 20 June 2005) para 130(c)
[178] Art. 3(1) Hostages Convention (n 11)
[179] WGAD, 'Deliberation No. 10 on reparations for arbitrary deprivation of liberty,' (4 May 2020)

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iii) The obligation to provide an effective remedy and reparations

The characterisation of State-sponsored arbitrary detention in State-to-State relations as an internationally wrongful act for which the perpetrator State incurs responsibility is relevant for how one views the coercion and its characterisation as an intervention which violates the principle of non-intervention, and for the framing of the available responses to it. In accordance with the Articles on the Responsibility of States, the breach of an international obligation would give rise to an obligation of cessation (which in the circumstances of an arbitrary detention would require release of the individual(s) from detention and the removal of any barriers to travel to their country of (predominant) nationality), as well as full reparation.[180]

The obligation to afford an effective remedy and reparation is set out in human rights treaties[181] and their interpretive bodies,[182] and in declarative texts.[183] It is also reflected in international humanitarian law treaties, particularly article 3 of the Hague Convention IV,[184] largely reproduced in article 91 of Protocol I.[185]

The right to reparation entails in part, the obligation to afford domestic remedies in response to human rights violations.[186] Jurisprudence and standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. Victims must receive adequate information,[187] they must be treated with humanity and dignity[188] and their privacy and safety, both physical and psychological, must be safeguarded.[189]

The reparation that is required will depend on the violation and the harm caused. According to the ARS, reparations must be 'full',[190] to wipe out all the consequences of the illegal act and re-establish the status quo ante. In addition to cessation (as discussed above) and assurances and guarantees of non-repetition where required, the obligation to afford reparation may take the form of restitution,

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[180] Arts. 30, 31, ILC, ARS (n 125). See also, WGAD, 'Deliberation No. 10 on reparations for arbitrary deprivation of liberty,' (n 179), generally and in particular para 10

[181] See, of particular relevance to this study, Art. 2(3) ICCPR; Art. 14(1) UNCAT; Arts. 18, 20(2), 24(4) Convention for the Protection of All Persons from Enforced Disappearance; Art. 16(9) Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Arts. 13, 41 ECHR; Arts. 25, 63(1) ACHR; Art. 21(2) African Charter on Human and Peoples' Rights

[182] Of particular relevance to this study, WGAD, 'Deliberation No. 10 on reparations for arbitrary deprivation of liberty,' (n 179); UN HRC, General Comment 31 (n 161); Committee Against Torture, 'General comment 3', Implementation of article 14 by States parties (13 December 2012) UN Doc CAT/C/GC/3

[183] E.g., Art. 8 UDHR; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (n 175)

[184] *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910)

[185] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 [Protocol I]

[186] E.g., Art. 8 UDHR; Art. 2(3) ICCPR; Art. 83 CPRMW

[187] *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012) [115]

[188] *AT v Hungary*, UN Doc CEDAW/C/32/D/2/2003 (CEDAW Committee, 26 January 2005) para 9.6(II)(vi); HRC, General Comment 31 (n 161) para 15; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (n 175), 12(c)

[189] *Basic Principles and Guidelines*, ibid, 10, 12(b)

[190] ARS (n 125) Arts. 31(1), 34; *Basic Principles and Guidelines,* ibid 18, which describes 'full and effective' reparation for gross human rights and serious international humanitarian law violations.

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compensation, and/or satisfaction.[191] Restitution has been ordered inter alia, to release individuals from prison,[192] or issue stays of execution in death penalty cases.[193] Compensation is understood to cover any financially assessable damage both material and moral and loss of profit,[194] as well as the costs for legal or expert assistance, medicine, and psychological and social services,[195] whereas rehabilitation includes measures for physical and psychological treatment[196] among other aspects. Satisfaction, understood as an exceptional remedy in the ARS,[197] has been frequently ordered in human rights cases to address injuries which involve breaches of trust.[198] Guarantees of non-repetition have included strengthening monitoring mechanisms and other procedural safeguards, changing policies or legislation, vetting public officials, and setting up commissions of inquiry.[199]

IV. Avenues for States of nationality (and potentially others) to pursue and resolve disputes

IV.1 Consular assistance

The Vienna Convention on Consular Relations (VCCR) requires detaining States to notify the detainee without delay (which has been taken to mean as soon as the detaining State has reason to believe that the detainee is a foreign national) of their right to seek assistance from the consular authorities of the country of the State of nationality, and if the detainee so requests, to notify the State of nationality about the detention and afford them the ability to access and communicate with the detainee.[200] There is no exemption to the rights set out in article 36 VCCR related to consular access in cases involving alleged acts of espionage,[201] or any other particular offence.

Consular officers are empowered to arrange for their nationals' legal representation and to provide a wide range of humanitarian and other assistance, with the consent of the detainee. In cases where a detainee expresses concern to consular officers, or consular officers have concerns on the basis of their own assessment, that one of their detained nationals is at risk of or already undergoing ill-treatment, and/or that the detainee is being detained arbitrarily, the conduct of consular visits and undertaking related diplomatic demarches on behalf of the detained nationals (e.g., to communicate any humanitarian concerns to the detaining State, to provide information to the detaining State about medical assistance needs or to communicate with family members) are

[191] ARS (n 125) Arts. 30(a), 30(b), 31
[192] *Loayza Tamayo v Peru* (Merits) Ser C no 33 (IACtHR, 17 September 1997) para 84
[193] *Fermín Ramírez v Guatemala* (Merits, Reparations, Costs) Ser C no 126 (IACtHR, 20 June 2005) para 130(c)
[194] ARS (n 125) Art. 36
[195] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (n 175) 20
[196] *Plan de Sánchez Massacre v Guatemala* (Reparations) Ser C no 116 (IACtHR, 19 November 2004) paras 106-8
[197] ARS (n 125) Commentary to Art. 37, para 1
[198] *Mack-Chang v Guatemala* (Merits, Reparations and Costs) Ser C no 101 (IACtHR, 25 November 2003) paras 8, 9, 11, 12
[199] *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, Comm no 292/04 (ACommHPR, 43rd Session, 7–22 May 2008) para 87
[200] VCCR, Art. 36(1)(a)-(c). See also, Directive 2013/13, of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, art. 8, 2012 O.J. (L 142) 6 [Article 4(2)(b) of which provides that suspects or accused persons have a right to consular notification and Article 8(2) states that those suspects or accused persons or their lawyers have the right to challenge a violation of this right to consular notification]
[201] *Jadhav (India v. Pakistan)* [2019] ICJ Rep 418, paras 73-75, 89

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extremely important. Nevertheless, any steps taken by consular officials in furtherance of consular assistance are humanitarian in nature and they are taken under the overall principle of respect for the sovereignty and independence of the foreign legal system and the principle of non-intervention.

The ICJ has held in the *Jadhav case* that the failure of detaining States to comply with obligations under article 36 VCCR (in that case, (i) by not informing the detainee of his rights; (ii) by not informing the State of nationality, without delay, of the arrest and detention of the individual; and (iii) by denying access to the detainee by consular officers, contrary to their right, inter alia, to arrange for his legal representation), constitute internationally wrongful acts of a continuing character.[202] In consequence it determined that the detaining State was under an obligation to cease those acts and to comply fully with its obligations under article 36 of the Vienna Convention.[203] In light of its limited jurisdiction pertaining to the interpretation of the VCCR, the ICJ does not make any further finding or order pertaining to the correctness of the conviction or sentencing,[204] though it notes that 'The Court considers the appropriate remedy in this case to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav. This is consistent with the approach that the Court has taken in cases of violations of article 36 of the Convention.'[205]

The applicability of consular rights pursuant to article 36 VCCR to dual nationals detained in one of their States of nationality is contentious, given that the VCCR is silent on the issue of dual nationality. Access to these rights can be argued by reference to theories of predominant nationality,[206] though such arguments may have little practical impact if the detaining State does not recognise dual nationality, and refuses access to the consular officials of the other State of nationality on that basis. Certainly, the other State of nationality may litigate the matter of consular rights in order to ensure acess. However, none of the ICJ case which considered consular access addressed the rights of dual nationals in a direct way, though the USA in *Avena* argued that several of the individuals were dual nationals and should therefore not be captured by Mexico's claim (though it failed to furnish proof of this contention and therefore it was never addressed substantively by the Court).[207]

IV.2 Diplomatic protection

In contrast to consular assistance, diplomatic protection is a mechanism according to which a State may secure reparation for injury to one of its nationals, premised on the principle that an injury to a nation is an injury to the State itself. Thus, diplomatic protection becomes relevant when the State of nationality considers that the detaining State has committed or is at real risk of committing an internationally wrongful act for which it incurs an obligation of cessation, guarantees of non-repetition where appropriate, and/or reparation. Even though the matter giving rise to the internationally wrongful act is, in the context of this Report, the detention of the national, this wrong is considered for the purposes of diplomatic protection as a wrong to the State of nationality, and any decision to pursue the matter would be undertaken on that basis.

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[202] Ibid, paras 133; 134
[203] Ibid, para 134
[204] Ibid, paras 136, 137
[205] Ibid, para 137. See similarly, *LaGrand (Germany v. USA)* [2001] ICJ Rep 514 para 125; *Avena and Other Mexican Nationals (Mexico v. USA)* [2004] ICJ Rep 65-66, paras 138-140 and p. 73, para 153
[206] *Nottebohm Case (Second Phase) (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 22 [re diplomatic protection, discussed below]
[207] *Avena case* (n 205) paras 41-42 and 53-57

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According to the Permanent Court of International Justice in *Mavrommatis*:

> ... by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.[208]

As the State is asserting its own right, whether, when and how it decides to do so is discretionary,[209] though in accordance with municipal administrative law, depending upon the country, the State would need to ensure that it gives full effect to any constitutional rights afforded to citizens in the State concerned, and that it does not fetter its discretion.[210]

A State can only extend diplomatic protection to its own nationals. The classic rule on diplomatic protection is that a State is not entitled to exercise diplomatic protection in respect to a dual national against the State whose nationality such person also possesses,[211] however this position has evolved. In accordance with the principle of predominant nationality, the State of predominant nationality may indeed exercise diplomatic protection against the State of secondary nationality.[212] This revised, more flexible position has been incorporated into the ILC's Draft Articles on Diplomatic Protection. Article 7 of these Draft Articles provides that 'A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.'[213] The ILC has explained that the term "predominant" 'conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities …'[214]

The determination of predominant nationality and the ability of a State of nationality to exercise diplomatic protection in accordance with the rule, is not conditioned upon the acceptance by the detaining State of the principle or of the factual assessment as to which nationality is predominant.

A State can only provide diplomatic protection and seek a remedy or file a complaint if the person concerned has already exhausted all local remedies to the extent possible and as could be reasonably expected.[215] The prior exhaustion of remedies in the responding State is not required in all circumstances, for example where there are no available, effective, or adequate local remedies.

IV.3 Legal measures in response to an incident of State-sponsored arbitrary detention in State-to-State relations

As already set out in this report, State-sponsored arbitrary detention in State-to-State relations constitutes a violation of international human rights law, a violation of the Hostages Convention, a violation of the principle of non-intervention and depending on the circumstances it may also violate international humanitarian law. Each of these violations may give rise to internationally wrongful

[208] *Mavrommatis Palestine Concessions (Greece v UK)* [1924] PCIJ Rep, Series A, No.2, 12
[209] *Barcelona Traction Light &Power Company Limited (Belgium v Spain)*, Second Phase, [1970] ICJ Rep 4, 44
[210] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 1598, para. 99
[211] Art. 4 of the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Law* (1930)
[212] *Nottebohm Case (Second Phase) (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 22
[213] ILC, 'Draft Articles on Diplomatic Protection' UN Doc A/61/10 (1 May-9 June; 3 July-11 August 2006) Art. 7
[214] Ibid, Commentary to Art. 7, para 4
[215] *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, para 333

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acts for which the detaining State incurs responsibility, and an obligation of cessation, guarantees of non-repetition where appropriate, and reparations.

A legal claim in respect of these internationally wrongful acts may be pursued in certain circumstances, which in the absent of consent between the disputing parties, would depend on the limited subject matter and personal jurisdiction of the applicable regional and international adjudicative bodies. The bodies which are most likely to be able to hear a claim, and their respective jurisdictional limits, are set out below.

i) The International Court of Justice

The ICJ has a wide and general subject matter jurisdiction for contentious proceedings.[216] It can adjudicate disputes concerning 'any question of international law' and 'the existence of any fact which, if established, would constitute a breach of an international obligation,'[217] and has considered many matters involving inter alia unlawful arrest and detention, and consular rights.[218] However the ICJ will only have jurisdiction to adjudicate a contentious claim in particular circumstances: where the parties to the dispute by special agreement agree for a matter to be addressed by the Court (this occurs very rarely); where the ICJ is recognised as the forum to resolve disputes related to the interpretation of a particular treaty that both parties to the dispute are parties of (of relevance to the subject matter of this research, the VCCR is one such treaty, the Hostages Convention is another); or where both parties to the dispute recognise the compulsory jurisdiction of the ICJ in legal disputes (this is also rare, particularly for those States which have most frequently been accused of perpetrating State-sponsored arbitrary detention in State-to-State relations).[219] With respect to this last category - compulsory jurisdiction cases, the *Diallo case*[220] is instructive. There, Guinean national Ahmadou Sadio Diallo was detained by DRC authorities in circumstances the Court finds to be arbitrary; additionally the ICJ determines that article 36 VCCR was violated. In a separate judgment on reparation, the Court sets out a detailed damages award, recalling that 'the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury.'[221]

The most usual route for a claim to be brought to the ICJ is when the ICJ is recognised as the forum to resolve disputes related to the interpretation of a particular treaty that both parties to the dispute are parties of (e.g., for the subject matter of this Report, the VCCR, the Hostages Convention or potentially in future for cases involving patterns which are widespread or systematic, the Crimes Against Humanity Convention[222]). The majority of claims brought to the ICJ pertaining to alleged

[216] Art. 36(1) *Statute of the ICJ* (adopted 26 June 1945, entered into force 24 October 1945)
[217] Ibid Art. 36(2)(b), (c)
[218] E.g., *Ahmadou Sadio Diallo (Republic of Guinea v DRC)* (Merits) [2010] ICJ Rep 639; *Jadhav (India v Pakistan)* (n 201); *LaGrand (Germany v USA)* (n 205); *Avena and Other Mexican Nationals (Mexico v USA)* (n 205)
[219] Art. 36 Statute of the ICJ (n 216)
[220] *Ahmadou Sadio Diallo* (n 218)
[221] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, Judgment, [2012] ICJ Rep 324, para 57
[222] See, e.g., Art 15(2) 'Draft articles on Prevention and Punishment of Crimes Against Humanity,' Adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10). On the potential for State-sponsored arbitrary detention in State-to-State relations to amount to crimes against humanity in particular contexts that may satisfy the requirements of being widespread or systematic, See, Carla Ferstman and Marina Sharpe, 'Iran's Arbitrary Detention of Foreign and Dual Nationals as Hostage-taking and Crimes Against Humanity,' (2022) 20(2) *Journal of International Criminal Justice* 403

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violations of the VCCR are claims which derive from States' failed attempts to exercise consular assistance in the detaining States.[223] This impacts upon the scope of the jurisdiction of the ICJ to address any contentious matters before the parties. If jurisdiction was based on the resolution of a dispute pertain to differences of opinion as to the interpretation of the VCCR, the ICJ will confine its adjudication to resolving such differences of opinion; it will not adjudicate matters not clearly within the scope of that jurisdiction. Thus in arbitrary detention cases which involve VCCR aspects, the ICJ will only deal with the VCCR aspects, and its remedies with be similarly confined. This issue arose in the *Jadhav case*, which concerned Pakistan's arrest and detention of Indian national Kulbhushan Sudhir Jadhav. The ICJ determined that there were indeed violations of the VCCR, but it made clear that its judgment and any indication of reparations could only stem from such violations: 'With regard to India's submission that the Court declare that the sentence handed down by Pakistan's military court is violative of international law and the provisions of the Vienna Convention, the Court recalls that its jurisdiction has its basis in Article I of the Optional Protocol. This jurisdiction is limited to the interpretation or application of the Vienna Convention and does not extend to India's claims based on any other rules of international law.'[224]

The only claim brought to the ICJ pertaining to the taking of hostages pre-dated the entry into force of the Hostages Convention.[225] The dispute clause of the Hostages Convention provides that any dispute between two or more States Parties pertaining to the interpretation of the Convention which is not settled by negotiation, shall, at the request of one of them, be submitted to arbitration.[226] If there is a failure to agree on the modalities for the arbitration within six months, any one of those Parties may submit the claim to the ICJ for resolution. However, this will not be automatic; it is subject to any declaration received at the time of ratification, accession or signature that the State Party concerned does not consider itself to be bound by the provision (on the jurisdiction of the ICJ to resolve the dispute which could not be resolved by negotiation or arbitration).[227] Thus, States Parties commit themselves to negotiation and arbitration. Of the 176 States Parties to the Convention, approximately 30 have declared that they do not consider themselves bound by the dispute resolution provisions in article 16, many of particular relevance for the phenomenon of State-sponsored arbitrary detention in State-to-State relations: Algeria, Belarus, Brazil, China, Colombia, Cuba, DPRK, El Salvador, Ethiopia, Hungary, India, Iran, Kenya, Lao, Malaysia, Mozambique, Myanmar, Moldova, Qatar, Russia, Saudi Arabia, Singapore, St Lucia, Thailand, Tunisia, Turkey, Ukraine, Venezuela, Viet Nam.

Those claims which are capable of being lodged at the ICJ pursuant to article 16 of the Hostages Convention will not face the problem experienced in the *Jadhav case*, of limited scope for remedies under the VCCR. This is because the Hostages Convention is extremely rich in setting out States' obligations and has an equally robust remedial framework in the case of breach.

ii) State-to-State human rights claims

Several universal human rights treaties allow for State-to-State complaints however they have only negligibly been used (only three complaints have ever been made, to the Committee on the Elimination of Racial Discrimination). Of relevance to the subject matter of this research, article 41

[223] See, e.g., *Jadhav (India v Pakistan)* (n 201); *LaGrand (Germany v USA)* (n 205); *Avena and Other Mexican Nationals (Mexico v USA)* (n 205)
[224] *Jadhav*, ibid, para 135
[225] *Iran Hostages case* (n 5)
[226] Art. 16(1) Hostages Convention
[227] Art. 16(2) Hostages Convention

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ICCPR,[228] article 21 of the UN Convention Against Torture[229] and article 74 of the Convention on the Protection of Migrant Workers[230] allow States parties who have made a declaration accepting the competence of the relevant Committee in this regard, to make a complaint against another State party who has also declared its acceptance, regarding compliance with the Convention. Given the limited number of States that have made such declarations, both those States which have most frequently been accused of perpetrating State-sponsored arbitrary detention in State-to-State relations and the States whose nationals are frequently subjected to such detentions, and the fact that the views of such treaty bodies are not formally binding, this is not a particularly effective legal route to resolve a claim.

State-to-State complaints are also possible under regional human rights conventions. Under article 33 ECHR, States parties have made approximately 30 inter-State applications against other States parties of the Convention.[231] The African Charter also sets out the possibility of inter-State procedures under its article 47, with acceptance automatic. Article 45 of the American Convention on Human Rights establishes an inter-State dispute mechanism however unlike the ECHR, States must expressly recognise its competence (similar to UN human rights treaty bodies). The provision has been sparingly used (though several requests for advisory opinions have been made by States parties).[232] The subject matter jurisdiction for regional human rights courts would stem from the violation of the right to liberty and security of the person, and depending upon the factual circumstances, possibly also, violation of fair trial rights. The difficulty stems from the personal jurisdiction of such courts, which extend only to the violations allegedly perpetrated by states parties to the regional treaty. Thus, a claim would only be able to be pursued where both the detaining State and the victim State are parties to the same regional treaty. The phenomenon of State-sponsored arbitrary detention in State-to-State relations is often (though not always) cross-regional.

iii) Remedies available to the detained victims of State-sponsored arbitrary detention in State-to-State relations

The victim of the arbitrary detention may be able to pursue a claim against the detaining State before domestic tribunals in the detaining State (depending upon the law in place in the detaining State). However, given the nature of this phenomenon in which the courts of the detaining State are being used under the cover of law to implement the arbitrary detention, it is unrealistic and unlikely that detainees will be able to avail themselves of independent and effective remedies before such courts.

Very exceptionally, the victim of the arbitrary detention may be able to seek a remedy before a domestic tribunal in its State of nationality.[233] Potentially, they may also be able to seek a remedy before a regional or international human rights court or treaty body (if the jurisdiction of the human rights court or body extends to the conduct of the detaining State). The detainee would also be able

[228] Approximately 50 of 173 States parties have made such declarations. See: < https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND>
[229] Approximately 1/3 of 173 States parties have made such declarations though the mechanism has never been activated. See: <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en>
[230] Of 58 States Parties, 4 States Parties have made such declarations. See: < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en>
[231] See, < https://www.echr.coe.int/documents/d/echr/press_q_a_inter-state_cases_eng?download=true>
[232] See generally, Rachel Reilly and Hannah Trout, 'Inter-State Complaints in International Human Rights Law,' British Institute of International and Comparative Law (2022) < https://www.biicl.org/publications/inter-state-complaints-in-international-human-rights-law?cookiesset=1&ts=1690664938>
[233] There are only a very limited number of States which recognise a cause of action against a foreign State by way of exceptions to sovereign immunity. This is outside the scope of this study.

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to seek an 'Opinion' from the WGAD; these opinions are non-binding though they are useful in clarifying the arbitrariness of the detention.

In most instances of State-sponsored arbitrary detention in State-to-State relations, there will be no legal remedies for want of jurisdiction. For example, the jurisdiction of the ECtHR extends only to the conduct of States parties to the ECHR, and only exceptionally to the extraterritorial conduct of those States parties. If a detainee is a national of a State party to the ECHR, but the detaining State is not a State party, the detainee would not be able to have recourse to the ECtHR against the detaining State. The detainee would only be able to bring an individual complaint to the UN Human Rights Committee or other relevant UN treaty body if the detaining State ratified the relevant treaty and indicated formally its acceptance of the individual complaints procedure applicable to that treaty. The combination of circumstances required to provide a detainee or his or her State of nationality with jurisdiction to bring a claim is therefore exceedingly limited.

IV.4 Additional response measures available to the State of nationality

Arbitration, conciliation, mediation

The State of nationality invariably will use negotiation through diplomatic means, failing which, conciliation, arbitration, or legal means (as discussed above), will be used to arrive at a resolution of the matter in a satisfactory way.

Counter-measures and use of force

Under international law, States may be entitled to respond to a breach of an international obligation by taking countermeasures to ensure cessation of the wrongful act and reparation for its consequences.[234] What further response measures the injured State may take in relation to the arbitrary detention of its nationals will depend upon the characterisation of the act(s), also taking into account the gravity of the measures taken by the detaining State and the rights in question.[235]

The European Commission, as part of its proposed response measures to instances of economic coercion, indicates that the measures would be selected and designed on the basis of the following criteria:

(a) the effectiveness of the measures in inducing the cessation of the economic coercion;

(b) the potential of the measures to provide relief to economic operators within the Union affected by the economic coercion;

(c) the avoidance or minimisation of negative impacts on affected actors by Union response measures, including the availability of alternatives for affected actors, for example alternative sources of supply for goods or services;

[234] ARS (n 125) Art. 22

[235] EC, Proposal for a regulation on economic coercion, (n 139) Art. 9(1)

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(d) the avoidance or minimisation of negative effects on other Union policies or objectives;

(e) the avoidance of disproportionate administrative complexity and costs in the application of the Union response measures;

(f) the existence and nature of any response measures enacted by other countries affected by the same or similar measures of economic coercion, including where relevant any coordination pursuant to article 6;

(g) any other relevant criteria established in international law. 3.[236]

At the highest echelon of possible response measures, in principle a State can counter a breach of the principle of non-intervention through application of the doctrine of self-defence, though the State would be limited in so doing by the principles of necessity, proportionality and imminence (if anticipatory), and any actions taken would need to be focussed on eliminating the initial breach. The use of force, however, is only allowed as part of the defence/response to the arbitrary detention if the initial unlawful intervention is at the same time an armed attack according to article 51 UN Charter (self-defence or a Security Council authorization of force to maintain or restore international peace and security).[237] Whilst there are varying interpretations of "armed attack," and the phrase would need to be interpreted in the light of the unique factual circumstances that surround an incident,[238] invariably the resort to arbitrary detention in State-to-State relations while recognised as an internationally wrongful act, would not ordinarily or easily meet such a threshold for "armed attack".[239] Nevertheless, the possibility should not be discounted completely.

V. General Conclusion

Aspects of State-sponsored arbitrary detention in State-to-State relations are captured by human rights and hostage-taking treaties as well as by the UN Charter, however the totality of the practice is not captured by any one text. The consequence of this is that the gravity of the phenomenon, which is particularly egregious because of the confluence of violations of human rights, that are orchestrated at the behest of the State, and for the ulterior purpose of securing a particular advantage from the State of nationality. The phenomenon is not the same as any arbitrary detention; it is particular, and this particularity is lost by the absence of a comprehensive definition.

The phenomenon of State-sponsored arbitrary detention in State-to-State relations constitutes a breach of international human rights law (arbitrary detention and potentially also, depending upon the circumstances of a particular case: torture and other cruel, inhuman, or degrading treatment and punishment; enforced disappearance; breach of fair trial rights). In very specific circumstances,

[236] Ibid, Art. 9(2)

[237] *Nicaragua v USA* (n 119) para 103

[238] Factors to consider include: the location of the arrest (was the territory of the State of nationality breached (e.g., consular premises; innocent passage by a State of nationality flag ship on the High Seas or Exclusive Economic Zone); were armed officials of the detaining State used in the "attack"; were the detainees operating in an official capacity when they were "attacked (e.g., ambassadors, visiting trade ministers from the State of nationality); was the attack accompanied by acts of violence.

[239] Oscar Schachter, 'International Law in the Hostage Crisis: Implications for Future Cases,' in Paul Kreisberg (ed), *American Hostages in Iran: The Conduct of a Crisis* (Council on Foreign Relations 1985) 325, 332. See also, Independent International Fact-Finding Mission on the Conflict in Georgia, Final Report (September 2009), 286-289, available at https://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf

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it may also breach international humanitarian law, and may constitute an underlying offence for war crimes or crimes against humanity. However, the human rights framework for outlawing arbitrary detention does not even require that acts of arbitrary detention are criminalised (unlike, for instance, the framework for torture or enforced disappearances). This is appropriate for the generality of circumstances of arbitrary detention some of which may benefit from criminalisation, others perhaps not. Arguably, however, the particularity of State-sponsored arbitrary detention in State-to-State relations is a human rights violation which is so grave that it gives rise to the obligation to prosecute or extradite (similar to hostage-taking). Similarly, the usual compensation for wrongful detention is an administrative payment which tends to correspond to the amount of time spent wrongfully detained.[240] This would not typically align with the gravity of State-sponsored arbitrary detention in State-to-State relations which involves the bad faith of the State and its officials. Thus, specificity in framing and defining the practice may help to ensure that the obligations and remedial framework associated with it are appropriately tailored to its gravity.

This author considers that the practice falls within the definition of hostage-taking under the Hostages Convention though as discussed, there are several States which restrict their understanding of hostage-taking to acts undertaken by non-state actors.[241] Regardless, the Hostages Convention does not explicitly engage with the responsibility of States for State-sponsored hostage-taking in State-to-State relations, and thus the remedial framework in the Hostages Convention is largely geared to addressing the individual criminal responsibility of alleged perpetrators (whether they are individuals operating under the guise of the State or as non-State actors). States' obligations under the Convention are geared (importantly) towards prevention, prosecuting perpetrators, and ensuring that hostages are released and where appropriate, repatriated. While perhaps implicit in the Convention, there is no explicit obligation on States to refrain themselves from engaging in hostage-taking.

As a form of unlawful coercion designed to influence matters within a State's *domaine réservé*, it also breaches the principle of non-intervention.

Both the arbitrary detention and the unlawful intervention constitute breaches of the detaining States' international law obligations for which it incurs State responsibility.

As an internationally wrongful act which is continuing, the detaining State has an immediate obligation of cessation, which in the context of arbitrary detention would require the immediate release of the detainee, and (also according to the Hostages Convention) to facilitate the detainee's departure. The detaining State also has the obligation to afford reparations for the internationally wrongful acts which should account fully for the harms. These should encompass restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate.

The detaining State is obligated to comply with the VCCR in informing the detainee about their rights and ensuring consular access. The failure to comply with the VCCR may constitute a further internationally wrongful act. The principle of predominant nationality may be relevant to the State of nationality to provide consular support to dual nationals, and separately, to exercise diplomatic protection.

The State of nationality invariably will use negotiation through diplomatic means, failing which, conciliation, arbitration, or legal means, will be used to arrive at a resolution of the matter in a

[240] See e.g., Trechsel, Stefan, 'The Right to Compensation for Wrongful Conviction', *Human Rights in Criminal Proceedings* (Oxford, 2006; online edn, 2010)
[241] See section II.1(ii) of this report.

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satisfactory way. The legal avenues to pursue claims against the detaining State exist in theory but are illusory in practice given the limited personal and subject matter jurisdiction of courts and other quasi-judicial bodies and States' limited willingness to be bound by such processes. States may also take countermeasures to ensure cessation of the wrongful act and reparation for its consequences. However, such measures are limited by the principles of necessity, proportionality, and imminence (if anticipatory), and any actions taken would need to be focussed on eliminating the initial breach.

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Annex: Areas for further study

In this Annex, priority areas for further study which stem from the legal research, are identified, taking into account the plans, as part of the Partnership Action Plan, for an Eminent Jurist Group to further consider such issues and make recommendations.

1. Comparative National Law and State Practice:

   a) Have States experienced incidents of State-sponsored arbitrary detention for leverage? If so, were the individuals affected detained pursuant to national criminal laws, special security-related legislation, administrative legislation or other?
   b) What have they termed such practices?
   c) How have States responded to incidents of State-sponsored arbitrary detention for leverage?
   d) Does the State of nationality have a legislative, regulatory or guidance document that it uses to guide its approach?
   e) What branches of government (and at what seniority) have been engaged in efforts to secure nationals' release (e.g., consular officials; ambassadors in the country of detention; government legal advisors; ministers; prime ministers/presidents)
   f) What obligations and duties of care do States of nationality have to nationals detained abroad and how are these obligations regulated and assured in practice? For example, what is the State of nationality's approach with respect to sharing of information, incorporating the family of the detainee's wishes, provision of counselling and related support, espousing a claim (diplomatic protection)?
   g) At what stage in the process, and on what bases, have States determined that a particular detention is not a usual consular matter in which a national becomes in conflict with the domestic laws of the detaining State? What legal and/or evidentially principles have States applied to assess the veracity of their nationals' narratives/complaints and to consider the motivations of the detaining State?
   h) Once the State of nationality has concluded that the detention is "for leverage", how has such a determination changed, if at all, the approach taken by the State of nationality to the matter?
   i) Does the State of nationality have a policy or approach it takes with respect to dual nationals, when the national is detained in the other State of nationality? To what extent does the State of nationality recognise the principle of predominant nationality and if so, how has that impacted on the State of nationality's demarches?
   j) Does the State of nationality have in place "Magnitsky" legislation or similar legislation which affords it with a framework to apply different measures including sanctions in response to unlawful State interventions? If so, has the State of nationality used, or contemplated using such a framework in response to State-sponsored arbitrary detentions in State-to-State relations, and if so, how helpful were such frameworks?
   k) Has the State of nationality initiated or contemplated using arbitration or judicial means to help resolve the matter?
   l) Has the State of nationality initiated or contemplated using other forms of (counter)measures to resolve the matter?

2. Bilateral and multilateral coordination and engagements

   a) In what kinds of circumstances have States engaged with other States (beyond the detaining State) to share information, coordinate, and/or support efforts to have their

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nationals released (e.g., lack of diplomatic relations with the detaining State; lack of embassy/consulate presence in the detaining State; the particular relations the third State has with the detaining State; the facts of the case which involve a multiplicity of countries (dual or triple nationalities; prisoner exchanges involving multiple countries) etc

b) Are there specific instances in which States worked bilaterally to coordinate the approach to take with a detaining State or with a view to multiplying leverage for the returns?

c) To what extent have States of nationality used regional and/or UN-level human rights and/or political bodies to help resolve such cases?

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