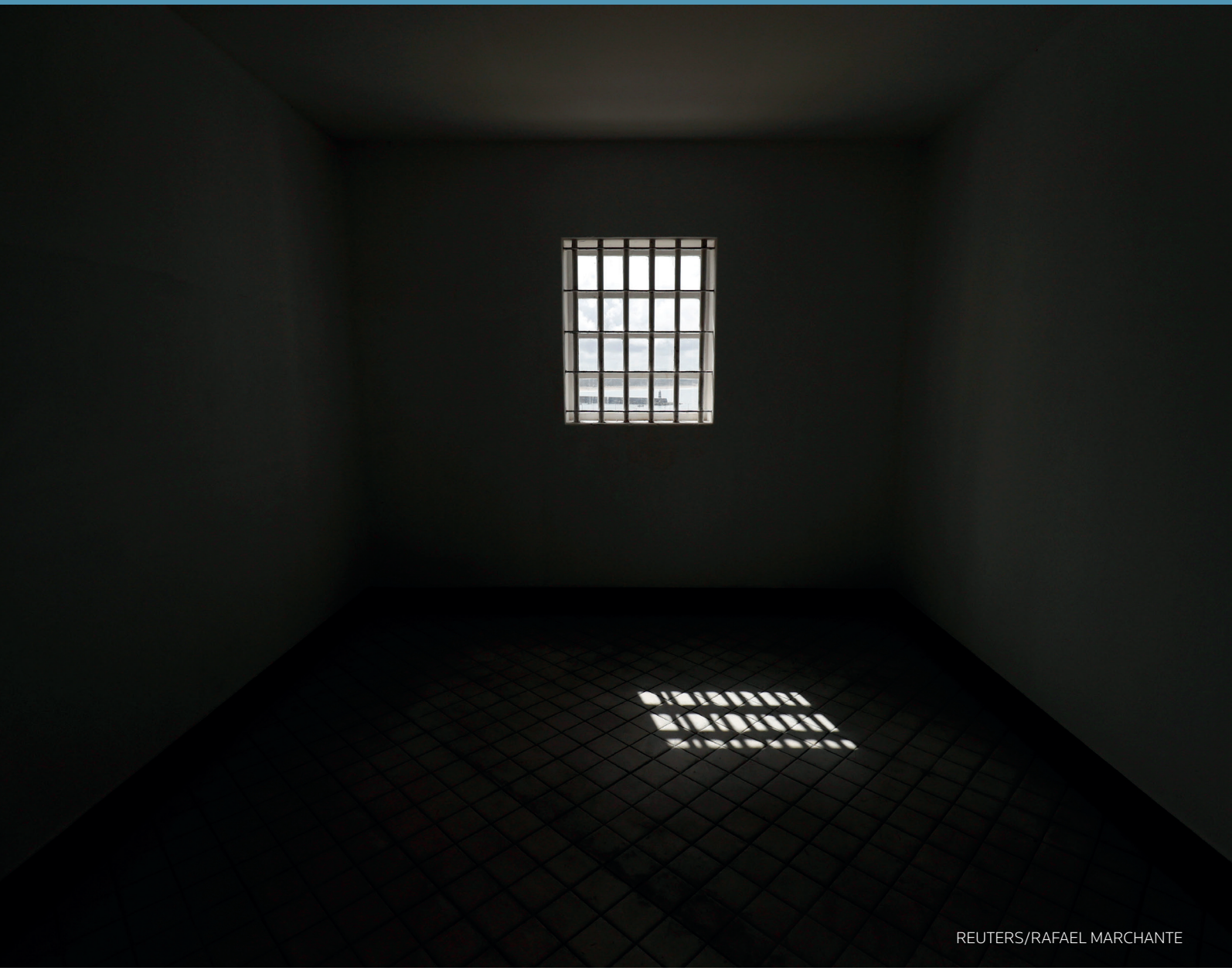
HELD HOSTAGE?

A LEGAL REPORT ON HOSTAGE-TAKING BY STATES IN PEACETIME AND THE VICTIM PROTECTION GAP

SEPTEMBER 2018



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FOREWORD

Individuals around the world have a right not to be arbitrarily detained and deprived of liberty. Hostage-taking by criminals is condemned and illegal but what happens when an innocent person is arbitrarily detained by a foreign State and used as a bargaining chip to achieve ulterior motives? Can this also be described as a hostage situation?

Certain States are notorious for deliberately targeting, arbitrarily arresting and detaining foreign individuals or dual nationals. Victims are often kept in solitary confinement until a forced confession is signed; there is limited access to a lawyer; evidence is fabricated and there are secret trials. Authorities imprison victims without offering valid reasons for the arrests and it is clear to most that they have a hidden agenda. These ulterior motives are often political and tied to disputes between States, or the action or inaction of the victim's State. Government officials typically use soft diplomacy to negotiate releases.

Hostage-taking behaviour by States violates international law during wartime but what laws and options can be relied upon when States commit such acts during peacetime? Are States powerless to rescue their citizens from hostage situations?

One of the goals of the Thomson Reuters Foundation is to strengthen the rule of law and human rights. TrustLaw is our global pro bono service that connects leading law firms and corporate legal teams with non-governmental organisations and social enterprises in need of free legal assistance. Through TrustLaw, we found outstanding lawyers and academics who worked incredibly hard to produce excellent comparative research on the issue of hostages. We are grateful to them, as well as to the activists and families who contributed their expert knowledge and time to make this legal report possible.

This report investigates the international and domestic legal frameworks that govern hostage-taking and aims to identify the protection gap in the law. It also reveals some of the actions States have taken during their attempts to free nationals of the United Kingdom, United States, Canada, France, Germany, Sweden, Austria and the Netherlands.

Our very own colleague at the Thomson Reuters Foundation, Nazanin Zaghari-Ratcliffe, has been imprisoned in Iran for almost two years and a half, of which 8 months have been in isolation. She was cruelly separated from her baby daughter Gabriella and has experienced unimaginable suffering, far from her husband Richard in the UK. This report offers friends and families of victims some insight into the hostage-taking phenomenon. We hope that it can be used to improve transparency in diplomatic processes and ensure the accountability of States.

Hostages held by States should not be ignored and forgotten. We will continue to do everything to help free Nazanin and draw attention to her plight. We trust that this report will be useful for the many advocates, friends, lawyers and families who are working to free their loved ones.

Monique Villa
CEO, Thomson Reuters Foundation

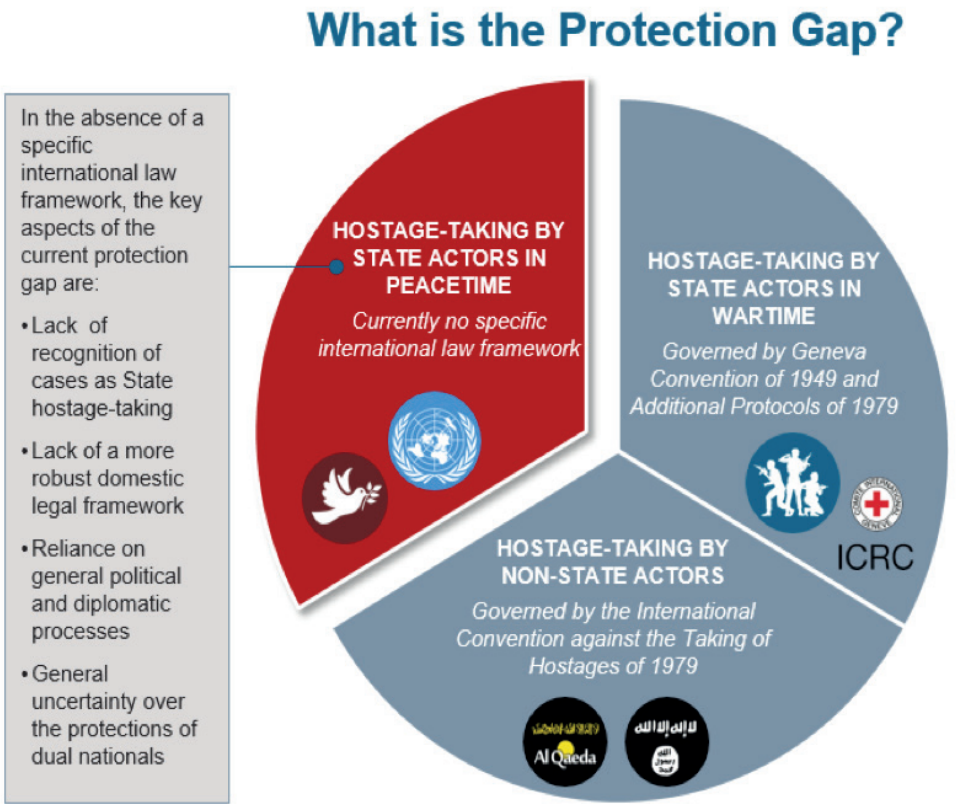
ABSTRACT

REUTERS/ELIANA APONTE

ABSTRACT

In recent years, a trend involving certain States detaining or imprisoning civilians who are dual nationals has become increasingly common. Such detentions frequently follow unfounded criminal charges, as a means by which the detaining State pursues ulterior national interests (e.g., as bargaining chips vis-à-vis other States). The circumstances of these detentions often fulfil the generally recognised international law definition of hostage-taking, and in such cases should therefore be referred to as hostage-taking. This change in perspective should shift the burden to require States that detain or imprison dual nationals to demonstrate why their activity does not amount to unlawful hostage-taking, rather than focusing on the purported actions of the victim.

Stakeholders — in particular, victims' families, defence counsel and government entities acting on behalf of the victims — attempting to deal with the growing number of incidents of State hostage-taking of civilians during peacetime face a clear protection gap in international law, international human rights law and the domestic legal and policy frameworks of States. The rising number of individuals that are falling victim to this growing phenomenon highlights an urgent need for governments to develop a collective response to close this protection gap — whether through a multilateral instrument, enhancements to domestic legal and policy frameworks or well-coordinated diplomatic démarches — to improve the protections afforded to affected individuals.



In order to analyse the protection gap, this report first describes the nuanced issues surrounding State hostage-taking in peacetime and outlines the scope of research that informs the subsequent legal analysis. The legal analysis describes the existing international law framework for protecting detained individuals and compares several domestic legal and policy frameworks that might address the protection gap. The report then outlines options for change at the national and international levels in both the shorter and longer terms. Annexes 1-9 below summarise the research carried out in respect of the international law and national law frameworks in more detail.

DEFINED TERMS

REUTERS/ROMEO RANOCO

DEFINED TERMS

"2015 Council Directive" means EU Council Directive (EU) 2015/637 of 20 April 2015.

"CAT" means Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

"ECHR" means the European Convention on Human Rights of 1953.

"European Prison Rules" means the European Prison Rules adopted by the Committee of Ministers of the Council of Europe in 1973 (Resolution 73.5).

"Geneva Conventions" means the Geneva Conventions of 1949 and their Additional Protocols of 1977.

"Hostages Convention" means the International Convention Against the Taking of Hostages of 1979.

"Human Rights Council" means the United Nations Human Rights Council.

"ICCPR" means the International Covenant on Civil and Political Rights of 1966.

"ICESCR" means the International Covenant on Economic, Social and Cultural Rights of 1966.

"ICJ" means the International Court of Justice.

"ICPAPED" means the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.

"JCPOA" means the Joint Comprehensive Plan of Action agreed between Iran, China, France, Russia, the United Kingdom, and the United States, Germany and the European Union on 14 July 2015.

"Nelson Mandela Rules" means the UN Standard Minimum Rules for the Treatment of Prisoners of 1957.

"State" means (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other states.

"Tokyo Rules" means the UN Standard Minimum Rules for Non-Custodial Measures of 1990.

"UDHR" means the Universal Declaration of Human Rights of 1948.

"UK" means the United Kingdom.

"UN" means the United Nations.

"UN Body of Principles" means the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988.

"UPR" means the Universal Periodic Review.

"U.S." means the United States of America.

"VCCR" means the Vienna Convention on Consular Relations of 1967.

"WGAD" means the UN Working Group on Arbitrary Detention.

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

1. WHAT IS THE PROBLEM?

1.1 Overview

This report addresses the current international law instruments and several examples of domestic legal and policy frameworks applicable to hostage-taking in peacetime, focusing on hostage-taking by States (rather than Non-state actors). The urgent need for review arises from an increasingly observable trend involving certain States detaining or imprisoning civilians, in particular dual nationals, frequently following unfounded criminal charges, as a means by which the detaining State subsequently pursues ulterior national interests (e.g., as bargaining chips vis-à-vis other States). A summary table setting out a (non-exhaustive) list of the media-reported cases is set out in Appendix 1.

In many cases, the circumstances in which the detentions arise and subsequently persist suggest the detentions are, at the very least, arbitrary: "arbitrary detention" is generally thought of as the deprivation of the liberty of an individual without any legal grounds or without respect to due procedures established by law.[1] Indeed, this has been confirmed by the **WGAD**, which has examined the circumstances of detained dual nationals in an increasing number of cases.[2] Yet, an investigation of the broader political context behind the States involved and the underlying motives of the detaining States suggest that the nature and circumstances of the detentions also satisfy the criteria of the generally recognised international law definition of hostage-taking.[3] The key feature of the offence of hostage-taking under international law is making the release of the prisoner contingent upon certain conditions, in order to compel a third party to do or refrain from doing certain actions. The ongoing detention of dual nationals by States would appear to fulfil this condition. The concessions requested and granted between States can take a variety of forms, including (but not limited to) an agreement on a prisoner swap, the settlement of a bilateral dispute, and/or the extension of some other economic or political benefit.

The characterisation of these detentions as hostage-taking should have implications for the way these situations are handled in terms of bilateral relations and international relations. This characterisation is necessary to highlight the urgent need for the international community to take action, to extend requisite protections to victims of such detentions, and to safeguard their human rights.[4] In fact, the lack of recognition by the international community of these situations as

1. This definition is derived from Article 9 of the ICCPR which preserves the right to liberty and security of person: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."
2. E.g. Opinion No. 28/2016 concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran); Opinion No. 52/2018 concerning Xiyue Wang (Islamic Republic of Iran).
3. See Article 1(1) of the Hostages Convention. See also the interpretation of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in Prosecutor v. Tihomir Blaškić (Case No. IT-95-14-A, 29 July 2004) and Prosecutor v. Ratko Mladić (Case No. IT-09-92-T, 22 November 2017).
4. Hereinafter, these situations are referred to as "hostage-taking".

hostage-taking is a key part of the current protection gap. Currently, hostage-taking States benefit from an a *priori* assumption of legitimacy when prosecuting and detaining individuals under their own domestic laws. As a result of this assumption, the victims of State hostage-taking and their families are initially required to demonstrate to their own governments and the international community why the criminal allegations made by the hostage-taking State are not well-founded. The international community's focus should instead be on the actions of the hostage-taking State. In particular, the burden should be on the hostage-taking State to demonstrate why its actions do not amount to unlawful hostage-taking. This requirement could be formalised through the codification of existing international law principles which would explicitly and specifically prohibit State hostage-taking.

Dual nationals have emerged as a key target of the recent phenomenon of State hostage-taking incidents. While there are no official statistics for the number of dual nationals worldwide, the figure is thought to run into the tens of millions. This highlights the number of potential victims at risk, especially in those countries where the phenomenon has been reported most frequently.

The hostage-taking of dual nationals has been observed most acutely in Iran where a spate of detentions has arisen in recent years, in particular following agreement on the **JCPOA** in July 2015. While there are no official statistics, there are an estimated five million Iranian dual nationals worldwide. Despite this prevalence, Iran does not formally recognise dual nationality, which can entrench the gap in international protection afforded to victims. However, the phenomenon of State hostage-taking is not confined to Iran. According to press reports, comparable situations have arisen in a number of other countries including, but not necessarily limited to, Egypt, Ethiopia, and Turkey.

The very concept of the hostage-taking of civilians by a State actor is blatantly at odds with international human rights law. However, the sovereignty of States under international law presents a clear hurdle to addressing this divergence. The existing international law framework does not afford individuals a direct right of recourse against hostage-taking in peacetime if the hostage-taker is a State (or a person acting under the direction or on behalf of a State). Individuals therefore currently remain at the mercy of the political and diplomatic processes of the country of their nationality, which carries an inherent degree of uncertainty given that such processes often lack formality, accountability, and transparency. The sovereignty of the hostage-taking State, and the delicacy with which the allegations of hostage-taking need to be addressed, place a significant burden on victims, who must react within the currently applicable political and diplomatic processes. A further layer of complexity arises if the individual is a national of both the hostage-taking State and a second country, as detailed in Section 2.1 below. In order to explicitly protect victims of hostage-taking in peacetime under international law where the hostage-taker is a State, either a new international treaty, or a modification of existing treaties is needed to codify and extend existing principles of international law to such circumstances.

The clear protection gap to which a rising number of detained individuals are exposed calls for governments to develop a collective response — whether through a multilateral instrument, amendments to domestic legal and policy frameworks or well-coordinated diplomatic démarches — to improve the rights and remedies afforded to affected individuals, both during their detention and after release.

1.2 Scope of research

In view of the growing number of dual nationals who have been taken hostage by State actors globally, this report seeks to gain a deeper understanding of the current international law framework applicable to this situation as well as the relevant current domestic legal and policy frameworks in a number of key jurisdictions across the world. These jurisdictions — Austria, Canada, France, Germany, the Netherlands, Sweden, the UK, and the U.S. (each, a "**Key Country**" and together, the "**Key Countries**") — were selected on the basis that a number of dual national citizens of these countries have fallen victim to hostage-taking by State actors. The overall goal of the research is to highlight the observed protection gap, in law and in practice, across the applicable legal frameworks, and to attempt to distil a set of options across the Key Countries that the international community could implement to improve the rights and remedies available to individuals, both at the national and international law level.

The research underlying this report was carried out through targeted questionnaires that contained a series of questions directed at local lawyers (including subject-matter experts) in the Key Countries to elicit information on (a) the current international law framework governing this situation, (b) the implementation within the Key Countries of the relevant international law instruments, (c) the current domestic legal framework in the Key Countries and the perceived protection gaps in that legal framework, and (d) the current domestic policy framework and the extent to which general policy principles have emerged based on that Key Country's handling of recent situations that have arisen. Summaries of this research are set out in Annexes 1-9 below.

The results of this research inform this report's (1) overall comparative analysis of the observed protection gap, both at the international law level and across the Key Countries, and (2) attempt to distil a set of policy options across the Key Countries that the international community could implement to help improve the rights and remedies available to affected individuals.

2. COMPARATIVE OVERVIEW OF INTERNATIONAL AND DOMESTIC LEGAL AND POLICY FRAMEWORKS

2.1 Current international law framework

(a) Current treatment of "hostage-taking" under international law

The **Hostages Convention** and **Geneva Conventions** are the two most relevant instruments currently applicable to hostage-taking. Neither instrument, however, addresses hostage-taking in peacetime if the hostage-taker is a State, or an entity or individual acting under the direction or on behalf of a State.

The Hostages Convention was the first international law instrument to codify a general prohibition against the taking of hostages in peacetime. However, it addresses only cases in which the hostage-taker is an individual, not a State.[5] While the drafters of the instrument envisaged that, as regards the hostage-taker, a "person" within the meaning of the Hostages Convention could, in principle, include an agent of a State, the Hostages Convention does not provide for any rights enforceable against States as hostage-takers, nor does it address the limitations of protections due to the principles of State immunity.[6] Crucially, the Hostages Convention explicitly carves out a State's intrastate matters from its remit, and so if the dual national is also a national of

5. See First Report of the Ad Hoc Hostages Committee, p. 64, paras. 18, 21.
6. Hostages Convention, full text.

the State in which he or she is being held hostage, the detaining State may argue that the Hostages Convention does not apply because the matter is an intrastate matter (in other words, between a State and its own citizen). Thus, if a State does not recognise dual nationality (for example, in the context of the recent instances of State hostage-taking in Iran), the limited protections afforded under the Hostages Convention may be denied completely.

In contrast, the Geneva Conventions impose obligations on States that are parties to the conventions, including the obligation to prevent hostage-taking. In addition, since the Geneva Conventions are silent on the issue of intrastate matters, they would not appear to view dual nationality as a bar to protection. However, the limitation of the Geneva Conventions is that they only apply during times of armed conflict.

Thus, clearly there exists a protection gap in international law with respect to protections afforded to civilians taken hostage by States during peacetime.[7]

(b) General human rights treaties

While general human rights treaties do not expressly cover hostage-taking, there are a number of other international law instruments that provide certain protections to persons detained, imprisoned, or otherwise deprived of their liberty, including if the perpetrator is a State or a party acting on behalf of a State. For example, the **ICCPR** and the **UDHR** provide a range of protections relevant to circumstances of hostage-taking and/or prolonged incarceration, including the right to life, liberty, and security of person, by prohibiting, inter alia, the subjection of any person to arbitrary arrest and detention, and granting individuals the right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment. In addition, while the **CAT** establishes a number of obligations on all State parties, since its entry into force, the absolute prohibition against the infliction of torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law. Thus, these treaties prescribe universally acknowledged rights that must be protected and which therefore mandate States to make efforts to close the protection gap apparent in the case of State hostage-taking during peacetime.

In addition to these general human rights treaties, certain UN instruments — namely the **Nelson Mandela Rules**, the **UN Body of Principles**, and the **Tokyo Rules** — are instructive as to the minimum acceptable standards for the treatment of prisoners, the avoidance of detention and imprisonment (where possible), and the use of non-custodial measures as alternatives to imprisonment. These instruments should therefore act as compelling guidance in the development of any new legal regime or international instrument governing hostage-taking in peacetime.

The protection gap concerning hostage-taking by State actors in peacetime also highlights the observable lack of explicit protections under international law instruments for persons with dual nationality. Few instruments afford any specific protections to, or otherwise address the circumstances of, persons who are nationals of more than one State. Accordingly, States would need to agree upon new principles to ensure the consular rights and diplomatic protections of hostages who are dual nationals. In particular, given that the lack of explicit protections, there is a clear gap in the framework established by the **VCCR** in respect of the diplomatic and consular relationship between sovereign States in circumstances in which the detained individual is a

7. While the limitations of the Hostages Convention and the Geneva Conventions do give rise to a gap with respect to protections afforded to civilians taken hostage by States during peacetime, they are instructive in providing a possible definition that could be used in any future international law instrument to create the crime of hostage taking perpetrated by States and their agents in peacetime.

national of both the offending State and another State.

Finally, existing protection mechanisms should inform considerations of the options that should be pursued to bring about change at the international law level in order to close the protection gap. The **WGAD** has a broad mandate to investigate individual cases of arbitrary detention, amongst others. Separately, the **UPR** is a compulsory mechanism to review human rights compliance by UN Member States. However, these mechanisms merely highlight human rights abuses committed by States. Neither of these bodies provides for a direct enforcement mechanism to compel the offending State to act or refrain from acting in a certain way.

Although it is clear that State hostage-taking of civilians during peacetime contravenes generally recognised principles of international law (including principles derived from the above-mentioned human rights treaties), no international treaty currently addresses this specific situation.

2.2 Comparative analysis of domestic legal and policy frameworks

(a) Implementation of key international law obligations

All Key Countries have ratified the key international law treaties relevant to the issue of hostage-taking, namely the Hostages Convention and the Geneva Conventions. In addition, all Key Countries have ratified key human rights instruments such as the ICCPR that afford individuals a range of general human rights — notably, the right to life, liberty, and security of person — and which prohibit any person from subjecting another person to arbitrary arrest and detention. The obligation to protect these rights mandates that States intervene to close the protection gap in cases of hostage-taking by foreign State actors.

The implementation of, and ongoing compliance with, the key international law obligations in the Key Countries can be summarised as follows:

- *Implementation of key treaties.* All Key Countries have ratified the Hostages Convention and the Geneva Conventions, the key human rights instruments such as the ICCPR and (where applicable) the CAT, and other relevant treaties such as the VCCR. While the basic principles underpinning these treaties are generally followed, the extent to which these international law instruments have been specifically implemented into domestic law varies.[8] Moreover, while not specifically implemented, in the development of domestic legislation and practices, most of the Key Countries have drawn, and continue to draw, on the principles contained in the Nelson Mandela Rules, the UN Body of Principles, and the Tokyo Rules.[9]
- *Notable reservations.* None of the Key Countries has placed any notable reservations on the ratification of the relevant international law treaties outlined above.
- *Compliance and monitoring reports.* All Key Countries are subject to regular monitoring in compliance with the international treaties. In particular, France, the UK, and the U.S. have all been subject to complaints before the WGAD. Moreover, most of the Key Countries have submitted a number of

8. For example, the international law treaties ratified by the Netherlands are directly applicable under certain conditions. Austria has implemented many of its international human rights obligations through its constitution and numerous national laws. Other countries such as Austria, Canada, France Germany, Sweden, and the UK have specifically implemented some of the international law treaties relevant to hostage-taking, conditions of imprisonment and general human rights. At the other end of the spectrum, the U.S. often does not specifically implement the international law treaties which it has signed and ratified by way of binding domestic legislation.

9. In Europe, all Key Countries have either specifically aligned their domestic laws with, or otherwise aim to apply, the European Prison Rules of 2006 which are based on the Nelson Mandela Rules.

compliance and monitoring reports in relation to their international human rights obligations, but none is directly relevant to hostage-taking.[10] In particular, none of these reports addresses the recent phenomenon of hostage-taking by State actors.

(b) Criminalisation of hostage-taking

In each of the Key Countries, hostage-taking is criminalised in accordance with the Hostages Convention. However, the relevant offences do not go beyond the definition of hostage-taking enshrined in the Hostages Convention to any material extent, and so do not explicitly cover instances of hostage-taking by State actors or officials acting on behalf of a State.

The scope of the relevant offences of hostage-taking in each of the Key Countries can be summarised as follows:

- *Scope of the relevant offences.* In most of the Key Countries, the scope of the relevant offences of hostage-taking is generally in line with the definition of hostage-taking under the Hostages Convention.[11] In particular, consistent with the scope of the Hostages Convention, the identity of the hostage-taker appears to be limited to individuals and in none of the Key Countries does the relevant offence of hostage-taking explicitly envisage a scenario in which the hostage-taker is a foreign State actor. While the relevant offences could, in principle, be used by the non-hostage-taking State to prosecute cases in which the hostage-taker is a foreign State official, in practice, immunity from criminal prosecution of foreign State officials may prevent such prosecutions in most of the Key Countries.[12] However, in Canada and the UK courts have recognised that there is no functional immunity for foreign State officials in criminal proceedings relating to some of the most serious crimes such as torture and so, in principle, there would be no automatic bar in prosecuting the relevant offence if the hostage-taker is a foreign State official.[13]
- E*xtraterritorial scope of relevant offences.* In each of the Key Countries, the relevant offences have extraterritorial reach in accordance with Article 5 of the Hostages Convention. Accordingly, jurisdiction can, in principle, be asserted by a State extra-territorially, if (a) the hostage is a national of the State, (b) the hostage-taker is a national or permanent resident of the State, or (c) the State's government is targeted by the act of hostage-taking (by virtue of the hostage-taker attempting to coerce that State to make a particular concession). In addition, the UK offence has a broader reach as it applies irrespective of the nationality of either the hostage or the hostage-taker, or the identity of any third party that the hostage-taker attempts to compel.
- *Dual nationality of hostage is not a bar to prosecution.* None of the Key Countries draws a distinction based on the nationality of the hostage and so, *prima facie*, the dual nationality of the hostage would not ostensibly present a bar to prosecuting the relevant offences. However, Article 13 of the Hostages

10. Note that Canada has recently submitted a monitoring report to the UN Human Rights Committee that addresses arbitrary detention in the domestic context.
11. Note that the scope of the relevant offence in Germany and the UK appears to be slightly broader. (Sections 234a, 239 to 239b (inclusive) of the German Criminal Code and Section 8 subsection 1 No. 2 of the German Code of Crimes Against International Law; Section 1 of the Taking of Hostages Act 1982). In addition, under both Austrian and French legislation, the offence of hostage-taking can be viewed as a terrorist offence carrying a greater maximum punishment, if there is an intention to disturb the public order with intimidation or terror. (Article 278c of the Austrian Criminal Code; Article 421-1 of the French Criminal Code).
12. Only the most senior level officials are entitled to benefit from personal immunity. Accredited diplomats are entitled to benefit from diplomatic immunity. Most regular state officials' entitlement is limited to functional immunity which attaches to the work they do as part of their usual functions. Academic opinion is currently divided on the question of whether functional immunity is available for state officials who have committed acts of torture, war crimes or hostage-taking. Some commentators argue that ICTY and ICJ cases have established the principle that functional immunity is no longer available for such acts.
13. In respect of the UK, this was confirmed in the House of Lords decision in R v Bartle Ex p. Pinochet Ugarte (No. 1) [2000] 1 AC 61. The House of Lords confirmed that foreign State officials are not protected from criminal prosecution for torture in the UK by functional immunity.

Convention provides that the Hostages 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."[14] In practice, States have shown a reluctance to protect dual nationals detained in the country of its other nationality and that country does not recognise dual nationality. This is a crucial aspect of the current protection gap in light of the recent surge of cases of dual national hostages. Therefore, any relevant domestic legislation that is enacted to apply to State hostage-taking situations should explicitly confirm that Article 13 of the Hostages Convention does not apply to cases of dual nationality.

Since the criminal offences of hostage-taking do not explicitly apply to foreign State hostage-takers, the Hostages Convention explicitly does not apply to domestic hostage-taking cases, and none of the Key Countries has to date prosecuted foreign State actors under the current offences. There, therefore, is a real need for the international community to enact specific laws that squarely cover a scenario in which the hostage-taker is a foreign State actor, so that there is no ambiguity as to the protections granted and their intended scope.

(c) General policy of political and diplomatic engagement in Key Countries

Outside the general legal framework for hostage-taking outlined above, none of the Key Countries has a specific domestic legal framework to deal with situations in which a citizen of the State is taken hostage by a foreign State actor. Governments in the Key Countries currently rely on their political and diplomatic processes to deal with such situations. Such processes inherently lack transparency and afford individual hostages minimal legal protection. The absence of a clear legal or policy framework and the reliance on political and diplomatic processes is a key part of the current protection gap apparent across the Key Countries. More specifically:

- Apart from the U.S., none of the Key Countries is bound by an affirmative duty to resolve hostage-taking situations which arise outside the State.[15] In the U.S., applicable federal law directs the President of the United States to use all "necessary and proper means" to obtain the release of a U.S. national unjustly held by a foreign State.
- Each of the Key Countries adopts a discretionary, case-by-case approach in affording assistance to nationals abroad, including in State hostage-taking situations. In most of the Key Countries, there is no legal right to consular assistance, although there is a policy of providing assistance (though this is not legally enforceable).[16] Certain countries, such as the UK and the U.S., appear to prefer to maintain a flexible approach to hostage-taking situations involving a foreign State, due to concerns around potential repercussions that may be taken by foreign States against their foreign officials should those government use criminal procedures.
- Most of the Key Countries have an explicit policy against incentivising hostage-takers. Accordingly, while not specifically criminalised,[17] each of the Key Countries has an official policy stance against making ransom payments or other substantive concessions to hostage-takers. However, certain Key

14. Hostages Convention, Article 13.
15. For example, in Germany, while the German government has an obligation to uphold the hostage's constitutionally guaranteed right of freedom, the protections afforded are limited to diplomatic means.
16. Note that Sweden has a legal right to consular assistance in certain circumstances, see Annex 7.
17. Subject to the general prohibition against financing terrorism provided by the International Convention for the Suppression of the Financing of Terrorism.

Countries adopt a more flexible approach, or at least retain more flexibility in practice. For example, according to a ruling of the German Federal Constitutional Court, although Germany has an official policy of not making ransom payments, this policy does not restrict the German government's discretion to conduct negotiations as it sees fit, including the making of ransom payments to hostage-takers provided that the decision is based on valid grounds. The German Constitutional Court has deemed that the payment of a ransom in order to free a German national is always a valid ground.[18]

- Most of the Key Countries do not provide lesser protection to dual nationals than they do to individuals who are solely their nationals.[19] In fact, the Dutch Ministry of Foreign Affairs has publicly stated that consular assistance applies equally to dual and non-dual Dutch nationals. In contrast, the UK Foreign and Commonwealth Office's stated policy is that consular assistance is not generally offered to dual nationals in disputes arising with the country of the dual national's other nationality, although exceptions have been made in cases where the detainee is "particularly vulnerable".[20] Similarly, since Canada addresses hostage cases as consular cases, it can be more difficult for Canada to provide consular assistance to dual nationals, both practically and legally.

(d) Specific mechanisms in Key Countries

Within the general policy framework of each of the Key Countries, there is a variety of policy approaches which have been used with particular success in specific situations. Together, these could inform governments of the domestic options that may be considered in dealing with State hostage-taking situations.

These specific policy approaches include:

- *Creation of a dedicated team within government.* The creation of special teams within the government to manage situations of State hostage-taking may be a crucial measure in the overall handling of hostage-taking situations, in particular for the families of the individual hostage. For example, a sub-group within the French Foreign Ministry known as the *Centre de Crise et de Soutien* is tasked with establishing contact with the hostage's family, keeping them updated, and providing legal and administrative support and psychological assistance if required. In the U.S., cases of State hostage-taking are now handled by the Special Representative of Hostage Affairs. In the UK, cases of State hostage-taking are now handled by the Special Cases team.
- *Use of third-party mediators.* In a number of recent State hostage-taking cases, third-party mediators have been used. For example, Oman reportedly acted as a third-party mediator in securing the release from an Iranian prison of Canadian-Iranian dual national, Homa Hoodfar, in September 2016. However, governments of some countries may at times express a reluctance to engage a third-party mediator to facilitate talks, in particular due to the perceived risks that may arise from the various lines of communication and the involvement of third parties. Nevertheless, it can be a useful tool in certain situations and, in fact, is a necessary tool if the concerned States do not have a diplomatic relationship.

18. This is pursuant to a decision of the Constitutional Court in the case of German former President of the Employer Association Hanns-Martin Schleyer, who was abducted by terrorists of the Red Army Faction in 1977 to obtain the release of other incarcerated Red Army Fraction terrorists. Cf. Constitutional Court, verdict of the First Senate of October 16, 1977, docket no. 1 BvQ 5/77 (in German language) regarding the duty of the country to protect victims of hostage-taking according to Article 2 subsection 2 Basic Law for the Federal Republic of Germany.
19. Letter of the Minister of Foreign Affairs, Gedetineerdenbegeleiding buitenland, 10 October 2014 (link).
20. UK Foreign and Commonwealth Office guidance document, page 5.

- *Possibility of civil claims against foreign State governments.* In the U.S., a number of avenues have been used to bring civil claims against foreign governments for damages caused by hostage-taking, for example under the Foreign State Immunities Act of 1976. In the UK, States and foreign State officials are protected from civil claims by the State Immunity Act 1978.[21]
- *Enactment of a Magnitsky's law.* The "Magnitsky Act" (as it is commonly referred to), which came into force in the U.S. in December 2012, allows the U.S. government to sanction gross violators of human rights, freeze their assets, and ban them from entering the U.S..[22] Equivalent measures came into force in Canada in October 2017, and in the UK in May 2018 by way of domestic legislation. While these laws may not provide direct legal recourse for victims of hostage-taking, the laws give States the ability to impose targeted sanctions on individuals who have committed gross human rights violations and may prove to be a powerful deterrent and tool for dealing with live situations.
- *Negotiation of an ongoing trade deal or settlement of a bilateral dispute.* The boundaries between certain State activities, such as negotiating an ongoing commercial relationship, settling a bilateral dispute and granting substantive concessions (including ransom payments) in dealing with a hostage-taking situation are not always clear. However, the distinction between each of these activities is an important (albeit delicate) one to make. Any policy against the grant of substantive concessions (including ransom payments) should not be viewed as a block to managing inter-State commercial relationships or ongoing bilateral disputes. In dealing with hostage-taking situations in recent years, certain governments have been willing to bifurcate pre-existing commercial negotiations or ongoing disputes from existing government policy against granting substantive concessions in order to bring about the release of a hostage. For example, in securing the release of four American prisoners (of which three were U.S.-Iranian dual nationals), the U.S. government was reported to have resolved an underlying separate financial dispute with the Iranian government that dated back more than three decades. In short, although the approach may not be without criticism, the research shows that retaining flexibility in this respect can be an important tool in a government's suite of options to deal with State hostage-taking situations.

Appendix 2 below sets out a more extensive comparative overview of the various policies adopted by the Key Countries over the last ten years.

3. OPTIONS FOR CHANGE

As summarised above, the levels of protection available to an individual that is taken hostage vary depending on the jurisdiction in which the hostage is detained and the nationality of the hostage. Taking into consideration the various domestic law approaches as well as the current international legal framework, this Section provides a non-exhaustive summary of the possible approaches that could be considered for implementation at a national and international level in order to enhance protections for anyone taken hostage in a foreign State (and their families).

21. Al-Adsani v the United Kingdom ECtHR Application no. 35763/97, dated 21 November 2001; and Jones and Others v. the United Kingdom ECtHR Application nos. 34356/06 and 40528/06, dated 14 January 2014.
22. Sections 404-406, H.R. 6156, the "Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012."

3.1 International level recommendations

The international community could implement a variety of measures to narrow the protection gap identified above in relation to hostages.

(a) Shorter-term options at the international level

The international government can consider the following options in the nearer term:

- *United Nations Special Rapporteur.* Create a new United Nations Special Rapporteur for Hostages position. This would provide an avenue for pushing action and resolution at an international level in relation to ongoing hostage situations, and ensure accountability of States and State officials after the resolution of a hostage situation. This may also lead to increased recognition of certain situations as hostage-taking, thereby ensuring greater protection.
- *Intergovernmental cooperation between law enforcement bodies.* Encourage governments to work together bilaterally and multilaterally using existing international cooperation structures to facilitate joint démarches in law enforcement. A more effective intergovernmental response to hostage situations would not only improve investigations of hostage situations in the short term, but could also act as a deterrent if an enforceable international law prohibition were to be adopted in the future.
- *Intergovernmental cooperation with regard to victims.* In addition to arranging collective meetings at a national level, arrange collective meetings with victims in multiple jurisdictions. This could serve as a useful forum for victims' families to discuss potential solutions with representatives from different governments.
- *United Nations Working Group.* Create a new United Nations Working Group for Hostages and/or revise the mandate of the WGAD to expressly protect cases of hostage-taking, as a specifically recognised category of arbitrary detention.
- *UPR.* Ahead of the next UPR reporting round, ensure all States provide sufficient information in relation to potential cases of hostage-taking and/or arbitrary detention before the review of a State that has been identified as taking foreign nationals hostage.
- *Multilateral political and economic sanctions pursued by States affected by hostage-taking.* Although likely to worsen diplomatic relations between relevant States in the short term, the imposition of sanctions could act as a deterrent against future hostage-taking.

(b) Longer-term options at the international level

Looking further ahead, the international community may consider establishing additional international law instruments to further close the protection gap.

- *Revise existing treaties.* Revise the Hostages Convention so that it better aligns with the role of the new Special Rapporteur (suggested above), introduce protection against State action, and provide for direct redress against States in breach of the Hostages Convention to improve accountability and deterrence. Introduce a monitoring mechanism so that independent bodies are able to visit the hostage to ensure that human rights protections have been complied with.[23]

23. A similar mechanism is provided for under Article 1 of the additional protocol to the CAT.

- *States to pursue direct legal recourse under existing legal enforcement mechanisms.* Most treaties create obligations of States vis-a-vis other States, meaning that treaty enforcement or special procedures do not give individuals any standing. Governments could bring State to State claims at the ICJ on the basis of the VCCR or other international human rights law mechanisms (*e.g.* the CAT).
- *States to adopt UN resolution on the recognition of dual nationality.* Such a resolution would state that whether or not a detaining State recognises dual nationality is not the basis for determining the rights and obligations to dual nationals owed to them by virtue of their other nationality. This would extend existing international law protections to dual nationals held captive in the jurisdiction of one of their nationalities.
- *Introduce new international convention.* Introduce a new multilateral convention for imposing sanctions, or providing individuals with directly enforceable rights, against States that engage in hostage-taking during peacetime. Such a convention may draw upon the existing definition of hostage-taking under the Hostages Convention and the Geneva Conventions in order to codify existing principles of international human rights law to prohibit "hostage-taking" by State actors during peacetime, and expressly protect dual nationals. This would provide specific international treaty protection for rights already subsisting under customary international law. Such a convention may also provide international law mechanisms for individuals or their families to qualify and obtain recognition under international conventions and the protections afforded by them (and by the UN, the hostage-taking State, and the victim State). In particular, adequate protections of persons imprisoned or detained whilst taken hostage can be introduced, including the provision of access to legal representation, adequate living conditions and medical treatment, contact with family and loved ones, and information about the terms and duration of any detention. Furthermore, such an instrument may contain enforcement mechanisms to provide for adequate remedies (including interim ones) beyond consular channels.
- *States to acknowledge that individuals have standing to enforce their rights under the VCCR at the ICJ and agree on remedies for breaches.* Complaints of violations of the VCCR may be brought before the ICJ, although there is an ongoing debate as to whether the right of enforcement belongs with the State (the position taken by the United States Supreme Court) or with the individual (a position which has been accepted by the ICJ). While the ICJ has heard cases including violation of the rights protected under Article 36 of the VCCR, the ICJ has not specified an appropriate remedy for such violations. Instead, the ICJ has left the fashioning of a remedy to the domestic courts to give "full effect" to the purpose and meaning of Article 36 of the VCCR. States could therefore agree a new system of remedies for breaches of rights protected by Article 36 of the VCCR.

3.2 National level recommendations

State governments are restricted by the need to respect another State's sovereignty and the principle of state immunity. However, States can consider implementing a variety of additional protections to meet their general obligations under international (and national) law to protect hostages' human rights.

(a) Shorter-term options at the national level

Whilst changes in official policy, national legislation, and international treaties require a substantial amount of time to implement, in the short term States may consider adopting a framework or other guidance (as appropriate for the jurisdiction) to provide additional support and protection for their citizens as hostages.

Based on the research conducted for this report, actions for States to consider include:

- *Governmental body or dedicated government team.* Create a specific governmental body to whom a hostage, or their family, can raise their individual case. This would grant individuals direct recourse to the government of the hostage's nationality when seeking assistance.
- *Commitment to meet victims' families soon after commencement of a hostage situation.* Experience indicates that governments can be slow to respond to requests from victims' families to meet in the early stages of a hostage situation. This limits the families' ability to gather information and respond quickly. It also exacerbates the stress suffered by victims' families. This contrasts with how a domestic kidnapping situation would be handled.
- *Information resources.* Whether through a specific governmental body or otherwise, collate and maintain an up to date information pack and a list of resources (including, but not limited to, contact details of human rights non-governmental organisations) as an initial step towards assisting a hostage or their family. This may help victims and their families understand the process of redressing the hostage situation through the government, details of any assistance that is available nationally, and any consular assistance available abroad and may be particularly helpful at the initial stages of a hostage-taking situation.
- *Dealing with cases collectively.* Subject to consent of all parties involved, arrange collective meetings with victims' families rather than dealing with hostage situations on an individual basis. This could enable a more consistent and effective approach to hostage situations and provide families with a greater degree of information in relation to how cases are handled by the relevant government. Furthermore, this would also be an effective way for victims' families to show solidarity in dealing with these situations.

(b) Longer-term options at the national level

In addition to more straightforward avenues of assistance that may be adopted quickly, States may also consider whether any of the following options can and/or should be implemented nationally in the longer term to extend protections for their citizens held hostage abroad.

Based on the research conducted for this report, examples of approaches adopted in the Key Countries include:

- *Official policy of assistance for dual nationals.* Issue an official policy to provide dual nationals with consular assistance and details of how to request and/or obtain such assistance. The content of the policy itself need not be public (to allow the government to retain any required flexibility), however the presence of an official policy (including conduct and response standards) would provide more accountability of the relevant government body responsible for dealing with hostage situations toward the hostage and the hostage's family.
- *Magnitsky's law.* Enact a Magnitsky law, which would provide States with an alternate but direct route to address human rights violations by third-party States (for example, by imposing sanctions on a State that is holding or has held its citizen hostage). This would pave the way for accountability of States who take individuals hostage.
- *Domestic legislative amendments.* Enact new legislation to provide a direct form of redress for a victim of hostage-taking in the national courts, whether by way of monetary compensation or otherwise, as well as enshrining any of the above options in legislation.

- *Refusal of state immunity.* Refuse diplomatic immunity for any consulate official whose government has taken an individual hostage in relation to any acts taken by that consulate official. Refuse to accredit diplomats against whom there are credible allegations of involvement in State-hostage taking or other crimes under international law.
- *Ransom payment policy.* Reconsider the characterisation of prior claims made by the detaining State and whether there is any basis for such claims. Where there is a pre-existing basis for the claim, some States have demonstrated a willingness to bifurcate pre-existing commercial negotiations or ongoing disputes from existing government policy against granting substantive concessions to bring about the release of a hostage.

4. FINAL REMARKS

There exists a clear protection gap in public international law and international human rights law with respect to protections afforded to civilians taken hostage by States during peacetime. In addition, based on an analysis of the protections afforded in each of the Key Countries, this protection gap has not been closed at the national level where the domestic legal framework broadly mirrors the international framework. Within this context, where situations of State hostage-taking arise, governments (at least, in the Key Countries) rely on their political and diplomatic processes to deal with such situations. These processes inherently lack transparency and afford individual hostages little to no binding protections. This absence of a clearly applicable legal or policy framework, and the reliance on political and diplomatic processes, constitutes the current protection gap across the Key Countries.

This report has highlighted a number of shorter and longer-term options that could be considered by States for change at both the national and international level to close the protection gap. These options demand urgent attention in order to afford the requisite level of protection to the rising number of victims of State hostage-taking.

APPENDICES

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APPENDICES

APPENDIX 1 – OVERVIEW OF SELECTED REPORTED CASES OVER PAST TEN YEARS

The below table sets out a non-exhaustive summary of cases we identified as potential State hostage-taking as of 17 September 2018 in respect of (i) dual-nationals and permanent residents (of which one of the nationalities or the permanency residency is that of a Key Country); (ii) detained abroad by a foreign State; and (iii) within the last ten years. Since the information is primarily based on public sources, it may not be completely up to date, given the inherently covert nature of these cases.

	Detaining country	Nationality / Residency Status	Name	Start of detention	Status
Austria					
1.	Iran	Austrian-Iranian dual national	Kamran Ghaderi	2 January 2016	Currently detained
Canada					
2.	Iran	Iranian national with Canadian permanent residency	Saeed Malekpour	October 2008	Currently detained
3.	Iran	Canadian-Iranian dual national	Maziar Bahari	June 2009	Released 20 October 2009
4.	Egypt	Canadian-Egyptian dual national	Mohamed Fahmy	29 December 2013	Released September 2015
5.	Iran	Canadian-Iranian dual national	Homa Hoodfar	6 June 2016	Released September 2016
6.	Iran	Canadian-Iranian dual national	Abdolrasoul Dorri-Esfahani	August 2016	Currently detained
7.	Iran	Canadian-Iranian dual national	Kavous Seyed Emami	24 January 2018	Died in custody on 8 February 2018
8.	Iran	Canadian-Iranian dual national	Maryam Mombeini	Prevented from leaving Iran on 7 March 2018	Prevented from leaving Iran
France					
9.	Iran	French-Iranian dual national	Nazak Afshar	Charged in 2009 and released. Arrested on return to Iran in April 2016	Currently detained
Germany					
10.	Turkey	German-Turkish dual national	Ali Ince	22 July 2016	Currently detained
11.	Turkey	German-Turkish dual national	Deniz Yücel	14 February 2017	Released 15 February 2018
Netherlands					
12.	Iran	Dutch-Iranian dual national	Zahra Bahrami	27 December 2009	Executed in 2011
13.	Iran	Dutch-Iranian dual national	Sabri Hassanpour	19 April 2016	Released May 2018
Sweden					
14.	Iran	Swedish-Iranian dual national	Ahmadreza Djalali	April 2016	Currently detained

	Detaining country	Nationality / Residency Status	Name	Start of detention	Status
United Kingdom					
15.	Iran	British-Iranian dual national	Kamal Foroughi	5 May 2011	Currently detained
16.	Iran	British-Iranian dual national	Roya Nobakht	October 2013	Released 25 August 2017
17.	Ethiopia	British national with Ethiopian heritage	Andargachew Tsege	June 2014	Released 29 May 2018
18.	Iran	British-Iranian dual national	Ghoncheh Ghavami	20 June 2014	Released 23 November 2014
19.	Iran	British-Iranian dual national	Bahman Daroshafaei	3 February 2016	Released February 2016
20.	Iran	British-Iranian dual national	Nazanin Zaghari-Ratcliffe	3 April 2016	Currently detained
21.	Iran	British-Iranian dual national	Mohammad Reza Hashemi-Nabi	23 December 2016	Currently detained
22.	Iran	Iranian national with UK residency	Aras Amiri	March 2018	Unconfirmed
23.	Iran	British-Iranian dual national	Mahan Abedin	April 2018	Currently detained
24.	Iran	British-Iranian dual national	Abbas Edalat	15 April 2018	Currently detained
United States					
25.	Iran	U.S. national	Robert Levinson	9 March 2007	Currently detained
26.	Iran	U.S. national with Iranian heritage	Amir Hekmati	August 2011	Released 16 January 2016
27.	Iran	U.S.-Iranian dual national	Saeed Abedini	September 2012	Released 16 January 2016
28.	Iran	U.S.-Iranian dual national	Jason Rezaian	22 July 2014	Released 16 January 2016
29.	Iran	U.S.-Iranian dual national	Nosratollah Khosravi-Roodsari	May 2015	Released 16 January 2016
30.	Iran	Lebanese national with permanent U.S. residency	Nizar Zakka	September 2015	Currently detained
31.	Iran	U.S.-Iranian dual national	Siamak Namazi	October 2015	Currently detained
32.	Iran	U.S.-Iranian dual national	Baquer Namazi	February 2016	Released on medical furlough in August 2018
33.	Iran	U.S.-Iranian dual national	Robin Shahini	11 July 2016	Released on bail in March 2017
34.	Iran	U.S.-Iranian dual national	Karan Vafadari	July 2016	Released on bail in July 2018 and awaiting appeal result
35.	Iran	Iranian national with permanent U.S. residency	Afarin Neyssari	July 2016	Released on bail in July 2018 and awaiting appeal result
36.	Iran	U.S.-Chinese dual national	Xiyue Wang	8 August 2016	Currently detained
37.	North Korea	U.S. national with Korean heritage	Kim Sang-duk	21 April 2017	Released on 9 May 2018
38.	North Korea	U.S. national with Korean heritage	Kim Hak-song	7 May 2017	Released on 9 May 2018
39.	Iran	U.S.-Iranian dual national	Morad Tahbaz	January 2018	Currently detained

APPENDIX 2 – OVERVIEW OF THE CURRENT POLICY FRAMEWORKS IN THE KEY COUNTRIES

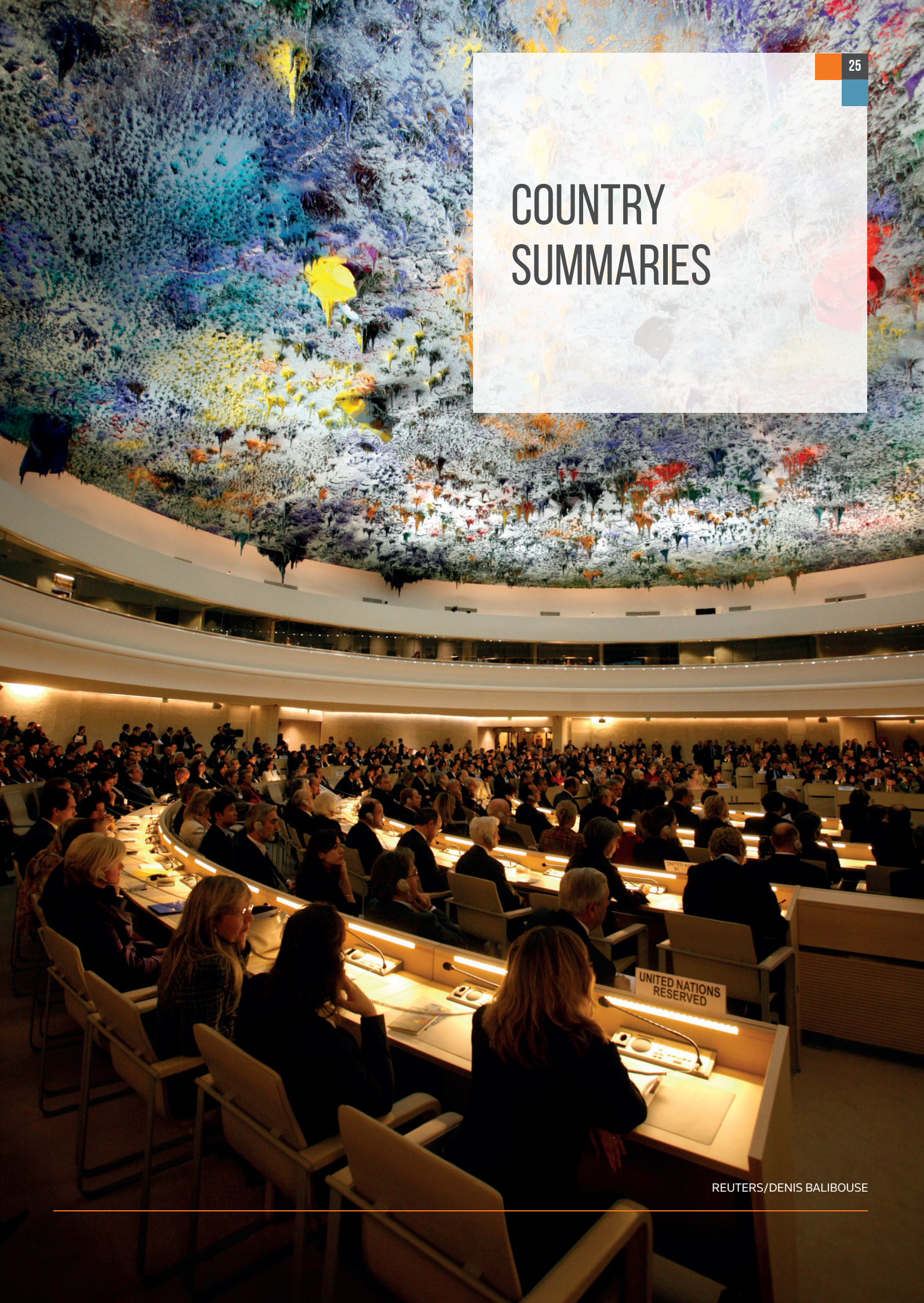
		Austria	Canada	France	Germany	Netherlands	Sweden	UK	USA
Number of reported dual national and legal residents detentions (Country of detention)		1 (Iran)	7 (Iran, Egypt)	1 (Iran)	2 (Turkey)	2 (Iran)	1 (Iran)	10 (Iran, Ethiopia)	14 (Iran)
Total population of country concerned*		8,735,453	36,624,199	64,979,548	82,114,224	17,035,938	9,910,701	66,181,585	324,459,463
Number of dual national citizens within country concerned**		No data	944,695	No data	No data	1,100,000	No data	613,940	No data
Policies during detention phase	Level of diplomatic engagement ● Policy against diplomatic engagement ● Moderate level of diplomatic engagement ● Full diplomatic engagement, including concessions	●	●	●	●	●	●	●	●
	Distinction in protections afforded to dual nationals ● No protections for dual-nationals ● More limited protections for dual nationals ● No lesser protections for dual nationals	●	●	●	●	●	●	●	●
	Existence of "Magnitsky" legal provisions ● No "Magnitsky" legal provisions ● "Magnitsky" legal provisions considered ● "Magnitsky" legal provisions enacted	●	●	●	●	●	●	●	●
	Policy on ransom payments / substantive concessions ● Ransom payments discouraged ● No official policy ● Ransom payments tolerated	●	●	●	●	●	●	●	●
Policies during release phase	Criminal liability for foreign state officials ● No criminal liability – immunity afforded ● Possibility of criminal liability – immunity denied	●	●	●	●	●	●	●	●
	Possibility of civil claims against foreign state actors ● No civil claims – immunity afforded ● Possibility of civil claims – immunity denied	●	●	●	●	●	●	●	●
Number of reported releases		**0**	**3**	**1**	**1**	**1**	**0**	**4**	**10**

Key	
●	Indicates a minimal response to hostage-taking and a reluctance on the part of the relevant State to pursue measures.
●	Indicates a moderate or neutral stance on the part of the State in relation to the relevant policy.
●	Indicates general flexibility and willingness on the part of the State to make available or pursue measures.

* Total Population - Both Sexes. World Population Prospects, the 2017 Revision. United Nations Department of Economic and Social Affairs, Population Division, Population Estimates and Projections Section. June 2017. Retrieved 22 June 2017.

** Using available data from 2011 http://www.inegi.org.mx/rde/rde_15/doctos/rde_15_art3.pdf.

COUNTRY SUMMARIES



REUTERS/DENIS BALIBOUSE

COUNTRY SUMMARIES

ANNEX 1 – SUMMARY OF INTERNATIONAL LAW

Current state of international law. At present, there exists a protection gap in public international law and international human rights law with respect to protections afforded to civilians taken hostage by States during peacetime. The Hostages Convention and Geneva Conventions are the two most relevant instruments currently applicable to hostage-taking. Neither instrument, however, addresses State responsibility for hostage-taking in peacetime where the hostage-taker is a State or entity acting under the direction or on behalf of a State.

International law instruments of direct relevance to issue of hostage-taking. The Hostages Convention, which entered into force in June 1983, was the first international instrument to codify a general prohibition against the taking of hostages in peacetime. The Hostages Convention operates on a principle of *aut dedere aut judicare* ("either extradite or prosecute") and requires State parties either to prosecute hostage-takers in their territory or to extradite them to an appropriate jurisdiction for prosecution (both of which would apply to the extent that an offence is committed by an individual rather than a State).

The Hostages Convention defines the crime of hostage-taking as: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organisation, 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".[24] Attempt and participation as an accomplice also constitute hostage-taking.[25] It should be noted, however, that hostages taken during an armed conflict are explicitly excluded from the scope of the Hostages Convention.[26] State parties are also required to make hostage-taking punishable by appropriate penalties.[27]

The application of the Hostages Convention is limited, however, in part due to the historical circumstances surrounding its drafting process. The Hostages Convention responded directly to the proliferation of high profile terrorist hostage incidents in the second half of the twentieth century. As such, the Hostages Convention addresses only the case where an individual, not a State, is the hostage-taker. Nevertheless, it is clear that the drafters of the text envisaged that a "person" within the meaning of the Hostages Convention could, in principle, include an agent of a State.[28] However, the Hostages Convention is silent as to State responsibility for acts of hostage-taking committed by such agents and does not provide for any rights of enforcement against States hostage-takers. Thus, it is clear that the drafters of the text ultimately

24. Hostages Convention, Article 1(1).
25. Hostages Convention, Article 1(2).
26. Hostages Convention, Article 12.
27. Hostages Convention, Article 2.
28. See First Report of the Ad Hoc Hostages Committee, p. 64, paras. 18, 21.

prioritised individual responsibility over State responsibility in the text of the Hostages Convention.[29]

Finally, while the Hostages Convention does not contain any specific provisions that apply to dual nationals, it explicitly carves out a State's intrastate matters.[30] Where a dual national is a victim of State hostage-taking and is a national of the State in which he or she is being held hostage, a potential dispute over jurisdiction and so a potential protection gap arises under the Hostages Convention could arise. In such circumstances, the (non-detaining) State of which the victim is a national could, in principle, assert jurisdiction under the Hostages Convention in order to intervene to protect the victim.[31] However, the detaining State of which the victim is also a national could argue that the matter is an intrastate one and that the Hostages Convention does not apply.[32] This dispute would need to be resolved, first, through negotiation or arbitration, and, failing this, following submission to the ICJ.

The Geneva Conventions expressly prohibit hostage-taking, but apply only during times of armed conflict. Each of the Geneva Conventions contains an identical Article 3, providing that each party to a conflict must apply certain minimum provisions, including recognising that "the taking of hostages" is "prohibited at any time and in any place whatsoever". States party to the Geneva Conventions must halt and prevent acts that contravene these instruments. State parties also have additional obligations in respect of certain breaches of the Geneva Conventions, including hostage-taking, which are defined as "grave breaches".[33] State parties must enact and enforce legislation penalising such breaches, and signatories to the Geneva Conventions are obliged to search for and prosecute persons accused of committing or ordering the commission of these crimes regardless of the hostage-taker's nationality or the State in which the crime is committed (giving States a basis for universal jurisdiction). Accordingly, whilst the Geneva Conventions do not provide any specific guidance in relation to dual nationals, the obligation on State parties to prosecute perpetrators of "grave breaches", together with the concept of universal jurisdiction, mean that the dual nationality of the victim should not be a bar to protection under these instruments.[34] A State that violates a Geneva Convention may be sued by the hostage's State at the ICJ provided that both parties consent to the proceedings.

Further, the Geneva Conventions and their Commentaries are instructive in prescribing a test for hostage-taking under international criminal law, as developed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Blaškić* and *Mladić* cases. This definition arguably may be read as applicable also to hostage-taking in peacetime[35] and, at a minimum, the existing test can serve as a guide for a new international instrument in this field.

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29. See Second Report of the Ad Hoc Hostages Committee, p. 58, para. 5.
30. Specifically, Article 13 provides that the Hostages 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".
31. Hostages Convention, Article 5(1)(b).
32. Since the Hostages Convention leaves the question of dual nationality unresolved, the issue would likely have to proceed to direct negotiation or arbitration between the relevant State parties, or failing that, be submitted to the ICJ.
33. The Geneva Conventions, Article 147.
34. Under the four Geneva Conventions, Article 49, 50, 129 and 146 respectively; International Committee of the Red Cross, Advisory Service on International Humanitarian Law "Universal Jurisdiction over war crimes" 03/2014, p. 1 the ICRC explains that "While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have generally been interpreted as providing for mandatory universal jurisdiction".
35. The Appeals Chamber of the ICTY in Blaškić stated that "the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person" (emphasis added). See Prosecutor v. Tihomir Blaškić, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No.IT-95-14-A, 29 July 2004, para. 639. Similarly, in the Mladić case, the Trial Chamber of the ICTY confirmed the "test" applied by the Appeals chamber of the ICTY in Blaskic as follows: "[t]he crime of taking hostages requires proof of the following elements: a) the unlawful confinement or deprivation of liberty of another person; b) the issuance of a threat to kill, injure or continue to detain another person; and c) the threat is intended to obtain a concession or gain an advantage". See Prosecutor v. Ratko Mladić, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-09-92-T, 22 November 2017, para. 3215.

Framework for diplomatic and consular relationships under the VCCR. The VCCR defines a framework for the diplomatic and consular relationships between States. The VCCR establishes the right of States to carry out consular functions in order to protect the interests of their nationals.[36] In addition, Article 36 of the VCCR gives nationals certain rights and imposes certain obligations on the receiving State in relation to the sending State's nationals.[37] The VCCR is silent on the treatment of individuals with multiple nationalities. In particular, the VCCR does not provide a solution for individuals where the receiving State does not recognise dual nationality and refuses to inform the consular post of the foreign State of which the individual is claiming nationality.[38] Complaints of violations of the VCCR may be brought before the ICJ, although there is ongoing controversy as to whether the right of enforcement belongs with the State (the position taken by the United States Supreme Court) or with the individual (a position which has been accepted by the ICJ). While the ICJ has heard cases including violation of Article 36 rights, the ICJ has not specified an appropriate remedy for such violations.[39] Instead, the ICJ has left the fashioning of a remedy to the domestic courts to give "full effect" to the purpose and meaning of Article 36.[40] Therefore, one must look to the domestic courts for guidance on available remedies in a particular State.

In sum, the VCCR does not refer specifically to the issue of hostage-taking, but does set out the rights and obligations of individuals and State parties in the context of arrest and detention, where it establishes the right for the arrested or detained party to seek diplomatic protection. However, the VCCR offers no guidance on how to resolve the issue where the detained individual is a national of both the offending State and another State.

Other international law instruments of more general application. There are a number of other international law instruments that provide certain protections to persons detained, imprisoned or otherwise deprived of their liberty, that are relevant to circumstances involving hostage-taking (including where the hostage-taker is a State or a party acting on behalf of a State).[41] For example, while it does not expressly cover hostage-taking, the ICCPR provides a range of protections relevant to circumstances of hostage-taking and/or prolonged incarceration, many of which are mirrored in the UDHR.[42] These include the right to life, liberty and security of person, which prohibits, inter alia, any person being subject to arbitrary arrest and detention.[43] The ICCPR and the UDHR also include the right to not be subjected to torture or cruel, inhuman or degrading treatment or punishment, and the right to private and family life (as well as the rights of the child). Each State party to the ICCPR undertakes to take all necessary steps, in accordance with its constitutional processes and the ICCPR provisions, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ICCPR, including by providing adequate remedies. While the ICCPR and UDHR prescribe certain key rights of individuals, broadly

36. The specific rights afforded to the sending State regarding its nationals are set out in Article 5 of the VCCR.
37. The specific rights afforded to nationals of the sending State regarding its nationals are set out in Article 36 of the VCCR.
38. This lacuna in the VCCR in relation to dual nationals has been raised in several cases, in particular relating to nationals of both the U.S. and Mexico.
39. See La Grand (Germany v. United States of America.), ICJ 466 (2001), judgment of 27 June 2001. Available at https://www.icj-cij.org/files/case-related/104/104-20010627-JUD-01-00-EN.pdf
40. Id.
41. In this regard, see the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which are a non-binding set of secondary rules which establish the consequences that occur as a result of breach a primary international law obligation. In particular, see Chapter II of Part 1 of the Articles deals with the attribution of conduct to a State. The general rule under international law is that conduct attributed to the State at the international level is conduct of its organs of government, or of others who have acted under the direction, instigation, or control of those organs, as agents of the State.
42. The rights set out in the ICCPR are also reflected in a number of regional human rights law instruments such as the European Convention of Human Rights and the EU Charter of Fundamental Rights.
43. For example, Article 9 of the ICCPR provides that any person who is arrested must be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them (Article 9.2). If arrested or detained on a criminal charge, a person shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (Article 9.3). Further, Article 9 states that anyone who is deprived of their liberty due to arrest or detention is entitled to proceedings before a court in order to decide promptly on the lawfulness of their detention and to order release if the detention is not lawful (Article 9.4). Should the detention be found to be unlawful, the victim of such unlawful detention acquires an enforceable right to compensation (Article 9.5).

recognised and respected, neither instrument expressly covers hostage-taking or provides specific protections with regard to dual nationals; however both the ICCPR and UDHR should inform and provide the basis in international law and State practice for the development of a separate international law instrument governing hostage-taking in peacetime, including where perpetrated by States.

Further, the CAT establishes a regime for international cooperation in the criminal prosecution of torturers.[44] Implementation of the CAT is monitored by the Committee Against Torture. While the CAT is not generally expressed in terms of individual rights and direct remedies, the CAT primarily seeks to achieve its aim of protecting individuals from torture or other cruel, inhuman or degrading treatment or punishment through the imposition of both positive and negative obligations on all States party to the CAT, including: an obligation to take effective measures to prevent acts of torture in any territory under its jurisdiction (Article 2); an obligation to ensure that acts of torture (including attempts to commit torture, or complicity or participation in such acts) are a criminal offence under their domestic law (Article 4); and an obligation to ensure that individuals alleging they have been subjected to torture have a right to complain to the competent authorities (Article 13). In the context of hostage-taking, such obligations would, in principle, be enforceable against a State party taking an individual hostage if the circumstances amounted to an act of torture under the CAT, and so may afford the hostage some level of protection in relation to the conditions in which the hostage is held. In sum, the CAT is instructive in the context of any new international instrument that may be developed to govern hostage-taking in peacetime, in particular as regards the conditions to which any person is subject whilst detained or imprisoned as a hostage.

In addition to the international convention framework, certain UN instruments provide non-binding guidance regarding the conditions under which persons may be imprisoned or detained. These include the Nelson Mandela Rules, the UN Body of Principles, and the Tokyo Rules. Whilst not directly relevant to hostage-taking, these instruments are instructive as to the minimum acceptable standards for the treatment of prisoners, the avoidance of detention and imprisonment (where possible), and the use of non-custodial measures as alternatives to imprisonment. Failure to comply with these instruments does not result in any direct sanctions for the State concerned, but does constitute a breach of certain internationally accepted legal norms. In addition, the three instruments should act as compelling guidance in the development of any new legal regime or international instrument governing hostage-taking in peacetime. In particular, where persons are detained by a State, as hostages or otherwise, the conditions of any form of imprisonment or detention must not fall below the minimum acceptable standards set out in the Nelson Mandela Rules and the UN Body of Principles.

Protection of dual nationals. Within the context of the protection gap concerning hostage-taking by State actors in peacetime, there is also an observable lack of protections under international law instruments for persons with dual nationality. Few instruments afford any specific protections to, or otherwise address the circumstances of, persons who are nationals of more than one State. Pursuant to Article 4 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, a State party to the convention may be precluded from affording diplomatic protection to its citizen who is being held by another State of which that person is a dual-national (the non-responsibility rule).[45] In addition, some States may also be willing to provide Canada with access to dual nationals on a confidential basis so as not to be seen to be establishing a precedent.

44. Since the CAT's entry into force, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law.

45. The Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 was established by the League of Nations Assembly and, upon the dissolution of the League of Nations, was transferred (together with all other multilateral treaties formerly deposited with the Secretary-General of the League of Nations) to the custody of the United Nations. This Convention was (1) signed and ratified by the Netherlands, Sweden and the UK; (2) signed but not perfected by Austria, France and Germany; (3) signed but denounced by Canada; and (4) not signed by the U.S.

Customary international law provides some guidance in this context, seeking to address a loophole whereby persons of dual nationality may be denied the protection of their State of nationality in circumstances where the offending State is also one in which they hold nationality. For example, the "*Nottebohm*" case of 1955 decided by the ICJ entrenched the principle of "effective" – i.e. active or dominant – nationality. This principle provides that where the claimant State is found to be the State of the individual's effective nationality, a claim brought by that State will not be dismissed by an international tribunal for lack of jurisdiction (due to the traditional notion of dual citizenship invalidating such claims). This concept is also reflected in the International Law Commission's Diplomatic Protection Draft Articles, Article 7 of which enables a State to act only on behalf of a national of that State against another State of which that person is also a national where the nationality of the former State is predominant. As such, any new instrument developed to address this protection gap should not preclude individuals from seeking diplomatic protection by allowing them, where possible, to prove their "effective" or "predominant" nationality in another State. Alternatively, a new instrument could be explicit as to its treatment of multi-nationals so that it enables any State of which the hostage is a national to establish jurisdiction in order to seek protection from that State.

Existing protection mechanisms within the current international law framework. The WGAD—a body of independent experts operating under the auspices of the UN Human Rights Council—is a body of independent human rights experts that investigate cases of arbitrary arrest and detention. It has a broad mandate, which includes investigating individual cases of arbitrary detention that may be inconsistent with the standards enshrined in the UDHR; sending urgent appeals to countries following information submitted to it; and conducting field missions upon the invitation of governments in order to better understand the situations prevailing in countries, as well as the underlying reasons for instances of arbitrary deprivation of liberty. In the context of arbitrary detention or hostage-taking by State actors, the WGAD has issued a number of opinions in recent years, for example in the recent cases of Nazanin Zaghari-Ratcliffe and Xiyue Wang, amongst others.[46]

The UPR is the only compulsory mechanism to review human rights compliance by UN Member States.[47] The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.[48] Reviews are conducted by the UPR Working Group which consists of the 47 members of the Human Rights Council; however any UN Member State can take part in the discussion with the reviewed States.[49] Accordingly, the UPR provides the opportunity to conduct a thorough periodic review of a country's international human rights obligations.

While the WGAD and UPR are useful mechanisms, they merely highlight human rights abuse committed by States. Neither of these bodies provides for a direct enforcement mechanism compelling the State to act or refrain from acting in a certain way.

46. In the case of Nazanin Zaghari-Ratcliffe, see https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Detention/Opinions/Session76/28-2016.pdf&action=default&DefaultItemOpen=1. In the case of Xiyue Wang, see https://www.law.uw.edu/news-events/news/2018/xiyue-wang-un-ruling.

47. The UPR was established when the Human Rights Council was created on 15 March 2006 by the UN General Assembly in resolution 60/251. Available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf

48. The UPR Working Group assesses the extent to which States respect their human rights obligations under (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments made by the State (e.g. national human rights policies and/or programmes implemented); and, (5) applicable international humanitarian law.

49. See OHCHR at https://www.ohchr.org/en/HRBodies/UPR/pages/BasicFacts.aspx.

ANNEX 2 – SUMMARY OF AUSTRIAN DOMESTIC LAW

I. Implementation of international law obligations

General approach. Austria has signed and ratified a range of international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights, notably the Hostages Convention, the Geneva Conventions, the ICCPR, the UDHR, the CAT, the ECHR and the VCCR.[50] The Austrian government has repeatedly undertaken to respect, protect, and fulfil human rights in Austria. Austria has implemented its international human rights obligations nationally through the Federal Constitution of Austria and numerous national laws.[51] Austria has drawn, and continues to draw, on UN standards and norms, including the Nelson Mandela Rules, the UN Body of Principles and the Tokyo Rules, in the development of its own national legislation and practices. Although these various UN standards are not binding on Austria specifically, Austria has implemented them into its national legislation in the form of the Austrian Penal Procedure Code (*Strafvollzugsgesetze*) and the observance of the European Prison Rules.[52]

Notable reservations. Austria has not placed any notable reservations on the ratification of the international law treaties to which it is a party that are broadly relevant to hostage-taking, conditions of imprisonment and general human rights.

Compliance and monitoring reports. Austria regularly reports to the UN on human rights topics. While Austria has submitted a number of monitoring reports with regard to its human rights obligations under international law treaties to which it is party, none of these reports directly cover hostage-taking of Austrian nationals by foreign State actors. Austria is subject to regular monitoring by the monitoring bodies established by the international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights. Such monitoring is usually carried out by Austria submitting a report at regular intervals on the current status of the implementation of human rights. There does not appear to have been any specific reporting by Austria in relation to hostage-taking. Finally, Austria has not been subject to individual complaints before the WGAD.

II. Domestic provisions

Criminalisation of hostage-taking. Certain acts connected with the concept of hostage-taking have been criminalised under Austrian national law. For example, the Austrian Criminal Code recognises offences relating to the deprivation of liberty, kidnapping for ransom, and the enforced disappearance of a person.[53] Whilst these offences do not explicitly refer to the term "hostage", the offences are modelled on the concept of hostage-

50. Of the relevant international law treaties, Austria has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990. Ratification of this convention was rejected on the grounds that some parts of the convention concerned EU competencies. See https://www.parlament.gv.at/PAKT/PR/JAHR_2006/PK0681/ (last accessed on 18 July 2018).

51. The Austrian Constitution is not a single document. Austrian constitutional law is split into many individual laws. The centrepiece is the Federal Constitutional Law (Bundes-Verfassungsgesetz, the "B-VG") which includes the most important federal constitutional provisions. However, the B-VG does not contain a catalogue of fundamental rights, which are implemented in many different laws, for instance the ECHR, the Basic Law on the General Right of Nationals (Staatsgrundgesetz) or the Federal Act concerning the Protection of Personal Data (Datenschutzgesetz). Other fundamental rights, like the freedom of association and assembly, are laid down in individual laws (Austrian Association Act (Vereinsgesetz) and Austrian Assembly Act (Versammlungsgesetz)). The fundamental procedural rights are guaranteed by Article 6 of the ECHR and Article 7 of the B-VG. These rights are concretised by individual procedural laws like the Austrian Criminal Procedure Code, the Austrian Administrative Penal Code, the Austrian Proceedings of Administrative Courts Act or the Code of Civil Procedure.

52. In addition to the Austrian Penal Procedure Code (Strafvollzugsgesetz), there are the European Prison Rules (Europäische Strafvollzugsgrundsätze), which were developed as a political recommendation in the prison sector. The European Prison Rules are essentially a revision of the Nelson Mandela Rules and are not binding on the European Member States, but are observed by Austria and influence the development of Austrian practices.

53. The offence of the deprivation of liberty (Article 99 of the Austrian Criminal Code) and kidnapping for ransom (Article 102 of the Austrian Criminal Code) were introduced on 1 January 1975. Offences relating to the enforced disappearance of a person (Article 312b of the Austrian Criminal Code) were introduced on 1 January 2015.

taking under the Hostages Convention.[54] As a result, Austrian national law is considered to be fully compliant with the Hostages Convention. There are also a number of other offences under the Austrian Criminal Code that relate to hostage-taking, for example conspiring to kidnap a person for ransom;[55] kidnapping a person for ransom where the hostage-taker or the hostage is an Austrian national (which includes an Austrian with dual nationality) or has his or her place of residence in Austria;[56] transferring a person to a foreign power without that person's consent by use of force or by obtaining the consent through a dangerous threat or deception.[57]

Scope of definition of hostage-taking. The Austrian Criminal Code is applicable if the relevant offence is committed on Austrian territory or the requirements of Article 64 of the Austrian Criminal Code are met. For example, under Article 42 of the Austrian Criminal Code and consistent with Article 5 of the Hostages Convention, the Austrian Criminal Code applies to kidnapping for ransom committed abroad without regard to the laws of the country in which the kidnapping occurred if: (i) the hostage-taker or the hostage is an Austrian national or has his or her place of residence in Austria; (ii) the offence has infringed on other Austrian interests; or (iii) the hostage-taker was, at the time of the offence, a foreign national who is present in Austria and cannot be extradited.[58] Similar provisions apply to an enforced disappearance of a person that occurs abroad.[59] As long as the offence is committed on Austrian territory or the criteria of Article 64 of the Austrian Criminal Code are met, the Austrian Criminal Code draws no distinction based on the identity of the hostage-taker or the nationality of the hostage. Accordingly, the relevant offences continue to apply in situations relating to dual nationality, regardless of whether the hostage-taker or the hostage is also a citizen of the foreign State in which the offence is committed. Overall, the offence would, in principle, appear to cover hostage-taking by foreign States (or, more specifically, officials of foreign States), including situations involving dual nationals, although the practical enforcement of the offence in such circumstances carries inherent difficulties. If a foreign State official enjoys diplomatic immunity, then the VCCR would apply, meaning that foreign State official is excluded from the criminal, civil and administrative jurisdiction of Austria. If not, there is no immunity against prosecution of such foreign State officials.

General policy framework in respect of hostage-taking. Outside the legal framework of the relevant offences under the Austrian Criminal Code set out above, there is no specific domestic legal framework for dealing with situations where an Austrian national is taken hostage or arbitrarily detained by a foreign State. Unless redress for a hostage-taking situation is pursued under the Austrian Criminal Code, the Austrian government relies on its political and diplomatic processes with foreign States in dealing with such situations. There is no general affirmative duty on the Austrian government to resolve hostage-taking situations. However, the Austrian government may in theory be obliged to resolve or intervene in hostage-taking situations due to Austria's obligation to protect fundamental rights; however, no claims have been reported on this basis.

The Austrian government does not have any public guidelines specifically addressing how it deals with the hostage-taking of Austrian nationals by foreign States. If a person is kidnapped or taken hostage abroad, actions taken by the Austrian government are decided on a case-by-case basis, and there is no policy or

54. For example, the offence of kidnapping for ransom relates to the use of force to kidnap a person against their consent in order to coerce a third person to do an act, to acquiesce, or to make an omission. Similarly, the offence of the deprivation of liberty involves the unlawful detention of another person.
55. See Article 277 of the Austrian Criminal Code.
56. See Article 64 of the Austrian Criminal Code.
57. See Article 103 of the Austrian Criminal Code.
58. See Article 64 para. 1, subpara 4a, of the Austrian Criminal Code.
59. See Article 64 para. 1, subpara 4c, of the Austrian Criminal Code.
60. See Article 278d of the Austrian Criminal Code.

practice to suggest that the Austrian government takes a different approach to hostage scenarios depending on whether the perpetrators are State actors or Non-state actors. As a general matter, while a victim of hostage-taking by a foreign State does not have a legal right to consular assistance, consular protection is generally provided to Austrian citizens (whether or not they are dual nationals).

Specific aspects of policy framework in respect of hostage-taking. Austria does not have a policy framework that is focused on disincentivising hostage-takers. Apart from payments to terrorist organisations, the payment of ransoms is not specifically criminalised.[60] Ransom payments were allegedly paid in three hostage situations that have arisen over the past ten years, although this has been denied by the Austrian Ministry of Foreign Affairs.[61] In offering diplomatic assistance, Austria does not draw any distinction between sole and dual Austrian nationals. There is no official policy requesting a media blackout in the event of an Austrian national being taken hostage; however, in the case of the detention of the Austrian-Iranian dual national, Kamran Ghaderi, no Austrian press reports have been found.

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been at least five reported cases in which Austrian nationals have been taken hostage or arbitrarily detained abroad by either State actors or Non-state actors. Of these, as outlined in Appendix 1 above, there was at least one reported case that involved an Austrian dual national that had been taken hostage or arbitrarily detained by a foreign State. This was the case of Kamran Ghaderi, an Austrian-Iranian dual national who was charged with espionage and arbitrarily detained in Iran in January 2016.[62]

General principles arising from treatment of cases and emergence of any "best practices" in government policy. Due to the dearth of official information available in relation to detention of Austrian dual nationals, no specific conclusions can be drawn in relation to Austria's approach to such situations. According to informal talks with members of the Austrian Ministry of Foreign Affairs, such situations are treated on a case-by-case basis.

61. The Austrian government explained in several official statements that it does not pay ransoms to terrorists.

62. See https://www.unitedagainstnucleariran.com/people/kamran-ghaderi; https://www.iranhumanrights.org/2017/01/kamran-ghaderi-prison/.

ANNEX 3 – SUMMARY OF CANADIAN DOMESTIC LAW

I. Implementation of international law obligations

General approach. Canada has signed and ratified many of the international instruments relating to the taking and treatment of hostages that are relevant in this context, including the Hostages Convention and the Geneva Conventions. Where Canada has ratified such international instruments, it has done so without any reservation in relation to hostage-related provisions. In addition to this, Canada has ratified the CAT, the UDHR, the ICCPR, the ICESCR and the VCCR but has not signed the ICPAPED. In order to have domestic effect, Canada must transpose any treaty ratifications into domestic law through implementing legislation. Canada has endorsed the Nelson Mandela Rules, meaning it has agreed to consider embodying them within its federal and provincial legislative framework; however, there is recent case law suggesting current Canadian legislation violates certain provisions of the Nelson Mandela Rules.[63] No information was available in relation to Canada's implementation or observance of the UN Body of Principles and/or the Tokyo Rules.

Notable reservations. Canada has not made any major reservations either in relation to the Hostages Convention, or any of the other applicable treaties.

Compliance and monitoring reports. While Canada has submitted a number of monitoring reports to the UN Human Rights Committee, the Committee Against Torture and the Committee on the Rights of the Child in relation to their respective treaties, none of these reports related to hostage-taking of Canadian nationals by foreign States. However, one of Canada's most recent reports to the UN Human Rights Committee addresses arbitrary detention in the domestic context and Canada's compliance with its obligations to protect against arbitrary detention.[64]

II. Domestic provisions

Criminalisation of Hostage-taking. Hostage-taking is criminalised in Canada. Canadian domestic law criminalises hostage-taking both within Canada and outside of Canada, as set out in Sections 279.1(1) and 3.1 respectively of the Act respecting the criminal law (the "**Canadian Criminal Code**"). The definition of the crime complies with the provisions of the Hostages Convention.

Scope of definition of hostage-taking. As is required by Article 5 of the Hostages Convention, Section 3.1 of the Canadian Criminal Code gives Canada several bases of extraterritorial jurisdiction over the crime of hostage-taking when it is committed beyond Canada's borders. Under Section 3.1, a person outside of Canada who commits a breach of the Section 279(1) hostage-taking prohibition is in certain circumstances deemed to have committed such act in Canada, including if the person taken hostage is a Canadian citizen (Section 3.1(e)). It should be noted that, under Section 18 of the State Immunity Act of Canada, there is no state immunity for a foreign State official in criminal proceedings or in proceedings in the nature of criminal proceedings. According to Section 46(2)(d) of the Extradition Act, SC 1999, hostage-taking is never a political act for the purposes of extradition law, meaning a foreign State official who has committed the crime of hostage-taking will not enjoy state immunity from prosecution for the hostage-taking because it will be a criminal proceeding and may be liable under Canadian law. This goes beyond what is required in the Hostages Convention.

63. Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen, 2017 ONSC 7491 (Ontario Superior Court of Justice); BCCLA and JHSC v Attorney General of Canada, 2018 BCSC 62 (British Colombia Supreme Court).

64. See paragraph 22 of Canada's report to the UN Human Rights Committee.

General policy framework in respect of hostage-taking. Canada does not afford its citizens with a legal right to consular assistance—it is dealt with as a matter of crown prerogative. There is thus no general affirmative duty for the government to act to protect a Canadian citizen abroad. Where a Canadian citizen has been taken hostage by a foreign State, there is no domestic framework to deal with this. Instead, Canada relies on diplomatic processes.

Specific aspects of policy framework in respect of hostage-taking. Apart from payments to terrorist organisations,[65] the payment of ransoms is not specifically criminalised in Canada. Canada also has a clear position that it does not allow or support financial payments or benefits in kind to assist in the release of a hostage. However, Canada does not always enforce its no-ransom payments policy. Due to the application of the Canadian Criminal Code prohibition on the payment of ransoms only where the purpose of the ransom is not to facilitate or carry out a terrorist activity, in the situation of a hostage-taking by a State actor, this would mean that the "hostage" is held by a legitimate foreign State and so a payment to that State would not be criminal under Canadian law. In any event, it is unlikely in those circumstances that any such payment to a foreign State would in fact be construed as a "ransom". On 13 February 2018, the Toronto Star reported that the "*RCMP (Royal Canadian Mounted Police, the federal police force) is now telling Canadian hostages' families they won't be prosecuted for negotiating with kidnappers.*"[66]

In relation to the Canadian Criminal Code, there are no exceptions made for situations of dual nationality where the citizen is also a citizen of the foreign State and dual nationality is not addressed in Canada's domestic legal framework. As such, there is no formal difference if a Canadian who has been taken hostage is also a citizen of the country in which they are held. However, as Canada addresses hostage cases as consular cases, it can be more difficult for Canada to provide consular assistance to dual nationals, both practically and legally. Practically, certain foreign States do not recognise dual nationality. Canada has not been able to provide effective consular assistance to persons holding dual nationality who are detained in China, Egypt, Iran, Iraq, Saudi Arabia and Syria. However, as Canada has renounced the Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, and in light of recent developments in international law moving towards the concept of a "dominant" nationality (as determined in the *Nottebohm* case referred to in Annex 1), Canada may be able to establish a predominant link to an individual in order to provide consular assistance.

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been at least 17 reported cases in which Canadian nationals have been taken hostage or arbitrarily detained abroad. Of these, at least seven reported cases have involved Canadian dual nationals who have been taken hostage or arbitrarily detained by foreign State actors. While one case has arisen in Egypt, the other six cases have arisen in Iran.

General principles arising from treatment of hostage-taking. Canada retains flexibility when dealing with hostage-taking. There is no formal or published policy in place in relation to Canada's approach to hostage-taking—Canada approaches such cases as consular cases. Consular cases in Canada are a matter of royal prerogative, meaning whether Canada intervenes is entirely at the government's discretion; Canadians have no right to consular assistance and Canada varies its approach between diplomatic engagement and disengagement.

65. Section 83.03 (in Parti II.1) of the Canadian Criminal Code.

66. https://www.thestar.com/news/canada/2018/02/13/the-rcmp-is-now-telling-canadian-hostages-families-they-wont-be-prosecuted-for-negotiating-with-kidnappers.html

An example of Canada using diplomatic engagement is in the case of Homa Hoodfar, a dual Canadian-Iranian national, who was a retired professor traveling to Iran in Feb 2016 for research and family reasons. She was held for four months. Although it is understood that her release was due to "humanitarian grounds, including an illness", it was also announced in the press reports that Hoodfar "*was released on the same day that Iran announced talks with Canada about reopening embassies in each other's countries*". According to law professor Vrinda Narain (interviewed in Montreal on 7 August 2018), who was part of the legal team that secured Hoodfar's release, the honest broker services of Oman were critical. Oman liaised between Canada and Iran (the Supreme Leader and the head of Revolutionary Guard). How Hoodfar's legal team accessed Oman was confidential but according to Narain, the "Canadian government was very helpful".

Best practices in government policy. Canada's Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law), which received royal assent in October 2017, provides Canada with a tool to sanction hostage-taking when such hostage-taking is committed by a foreign official for a listed purpose. However, Canada's Magnitsky Law is not specifically directed at hostage-taking and targets the assets of corrupt officials who have committed gross human rights violations.[67]

67. Shortly after Canada's Magnitsky Law entered into force, the country issued its first round of Magnitsky sanctions, targeting 52 human rights abusers from Russia, Venezuela and South Sudan. The law has subsequently been used to target violators from Myanmar.

ANNEX 4 – SUMMARY OF FRENCH DOMESTIC LAW

I. Implementation of international law obligations

General approach. France ratified the Hostages Convention on 9 June 2000 and did not make any reservations to this instrument at the time of signing.[68] In addition to this, France has ratified the following international and regional instruments, including the Geneva Conventions and the CAT. Following the ratification, such instruments become directly enforceable in France upon publication in the *Journal Officiel* and as such prevail over Acts of Parliament. France is also a signatory to the UDHR, and has ratified the ICCPR and the ICESCR. France has yet to directly implement the Nelson Mandela Rules, the UN Body of Principles or the Tokyo Rules in its domestic legislation. France has, however, adopted the European Prison Rules (and transcribed the same into French law pursuant to the Law of 24 November 2009), which are aligned with the Nelson Mandela Rules.

Notable reservations. France has not made any major reservations in relation to the Hostages Convention or other international law instruments relevant in this context.

Compliance and monitoring reports. While France has submitted a number of monitoring reports in relation to international treaties,[69] none of these reports relates to hostage-taking of French nationals by a foreign State. Although France has been subject to five individual complaints before the WGAD, the French government tends to respond to the allegations made before the WGAD and cooperate with investigations.

II. Domestic provisions

Criminalisation of hostage taking. Hostage-taking is criminalised in France under the French Code penal, pursuant to Article 224-1 in relation to the "arresting, abducting, detaining or illegally confining a person" and Article 221-12 in relation to the enforced disappearance of an individual by an agent of the French State.

Scope of the definition of hostage-taking. France has adopted the definition of hostage-taking provided by the Hostages Convention and, in line with Article 12 of the Hostages Convention, these provisions only apply where there is a foreign element to the alleged facts or circumstances. However, the definition of hostage-taking under French law does not cover situations where a citizen of the country is arbitrarily detained or held hostage by a foreign State, and foreign State officials or agents enjoy full diplomatic privileges and immunities.

General policy framework in respect of hostage-taking. There is no domestic legal framework for dealing with a hostage situation and France does not afford its citizens a legal right to consular assistance. France relies on extra-legal diplomatic processes in these circumstances, with bodies such as the Direction générale de la Sécurité extérieure and the Groupe d'Intervention de la Gendarmerie national playing the roles of information-gathering and, if necessary, intervention on the ground.

Specific aspects of policy framework in respect of hostage-taking. Apart from payments to terrorist organisations,[70] the payment of ransoms is not specifically criminalised in France. The current official policy in France vis-à-vis hostage-taking is the non-payment of ransoms. This doctrine has been reiterated by French Presidents, Foreign Ministers, and Government officials. However, negotiation is not excluded from the French government's policy.[71] Where the crime has been committed on French territory, French law makes

68. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000218308&categorieLien=id.
69. The CAT, the ICAPED, the Convention on the Rights of the Child, the ICCPR and the ICESCR.
70. https://www.legifrance.gouv.fr/content/location/1740.
71. http://www.slate.fr/france/79482/otages-rancons.

no distinctions based on nationality of the hostage or the identity of the hostage-taker. There are no particular rules relating to dual-nationality citizens.

III. Recent policy and practice

Overview of recent cases. Given the confidential nature of hostage rescue within the French legal framework, it is difficult to establish every single incident of hostage-taking over the past ten years concerning French nationals. Over the past ten years, there have been few reported cases in which French nationals have been taken hostage or arbitrarily detained abroad. As outlined in Appendix 1 above, there was at least one reported case that involved a French dual national that had been taken hostage or arbitrarily detained by a foreign State. This was the case of Nazak Afshar, a French-Iranian dual national who was arbitrarily detained in Iran in 2009.

Emergence of any "best practices" in French government policy. The Foreign Ministry has created a sub-group within the ministry known as the *Centre de Crise et de Soutien* (or CDCS, set up by Article 3 of Decree No. 2012-1511 of 28 December 2012),[72] which is in charge of identifying the hostage's family. The CDCS establishes contact with hostages' families, keeping them updated, also providing legal and administrative support, and psychological assistance if required. The CDCS also coordinates the necessary public authorities such as the prefecture, judicial and financial services, reaches out to hostage-victim support groups, and coordinates with the communications team and press secretary of the Foreign Ministry concerning press releases.[73]

72. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026858905&categorieLien=id.
73. http://www.assemblee-afe.fr/IMG/pdf/rapport_2017.pdf.

ANNEX 5 – SUMMARY OF GERMAN DOMESTIC LAW

I. Implementation of international law obligations

General approach. Germany has signed and ratified a range of international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights, notably the Hostages Convention, the Geneva Conventions, the ICCPR, the UDHR, the CAT, the ECHR and the VCCR. In order to be directly enforceable in Germany, international treaties ratified by Germany must be specifically implemented into domestic law. While the Nelson Mandela Rules, the UN Body of Principles and the Tokyo Rules do not apply directly under German law, these soft-law instruments form the basis for making and interpreting national provisions. These instruments were also taken into account and partially incorporated into the "Act concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty".[74] In addition, the European Prison Rules, although not legally binding, may be taken into consideration when interpreting German law.

Notable reservations. Germany has not placed any notable reservations on the ratification of the international law treaties to which it is a party that are broadly relevant to hostage-taking, conditions of imprisonment and general human rights.

Compliance and monitoring reports. While Germany has submitted a number of monitoring reports with regard to its human rights obligations under the international law treaties to which it is party, none of these reports directly cover hostage-taking of German nationals by foreign States.[75]

II. Domestic provisions

Criminalisation of hostage-taking. Hostage-taking is criminalised in Germany pursuant to the German Criminal Code (the "**GCC**") and the German Code of Crimes Against International Law.[76] Under the GCC, a person who deprives anyone's freedom commits an offence. It is also a crime to prevent another person from returning from abroad and thereby exposing that person to the danger of being persecuted for political reasons and, in violation of the principles of the rule of law, of suffering harm to life and limb through violence or arbitrary measures, of being deprived of his freedom.

Scope of the definition of hostage-taking. The GCC applies only to misconduct by individuals and therefore an action of a foreign State would not breach the provisions of the GCC. However, an individual acting on behalf of that foreign State may be liable under the GCC provided that the German courts have jurisdiction over the act. Pursuant to Sections 3 to 7 (inclusive) of the GCC, German courts have jurisdiction over crimes committed outside of Germany if (i) the hostage is German, or (ii) the hostage-taker is German and the particular act is considered a crime under the jurisdiction of the foreign State as well. However, for acts in the exercise of the foreign State authority (*acta iure imperii*), foreign State officials generally enjoy immunity against prosecution. Imprisonment based on the law of the foreign State, although its legal basis may be considered unjust under a European perspective, is within the scope of the foreign State authority.

General policy framework in respect of hostage-taking. Outside the framework of German criminal law, there is no specific domestic legal framework for dealing with situations where a German national is taken hostage

74. https://www.gesetze-im-internet.de/englisch_stvollzg/index.html.
75. Germany has submitted monitoring reports under the ICCPR and the CAT.
76. Sections 234a, 239 to 239b (inclusive) of the German Criminal Code and Section 8 subsection 1 No. 2 of the German Code of Crimes Against International Law.

or arbitrarily detained by a foreign State. In the event of a German national being taken hostage, the police, federal police forces and federal armed forces, as well as the Ministries of the Interior of both each German state and the Federate state and the Federal Foreign Office as well as the respective German embassy, may be involved in resolving the situation.[77] In addition, the German government has an overall obligation to support any German national arbitrarily detained, since every German has a constitutionally guaranteed right of freedom[78] which has to be defended by the government and lawmakers. This support constitutes at least legal support from the German embassy. The protection of a German national in the event of detention or hostage-taking by a foreign State, however, is limited to diplomatic means between the two States involved.[79]

Specific aspects of policy framework in respect of hostage-taking. As a general matter, Germany has a policy focused on disincentivising hostage-taking, including a public policy of not paying any ransoms in hostage-taking situations.[80] Apart from payments to terrorist organisations,[81] the payment of ransoms is not specifically criminalised (unless made to reward criminal conduct such as hostage-taking).[82] However, the German government has discretion to conduct negotiations as it sees fit, including the making of ransom payments, provided that the decision is based on valid grounds. The German Constitutional Court has deemed that the payment of a ransom in order to free a German national is always a valid ground.[83]

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been at least six reported cases in which German nationals have been taken hostage or arbitrarily detained abroad by either State actors or Non-state actors. Of these, as outlined in Appendix 1 above, at least two reported cases have involved German dual nationals who have been taken hostage or arbitrarily detained by foreign States.[84]

General principles arising from treatment of cases. In line with the German government's official policies, there have not been any official confirmations of ransom payments being made by the government. However, according to a 2014 press report, in the case of twice-abducted German sailors,[85] the German government may have paid a ransom to free hostages. Based on publicly available information, the extent to which consular involvement and/or economic steps taken by the German government appear to have directly influenced the release of dual-national German-Turkish detainees is unclear. In the case of Yücel, during the course of his detention in Turkey, the German government initially took economic and political steps against Turkey. However, closer to Yücel's release, Germany approved certain defence exports to Turkey. The German media indicated that Germany was willing to meet requests to "free" its citizens, such as commitments to arms deals,

77. Cf. Heinz-Georg Sundermann, "Polizeiliche Befugnisse bei Geiselnahmen", NJW 1988, p. 3192 ff (in German language); http://www.spiegel.de/spiegel/print/d-65640634.html (in German language); http://www.zaoerv.de/66_2006/66_2006_4_a_789_818.pdf (in German language).

78. Article 2 subsection 2 Basic Law of the Federal Republic of Germany.

79. Administrative Court Berlin, verdict of April 4, 2006, docket no. 14 A 12.04 (in German language).

80. G8 communique of Lough Erne, 2013. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf.

81. Sections 89c and 129a sub-section 5 in conjunction with 129b subsection 1 German Criminal Code, Section 18 subsection 1 No. 1 lit. a Foreign Trade and Payments Act in conjunction with Article 2 subsection 2 lit. a Council Regulation (EC) No. 881/2002 as amended by Article 1 No. 5 Council Regulation (EU) 2016/363.

82. Section 140 German Criminal Code.

83. This is pursuant to a decision of the Constitutional Court in the case of German former President of the Employer Association Hanns-Martin Schleyer, who was abducted by terrorists of the Red Army Faction in 1977 to obtain the release of other incarcerated Red Army Fraction terrorists. Cf. Constitutional Court, verdict of the First Senate of October 16, 1977, docket no. 1 BvQ 5/77 (in German language) regarding the duty of the country to protect victims of hostage-taking according to Article 2 subsection 2 Basic Law for the Federal Republic of Germany.

84. More specifically, Ali Ince (2016, a German-Turkish dual national detained in Turkey); Deniz Yücel (2017, a German-Turkish dual national detained in Turkey).

85. In relation to the sailors: https://www.stern.de/panorama/stern-crime/philippinen--abu-sayyaf-richtet-deutschen-segler-hin-7346424.html (in German language).

after other political measures, such as travel advisory warnings regarding Turkey, freezing of defence exports and placing government export credit guarantees for German companies doing business with Turkey under review did not succeed.

Emergence of any "best practices" in German government policy. With the limited amount of public information available in relation to specific hostage-taking situations and no official policy enshrined to protect German nationals, few conclusions as to best practice can be made in relation to German governmental policy. However, the German Constitutional Court's clear confirmation that the German government must protect its citizens in the event of hostage-taking may provide helpful recourse to persuade the German government to take further action for any hostage-taking victims and their families in the future.

ANNEX 6 – SUMMARY OF NETHERLANDS DOMESTIC LAW

I. Implementation of international law obligations

General approach. The Netherlands has signed and ratified a range of international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights, notably the Hostages Convention, the Geneva Conventions, the ICCPR, the UDHR, the CAT, the ECHR and the VCCR. In the Netherlands, a treaty that is ratified by parliament will become directly applicable as a matter of domestic law if it is (i) unconditional, and (ii) sufficiently precise, so that it can without doubt be applied in the domestic legal order as objective law. However, violation of a treaty provision can only be criminally sanctioned by a Dutch court if a Dutch domestic legal instrument provides a basis for doing so. In addition, the Netherlands has not directly implemented certain non-binding principles such as the Nelson Mandela Rules, the UN Body of Principles and the Tokyo Rules, but it has implemented similar rules (covering, for example, separate imprisonment for men and women, a minimum level of hygiene and care and a sanctions and complaints procedures, including a right to appeal decisions under such procedures) through, in principal, the Custodial Institutions Act[86] and the Prison Rules,[87] together with the observance of the European Prison Rules.

Notable reservations. The Netherlands has not placed any notable reservations on the ratification of the international law treaties to which it is a party that are broadly relevant to hostage-taking, conditions of imprisonment and general human rights.

Compliance and monitoring reports. While the Netherlands has regularly submitted reports with regard to its human rights obligations[88] under the international treaties[89] to which it is a party, none of these reports directly cover hostage-taking or arbitrary detention. In addition, no individual complaints have been made against the Netherlands before the WGAD.

II. Domestic provisions

Criminalisation of hostage-taking. Hostage-taking is criminalised in the Netherlands pursuant to Article 282a of the Dutch Criminal Code ("**DCC**"), which was enacted specifically to ensure the Netherlands' compliance with its obligations under the Hostages Convention. Under the DCC, a person who intentionally deprives or continues to deprive a person (the "**hostage**") unlawfully of his liberty with the intention of compelling a third party to act or to refrain from certain acts commits the offence of "hostage-taking".

Scope of the definition of hostage-taking. The definition of the offence of hostage-taking under the DCC broadly follows the definition of the Hostages Convention. The offence covers hostage-taking both in[90] and, subject to certain conditions, outside the Netherlands and is therefore extraterritorial in scope.[91] The offence does not draw any distinction based on the nationality of the hostage and thus would not appear to exclude dual-national hostages. Similarly, the offence does not draw any distinction based on the nationality of the

86. Penitentiaire beginselenwet, 18-06-1998, Stb. 1998, 430 (link).
87. Penitentiaire maatregel, 23-02-1998, Stb. 1998, 111 (link).
88. Reports to the Human Rights Council as part of the UPR.
89. The CAT, the ICCPR, the ICPAPED, the Convention on the Rights of the Child, the Convention for the Protection of Human Rights and Fundamental Freedoms.
90. Article 2 of the DCC.
91. More specifically, under Article 5 of the DCC, a person would commit an offence under Article 282a of the DCC if he committed an act outside of the territory of the Netherlands against a Dutch national under certain conditions, including a corresponding criminalisation of the act in the country where the act was committed. In addition, pursuant to article 6 of the DCC, combined with the Decree on International Obligations with Regard to Extraterritorial Criminal Jurisdiction, the Dutch courts will have jurisdiction over a person who commits the crime of hostage-taking under Article 282a of the DCC outside of the Netherlands to the extent (i) the crime was committed with the intent of compelling the Dutch government to act or refrain from taking certain actions or (ii) the alleged offender is present in the Netherlands.

hostage-taker and thus would appear to cover foreign nationals. Overall, the offence would, in principle, appear to cover hostage-taking by foreign States (or, more specifically, officials of foreign States), including situations involving dual Dutch nationals, although the practical enforcement of the offence in such circumstances carries inherent difficulties. In particular, Article 8d of the DCC limits the applicability of certain articles (including Article 5 of the DCC) by the exceptions recognised in international law, which is generally understood to preclude Dutch courts from exercising jurisdiction over foreign States and/or foreign State officials who enjoy immunity, for alleged violations of the DCC.[92] As such, it is unlikely that Article 282a of the DCC could be applied by a Dutch court to criminally sanction a foreign State or a foreign State official that has committed the offence of hostage-taking as defined in the Netherlands.

General policy framework in respect of hostage-taking. Outside the framework of the DCC, there is no specific domestic legal framework for dealing with situations where a Dutch national is taken hostage or arbitrarily detained by a foreign State. There is neither (i) an affirmative duty on the Netherlands to resolve hostage-taking situations nor (ii) legally enforceable rights for Dutch nationals to consular protection enshrined in Dutch legislation[93]. There is case law pursuant to which the Dutch government is bound to consider the interests of its nationals who are imprisoned abroad. However, this protection may provide limited guarantee or recourse in practice, as the State has a large degree of freedom to decide on what kind of aid it will provide.[94] Notably, the Dutch government has no obligation to interfere in the judicial proceedings of another State but it must consider the imprisoned Dutch national's interests, and whether that foreign State's laws and regulations are properly applied. In its assessment, the Dutch government can legitimately ascribe significant weight to political foreign policy considerations.

Specific aspects of policy framework in respect of hostage-taking. Apart from payments to terrorist organisations,[95] the payment of ransoms is not specifically criminalised in the Netherlands.

Where a Dutch national is imprisoned by a foreign State, there are internal guidelines to be followed by the Dutch Ministry of Foreign Affairs (the "**Ministry**"). However, these guidelines cannot be seen as official policy which binds the Dutch state's freedom to act. In addition to the guidelines, there is a policy to provide consular assistance to Dutch citizens imprisoned abroad, notwithstanding the fact there is no legally enforceable right to consular assistance. The Dutch embassy or consulate abroad will act as an intermediary for the prisoner's family, as well as provide information about the conditions in prison and the foreign State's court system. The aim of this consular assistance is to ensure Dutch prisoners are treated equally to other prisoners. The Netherlands does not have an official policy applicable to situations involving hostage-taking by a foreign State. In providing consular aid to Dutch citizens imprisoned abroad, the Ministry distinguishes between (i) countries committed to a humane prison policy and (ii) countries not sufficiently committed to a humane prison policy. In case of imprisonment of a Dutch national by a country of the latter category, the Ministry may provide financial aid in addition to the standard package of personal visits and information about subsidised third party assistance available to all Dutch nationals imprisoned abroad.[96] In the Ministry's policy of providing consular assistance, no distinction is made between general imprisonments, arbitrary detention or hostage-

92. Pursuant to Article 31 of the VCCR, individuals acting in consular or diplomatic appoints enjoy immunity from any criminal prosecution.

93. See Appeal Court The Hague, 25 November 2004, ECLI:NL:GHSGR:2004:AR7484, par. 6

94. Hague 22 November 1984, NJ 1985, 862, ILR p.p. 340-344. Appeal Court The Hague, 25 November 2004, ECLI:NL:GHSGR:2004:AR7484. We note that other judgements appear to follow the same line of reasoning. See e.g. ECLI:NL:RBDHA:2016:15224 (link).

95. Article 421 of the DCC.

96. Letter of the Minister of Foreign Affairs, Gedetineerdenbegeleiding buitenland, 10 October 2014 (link).

taking and there are no specific policies or additional protections for situations of hostage-taking by a foreign State or detentions in a foreign State on other grounds. In addition, the Ministry has publicly stated that its policy to provide consular assistance applies equally to dual and non-dual Dutch citizens.[97]

III. Recent policy and practice

Overview of recent cases. Over the past ten years, as set out in Appendix I, there have been at least two reported cases in which Dutch nationals have been taken hostage or arbitrarily detained abroad by a foreign State. Both of these cases have arisen in Iran (Sabri Hassanpour and Zahra Bahrami). Zahra Bahrami was executed by Iranian authorities. In each case the Dutch government, by its own claims, used diplomatic channels to work towards release of the prisoners, but abided by its policy of limited public communication, even after the prisoners were released, which therefore limits what can be deduced about the government's approach.

General principles arising from treatment of cases. The Dutch government limits public communication about specific hostage-taking situations, including after the situation is resolved, and appears to follow some unofficial policies in dealing with hostage-taking. There is limited information available about the recent cases, and it would appear that the Dutch government uses encouragement via diplomatic and consular channels to ensure Dutch prisoners receive a fair trial and medical treatment. The Dutch government's approach is also adaptable to particular situations: on one occasion, the Dutch government provided a loan to Doctors Without Borders ("**DWB**") for the purpose of paying a kidnapping ransom for one of its Dutch doctors, as DWB lacked sufficient funds to pay the ransom itself.[98] The Dutch government stressed that due to its character as a loan, such aid was not a breach of its policy not to pay ransoms[99] and even pursued the repayment of the loan by DWB in court.

Emergence of any "best practice" in Dutch government policy. Although there have not been many publicly reported instances of Dutch nationals detained abroad by a foreign State, Dutch government policy does appear to provide some guidance and assistance tailored for these situations. In particular, the Dutch approach to ensuring humane prison conditions seeks to address its nationals' safety concerns while respecting a foreign State's sovereignty under international law. In addition, the Ministry's approach to assist families of detainees with information, financial aid in certain instances and other assistance may provide some valuable recourse to Dutch nationals taken hostage abroad and their families.

97. Letter of the Minister of Foreign Affairs, Gedetineerdenbegeleiding buitenland, 10 October 2014 (link).
98. https://www.nu.nl/algemeen/330907/nederland-betaalde-miljoen-losgeld-voor-arjan-erkel.html.
99. https://www.rijksoverheid.nl/documenten/kamerstukken/2009/07/17/antwoorden-op-kamervragen-over-het-voorschieten-van-losgeld-ten-behoeve-van-arjan-erkel.

ANNEX 7 – SUMMARY OF SWEDISH DOMESTIC LAW

I. Implementation of international law obligations

General approach. Sweden has signed and ratified a range of international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights, notably the Hostages Convention, the Geneva Conventions, the ICCPR, the UDHR, the CAT, the ECHR and the VCCR. With respect to treaties to which it is a party, Sweden either implements the international law treaties directly through promulgating separate domestic legislation or by adopting the view that current existing legislation addresses the requirements of an international treaty or rule to which Sweden has become a party. Finally, none of the Nelson Mandela Rules, the UN Body of Principles or the Tokyo Rules have been specifically implemented in Sweden; however, the Swedish constitution incorporates a number of the basic principles relating to human rights and fundamental freedoms, which apply during imprisonment. The European Prison Rules are not directly implemented in Swedish law, but are considered indirectly applicable through the "Act on Imprisonment" and the "Act on Detention"[100], and are observed by the Parliamentary Ombudsmen. Furthermore, the Act on Imprisonment[101] incorporates certain principles such as treating prisoners with dignity, no limitations of the prisoner's liberty other than as necessary for order and security, prisoners not to be kept with those of the opposite sex, etc. The Act on Detention regulates the treatment of a person under detention, arrest or apprehension and the rules therein are similar to the ones in the Act on Imprisonment.

Notable reservations. Sweden has not placed any notable reservations on the ratification of the international law treaties to which it is party that are broadly relevant to hostage-taking, conditions of imprisonment and general human rights.

Compliance and monitoring reports. While Sweden has submitted a number of monitoring reports with regard to its human rights obligations under the international law treaties to which it is party, none of these reports directly cover hostage-taking of Swedish nationals by foreign States.[102] Sweden's most recent report to the UN Human Rights Committee addresses possible limitations of Swedish national legislation in respect of its obligations towards persons under detention, but does not directly cover hostage-taking of Swedish nationals by foreign States.

II. Domestic provisions

Criminalisation of hostage-taking. Hostage-taking is criminalised in Sweden pursuant to the Swedish Penal Code of 1965 (the "**SPC**"). Under the SPC, a person who commits an act against an individual's liberty and peace shall be liable for an offence. Section 1 of the SPC punishes seizing, carrying off or confinement of a child or some other person with an intent to injure, force into services or extort. Section 2 of the SPC punishes any other type of confinement or deprivation of liberty that is not covered in Section 1 of the SPC. The offence of hostage-taking is not specifically dealt with in any other legislation; however, the Instrument of Government (which constitutes part of the Constitution of Sweden) aims to protect against all deprivation of liberty, which indicates a freedom to move within the country's territory and to leave when an individual so wishes.[103]

100. See, The Act on Detention, https://www.kriminalvarden.se/globalassets/om_oss/lagar/hakteslagen-engelska.pdf.

101. See, The Act on Imprisonment (2010: 610), Chapter 1, Sections 2, 4 and 6, https://www.kriminalvarden.se/globalassets/om_oss/lagar/fangelselagen-engelska.pdf.

102. In relation to the UDHR, the Convention on the Rights of the Child, the Nelson Mandela Rules and the CAT.

103. Chapter 2 sections 6 and 8.

Scope of the definition of hostage-taking. The criminalisation of hostage-taking under the SPC purports to cover the crimes described in the Hostages Convention and hence, to this extent the SPC is in compliance with the Hostages Convention. While the SPC does not expressly cover situations where a citizen of the country is arbitrarily detained or held hostage by a foreign State, the SPC does purport to apply to, and the Swedish courts have jurisdiction over, a crime committed outside of Sweden if the crime was committed against the Swedish nation, a Swedish municipal authority or other assembly, a Swedish public institution or against a Swedish national (except to the extent that crime was committed in an area not belonging to any State) or a crime for which the least severe punishment prescribed in Swedish law is imprisonment for four years or more (which includes hostage-taking and kidnapping).[104] It is unlikely that this provision will apply to a foreign State as its scope is limited to natural persons. While it may be possible to prosecute a person acting on behalf of a State actor, leading to an international arrest warrant, questions surrounding sovereign immunity may still make this prohibitive. Additionally, Sweden allows dual nationality and does not discriminate in the application of law based on dual or single nationality.

General policy framework in respect of hostage-taking. Outside the framework of the SPC, there is no specific domestic legal framework for dealing with situations where a Swedish national is taken hostage or arbitrarily detained by a foreign State. The Swedish government relies on its political and diplomatic processes in such situations. In addition, Sweden extends consular protection where its citizen (or any European Union citizen) is arbitrarily detained or held hostage by a foreign State, pursuant to the 2015 Council Directive. The 2015 Council Directive was implemented by way of new Swedish legislation under the Law on Consular Financial Assistance (the "**LCFA**"). Pursuant to the LCFA, a person deprived of his or her liberty by the decision of a court may be granted (either directly or through members of their families) economic assistance in regards to the cost of investigation, evidence, legal counsel etc., and has an enforceable right to consular assistance in certain circumstances.[105]

Specific aspects of policy framework in respect of hostage-taking. The payment of ransoms is not specifically criminalised in Sweden although, as a general matter, Sweden does not favour payment of ransoms, pursuant to a public statement by Sweden's Minister for Foreign Affairs in 2017.[106] The current policies for dealing with arbitrary detention or hostage-taking by a foreign State include the non-payment of ransoms and practicing quiet diplomacy.[107] While Swedish law does not make any exceptions to its policy of not paying ransoms based on dual nationality or a situation involving armed conflict, there are no concrete policies explicitly, or publicly, adopted by the Swedish government to handle the situation internationally except for relying on extra-legal diplomatic processes.

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been a handful of reported cases in which Swedish nationals have been taken hostage or arbitrarily detained abroad by either State actors or Non state actors. Of these, as outlined in Appendix 1 above, at least one reported case has involved a Swedish-Iranian dual national that has been taken hostage or arbitrarily detained by a foreign State.[108]

104. Chapter 2 Section 3 of the SPC.
105. Paragraph 7, Law on Consular Financial Assistance.
106. https://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=6725098.
107. https://www.regeringen.se/uttalanden/2017/06/skriftligt-uttalande-av-utrikesminister-margot-wallstrom-med-anledning-av-johan-gustafssons-frislappande
108. More specifically, Ahmadreza Djalali (2016, a Swedish-Iranian dual national detained in Iran).

General principles arising from treatment of cases. As there have been a limited number of cases involving Swedish dual nationals who have been taken hostage or arbitrarily detained by foreign States, it is difficult to draw any conclusions regarding general principles followed during a hostage-taking, other than the Swedish government's commitment to not make any ransom payments for the release of hostages.

Emergence of any "best practices" in Swedish government policy. While there is little available empirical evidence in relation to the Swedish government's approach to dealing with, and assisting, Swedish dual nationals who are taken hostage or arbitrarily detained by a foreign State, Sweden's direct implementation of the 2015 Council Directive pursuant to the LCFA establishes a route to legal recourse for individuals taken hostage or arbitrarily detained and their families for economic assistance in certain circumstances.

ANNEX 8 – SUMMARY OF UNITED KINGDOM DOMESTIC LAW

I. Implementation of international law obligations

General approach. The UK was an original signatory to and has ratified a range of international law treaties broadly relevant to hostage-taking, conditions of imprisonment and general human rights, notably the Hostages Convention, the Geneva Conventions, the ICCPR, the UDHR, the CAT, the ECHR and the VCCR. The UK follows a dualist system and so UK courts will only apply treaties that have been ratified and specifically incorporated into domestic law. The UK has specifically implemented a number of international law treaties broadly relevant to hostage-taking by foreign States by way of domestic legislation—in particular, Hostages Convention by way of the Taking of Hostages Act 1982 ("**THA82**") and the ECHR by way of the Human Rights Act 1998. Where an international law treaty has been ratified, but not directly incorporated into domestic law by way of legislation, it is not directly enforceable in the UK courts, although it can nonetheless be used to assist interpretation where UK legislation is ambiguous.[109] In addition, international law treaties that the UK has ratified, but not specifically implemented under domestic legislation, are often referred to as part of campaigns, debates and committee sessions in relation to UK domestic legislation, as the UK is bound by an international law obligation to comply with the terms of the treaty. Finally, while there have been some references to the Nelson Mandela Rules, the UN Body of Principles and the Tokyo Rules in domestic legislation and UK Parliament discussions, these have not been specifically implemented by way of domestic legislation.[110]

Notable reservations. The UK has not placed any notable reservations on the ratification of the international law treaties to which it is a party that are broadly relevant to hostage-taking, conditions of imprisonment and general human rights.

Compliance and monitoring reports. While the UK has submitted a number of monitoring reports with regard to its human rights obligations under the international law treaties to which it is party, none of these reports specifically cover hostage-taking of UK nationals by foreign States.[111] The UK has made numerous statements to the Human Rights Council regarding arbitrary detention, but none directly concerning hostage-taking of British nationals by foreign States.[112]

II. Domestic provisions

Criminalisation of hostage-taking. Hostage-taking is criminalised in the UK pursuant to the THA82, which implements the UK's ratification of the Hostages Convention. Under the THA82, a person who detains any person (the "hostage"), anywhere, and, in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence. Apart from the THA82, the offence of hostage taking is not specifically dealt with (other than some cursory references) comprehensively in any other dedicated legislation.

109. The Geneva Conventions, the ICCPR, the UDHR, the CAT and the VCCR have not been specifically implemented under domestic legislation in the UK.

110. As regards minimum standards for the treatment of prisoners, note that there has been more focus on the European Prison Rules than the Nelson Mandela Rules in the UK.

111. The UK has submitted monitoring reports under the ICCPR, the CAT, the ECHR and the Convention on the Rights of the Child.

112. Note that, following a complaint, the WGAD has deemed ongoing detention of Julian Assange in the Ecuadorian embassy in the UK to be arbitrary, although this has been strongly rejected by the UK.

Scope of the definition of hostage-taking. The definition of the offence of hostage-taking under the THA82 closely follows the definition under the Hostages Convention,[113] covering hostage-taking both in and outside the UK and is therefore, in principle, extraterritorial in scope.[114] The offence does not draw any distinction based on the nationality of the hostage and thus would not appear to exclude dual-national hostages. Similarly, the offence does not draw any distinction based on the nationality of the hostage-taker and thus would appear to cover foreign nationals. Overall, although the offence may in principle appear to cover hostage-taking by foreign States (or, more specifically, officials of foreign States), the practical enforcement of the offence in such circumstances carries inherent difficulties, particularly taking into account applicable sovereign immunity protections afforded to foreign State officials, as considered by the House of Lords.[115]

General policy framework in respect of hostage-taking. Outside the framework of the THA82, there is no specific domestic legal framework for dealing with situations where a UK national is taken hostage or arbitrarily detained by a foreign State, and the UK government relies on its political and diplomatic processes in dealing with such situations. This means that there is no affirmative duty on the UK to resolve hostage-taking situations and, as a general matter, there is no legal right to consular assistance, as set out in the UK Foreign and Commonwealth Office's ("**FCO**") guidance document.[116] The UK government adopts a discretionary, case-by-case approach in affording assistance to UK nationals abroad, including in dealing with hostage-taking situations. The FCO guidance document contains the UK government's basic policy towards consular assistance, and little further guidance has been published on the exact steps the UK government takes in the process. Moreover, in dealing with hostage situations, while the UK government will do everything it properly can to make sure the hostage is released safely, the FCO guidance document expressly states that it will not make substantive concessions to hostage-takers, including paying a ransom, changing government policy or releasing prisoners.[117]

Specific aspects of policy framework in respect of hostage-taking. As a general matter, the UK has a policy focused on disincentivising hostage-taking. Accordingly, as set out in the FCO's guidance document, the UK government has a policy against the payment of ransoms or offering equivalent substantive concessions. Apart from payments to terrorist organisations, the payment of ransoms is not specifically criminalised under the THA82 or other relevant legislation. Moreover, there is a long-standing tradition of the UK government requesting a media blackout and the media to show restraint in certain circumstances.[118] Finally, according to the FCO's guidance document, the UK government would appear to have a general policy against offering diplomatic assistance to UK dual nationals in situations arising with the country of their other nationality, but it is specifically stated that exceptions may be made to this general rule if in the circumstances of the case, the FCO determines that the dual national is "particularly vulnerable."[119]

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113. One point of divergence is that the crime of hostage-taking under the THA82 does not stipulate that the objective of compelling a State, international organisation or person to do or abstain from doing an act needs to be an explicit or implicit condition for the release of the hostage, which would appear to be required by the definition of the crime of hostage-taking under the Hostages Convention. The practical significance of this distinction is unclear.

114. Within the UK, judicial protection of freedom from arbitrary arrest and detention is of ancient standing in English law, notably manifested in the Magna Carta (1212) and the Bill of Rights (1688). These protections are available to any person who is detained in the UK, regardless of nationality. Under current UK legislation, this principle is reflected in detention time limits (e.g., the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000), time limits for remand (e.g., Prosecution of Offences Act 1985, Prosecution of Offences (CLT) Regulations 1987, Criminal Procedure Rules 2015) and the ability to challenge detention (e.g., Bail Act 1976, part 54 (judicial review) and part 87 (habeas corpus) of the Civil Procedure Rules 1998 and section 5 of the Human Rights Act), amongst others.

115. Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) Hansard, 25 November 1998.

116. See the FCO's "Support for British nationals abroad: a guide", available via the following link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702920/FCO_Brits_Abroad_guide__final_revised2.pdf.

117. FCO guidance document, page 22.

118. See for instance, Section 3.8 of the Ofcom Broadcasting Code (April 2017) or Cook ,T. The UK Media Law Pocketbook, Routledge, 2013.

119. FCO guidance document, page 5.

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been about 30 reported cases in which UK nationals have been taken hostage or arbitrarily detained abroad by either State actors or Non-state actors. Of these, as outlined in Appendix 1 above, at least ten reported cases have involved UK dual nationals that have been taken hostage or arbitrarily detained by foreign States.[120] Except for one case that arose in Ethiopia, all of these cases have arisen in Iran.

General principles arising from treatment of cases. In line with the UK government's "no-concession, no-payment" negotiation policy in hostage-taking situations, the UK government's response in the cases involving UK dual nationals that have been taken hostage or arbitrarily detained by foreign States has ranged from concerted inaction to moderate diplomatic engagement (including requests for consular assistance). Only four detainees—Roya Nobakht, Andargachew Tsege, Ghoncheh Ghavami, and Bahman Daroshafaei—appear to have been released to date. Based on publicly available information, the extent to which this approach has directly resulted in the release of these detainees is unclear.

Emergence of any "best practices" in UK government policy. Our research has found that there are no best practices per se and discretion is at the forefront of any assistance that is provided. For example, UK nationals do not have a legal right to consular assistance, it is provided on a discretionary case by case basis and the same basis of discretion applies to UK nationals who are arbitrarily detained or held hostage.

The UK also enacted the Criminal Finances Bill, inspired by the U.S. Magnitsky Act, which provides the UK with a tool to sanction hostage-taking when such hostage-taking is committed by a foreign official for a listed purpose. However, this act is not specifically directed at hostage-taking and targets the assets of corrupt officials who have committed gross human rights violations.

120. More specifically, Kamal Foroughi (2011; a British-Iranian dual national detained in Iran); Roya Nobakht (2013; a British-Iranian dual national detained in Iran); Andargachew Tsege (2014; a British-Ethiopian dual national detained in Ethiopia); Nazanin Zaghari-Ratcliffe (2016; a British-Iranian dual national detained in Iran); Bahman Daroshafaei (2016; a British-Iranian dual national detained in Iran); Abbas Edalat (2018; a British-Iranian dual national detained in Iran); and, finally, one as yet unnamed individual (2018; a British-Iranian dual national detained in Iran). In addition, Philip Blackwood, a British-New Zealand dual national, was charged in Myanmar in 2014 and ultimately released in 2016. The case was handled by the New Zealand government and does not appear to have involved any engagement by the UK government. It has also been reported that Aras Amiri, an Iranian national with permanent residence in the UK who worked for the British Council, was detained in Iran in 2018. Since Ms. Amiri was not a UK citizen, her case has not been supported by the UK government. These cases have not been included in the analysis given the lack of involvement of the UK government.

ANNEX 9 – SUMMARY OF UNITED STATES DOMESTIC LAW

I. Implementation of international law obligations

General approach. The U.S. participates in international law by signing and ratifying treaties, but often does not directly transpose these provisions into binding federal or domestic law. The U.S. signed and ratified the Hostages Convention, the Geneva Conventions, the CAT, the ICCPR and the VCCR. The U.S. also voted in the general assembly for adoption of the UDHR. The U.S. signed but has not ratified the Convention on the Rights of the Child, the American Convention on Human Rights and the Geneva Convention Additional Protocols of 1977. The U.S. does not have direct mechanisms for implementing the Nelson Mandela Rules, the UN Body of Principles or the Tokyo Rules. The U.S. meets standards set out in these policies through a variety of constitutional, statutory and regulatory provisions, as well as judicial decisions and policy documents issued by government agencies.

Notable Reservations. The U.S. has not made any notable reservations in relation to the Hostages Convention. However, the U.S. made reservations under both the CAT and the ICCPR to interpret the meaning of "cruel, inhuman or degrading treatment or punishment" as the "cruel and unusual punishment" that is prohibited by the Eighth Amendment to the U.S. Constitution, which may be relevant in a hostage-taking situation.

Compliance and monitoring reports. The U.S. has submitted a number of reports and written responses to questions from UN bodies with respect to the CAT and the ICCPR. These materials primarily discuss the treatment of prisoners at Guantanamo Bay and do not directly address the issue of hostage-taking or unjust detention by foreign States. The Trump Administration has not yet issued similar reports.

II. Domestic Provisions

Criminalisation of hostage-taking in the U.S. The U.S. criminalised hostage-taking at both the state and federal levels, by passing the Act for the Prevention and Punishment of the Crime of Hostage-Taking in 1984 (18 U.S.C. § 1203) (the "**Hostage-Taking Act**"), which implemented the Hostages Convention. Under the Hostage-Taking Act, whoever detains and threatens to kill, to injure or continue to detain another person in order to compel a third person or governmental organisation to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts/conspires to do so, shall be guilty of an offence.

Scope of the definition of hostage-taking. In line with Article 5 of the Hostages Convention, the Hostage-Taking Act only applies to situations outside the U.S. if: (i) the offender or person seized/detained is a national of the U.S.; (ii) the offender is found in the U.S.; or (iii) the governmental organization sought to be compelled is the U.S. The Hostage-Taking Act also criminalises kidnapping, a similar offence, which occurs when someone unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts or carries away and holds for ransom or reward or other gain any person. In order to be penalised under the Hostage-Taking Act, the person committing the act of kidnapping must have wilfully transported the other person in interstate or foreign commerce, regardless of whether the other person was alive at the time, or the offender travelled in interstate or foreign commerce or used the mail or other means. The Hostage-Taking Act's definition of hostage-taking includes no suggestion that a foreign State or foreign official would be exempt from the statute's coverage. However, the U.S. has traditionally not characterised situations where a foreign State has detained a U.S. citizen to be a "hostage-taking", even if the U.S. has objected to the detention as arbitrary, thereby limiting the application of the Hostage-Taking Act in these instances.

General policy framework of other hostage related crimes. Under 22 U.S.C. § 1731, the Hostage-Taking Act, the president of the U.S. is directed to use all "necessary and proper means" to obtain the release of a U.S. national unjustly held by a foreign government. There is, however, no affirmative legal duty on the part of the U.S. government to prevent a U.S. national from being taken hostage or to intervene if a U.S. national has been taken hostage. Several departments and agencies have issued policies or directives aimed at conducting outreach before hostage-taking or kidnapping occurs, protecting U.S. nationals abroad and extending aid and assistance to distressed U.S. citizens. In 2015, in response to a number of high profile hostage situations involving U.S. citizens, the U.S. took legislative and executive action by establishing a regulatory body to address hostage-taking. Congress passed legislation mandating the designation of a federal official as the "Interagency Hostage Recovery Coordinator" with responsibility for coordinating efforts related to "United States persons who are hostages held abroad", and is charged with coordinating activities of the federal government relating to hostage situations. In addition to this legislation, the Obama Administration issued several policies to address the issue of hostage-taking. The documents establish a Hostage Response Group, Hostage Recovery Fusion Cell and a Special Presidential Envoy for Hostage Affairs, which are tasked with coordinating the interagency response to hostage-taking situations and coordinating with family members of hostages held abroad. However, there are no additional legal protections that would apply specifically in the situation of a U.S. national being held by a foreign State. Situations of detention by a foreign State are typically handled by the Department of State ("**DOS**"), and not generally viewed as hostage-taking situations by the U.S. government. The Federal Bureau of Investigation has the authority to investigate all kidnapping and hostage-taking of U.S. citizens abroad.

Specific aspects of policy framework in respect of hostage-taking. Dual nationality is not a bar to the application of the Hostage-Taking Act, provided that the individual satisfies the definition of "national of the United States". There are no particular rules relating to dual nationals, and no evidence to suggest that dual nationals are treated differently in hostage-taking contexts.

In the U.S., the issue of immunity of foreign government officials from civil and criminal liability is not governed by the U.S. statutory codification of sovereign immunity (the Foreign Sovereign Immunities Act ("**FSIA**")). Civil liability of foreign government officials is governed "by foreign sovereign immunity under the common law."[121] Sovereign immunity for foreign officials from criminal prosecution is an unsettled and underdeveloped area of law in the U.S., and criminal charges are rarely invoked against foreign government officials for activities that take place on foreign soil.[122]

Despite significant uncertainty regarding sovereign immunity and the limitations to the application of the Hostage-Taking Act as set out above, there may be instances in which civil suits may be brought against certain foreign governments for hostage-taking. The FSIA contains an exception that authorises suits against foreign governments that have been designated as "state sponsors of terrorism" when they engage in "hostage-taking" against U.S. nationals. Specifically, the FSIA authorises lawsuits in situations in which "money damages are sought against a foreign State for personal injury or death that was caused by ...hostage-taking ...if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign State while acting within the scope of his or her office, employment, or agency."[123]

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121. Samantar v. Yousuf, 560 U.S. 305, 324, 130 S. Ct. 2278, 2292, 176 L. Ed. 2d 1047 (2010).

122. But see Department of Justice, Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election (Jul. 13, 2018), available at: https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election.

123. 28 U.S.C. § 1605(A)(a)(1).

There is voluminous case law regarding the specific elements that must be met in order to properly bring a claim for hostage-taking against a foreign government in the limited circumstances in which such claims are permitted under the FSIA. In general, U.S. courts have narrowly construed the scope of the "hostage-taking" hostage-taking exception to the FSIA. Recently, the District of Columbia District Court held that "hostage-taking" under FSIA does encompass certain situations in which U.S. citizens are unjustly detained. Specifically, in *Hekmati v. Islamic Republic of Iran*, that court established that Hekmati was a hostage as defined under FSIA when he was detained "on false espionage charges and, for four-and-a-half years, Iran continuously threatened to kill, injure, and detain him, in an effort to compel the U.S. to release Iranians imprisoned in the U.S. or make other political or financial concessions to Iran."[124] While it is theoretically possible to consider filing suit against a hostage-taker under the Racketeer Influenced and Corrupt Organizations Act ("**RICO**"), recent case law limiting the extraterritorial reach of RICO cases some doubt on the viability of such cases.[125] Moreover, the availability of RICO lawsuits against foreign governments is unsettled because of issues of sovereign immunity.[126]

Apart from restrictions on payments to terrorist organisations, there is no general legal prohibition on the payment of ransom money or similar benefits. Under 18 U.S.C. § 1202, it is illegal to possess or transfer ransom money paid in connection to a kidnapping. In other words, the provision does not criminalise the payment of ransom money itself; rather, it criminalises the possession and use of such funds by the offender or third parties after its payment as ransom. In 2015, the Obama Administration announced that it would not pursue prosecutions against families who made payments in such situations, but it is unclear if the Trump Administration will follow a similar policy. The U.S. government also has a policy of not paying ransom money and expressly discourages private individuals or entities from making such payments, as set out in the DOS Foreign Assistance Manual and the Obama Administration's policy directive still in effect.[127]

III. Recent policy and practice

Overview of recent cases. Over the past ten years, there have been dozens of instances of U.S. citizens being taken hostage or arbitrarily detained by State actors and Non-state actors. Of these, as outlined in Appendix 1 above, at least nine reported cases have involved U.S. dual nationals that have been taken hostage or arbitrarily detained by foreign States. A majority of these cases have arisen in Iran.

General principles arising from treatment of cases. President Obama's presidential policy directive states that the U.S. "will use every appropriate resource to gain the safe return of U.S. nationals who are held hostage," but it "will make no concessions to individuals or groups holding U.S. nationals hostage". However, some commentators have questioned whether this policy has been uniformly applied in practice. In particular, in the case of Jason Rezaian, it was revealed following his release that a cash payment sent to Iran was conditioned on the release of the U.S. prisoners, sparking charges that the U.S. government had paid a ransom. Administration officials explained that the payment was made in settlement of a significant, longstanding claim held by Iran against the U.S. at the Iran-United States claims tribunal in The Hague. President Obama described the payment as "the United States and Iran resolving a financial dispute that dated back more than

124. Hekmati v. Islamic Republic of Iran, 278 F. Supp. 3d 145, 162 (D.D.C. 2017).

125. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016).

126. See, e.g., John D. Corrigan, Restricting Rico Under Fsia, 84 St. John's L. Rev. 1477 (2010).

127. The DOS Foreign Assistance Manual states, "The U.S. Government will make no concessions to individuals or groups holding official or private U.S. citizens hostage. The U.S. will use every appropriate resource to gain the safe return of U.S. citizens who are held hostage." U.S. Department of State, Foreign Assistance Manual, Hostage Taking and Kidnappings, 7 FAM 1823 (2018).

three decades". Additionally, Mr Rezaian was released along with three other U.S. prisoners in exchange for the release of seven Iranians indicted or imprisoned in the U.S. President Obama released a public statement regarding the prisoner swap, in which he spoke of the swap in the context of a larger détente between the two nations and the recent signing of the JCPOA. It is a longstanding U.S. policy on unjust detentions by foreign State actors not to characterise such situations as a hostage situation, meaning that such detentions will fall outside of any legislative protection otherwise afforded to hostage situations in the U.S. and are instead treated as diplomatic matters by the DOS.

Emergence of any "best practices" in U.S. government policy. The U.S. government has not published a "best practices" guide or document. However, some of the policies described above may be viewed as outlining a number of best practices. Specifically, the U.S. government has policies against paying ransom or offering concessions to hostage-takers.

As noted above, in 2015 a number of new policies were released aimed at streamlining coordination between government agencies and increasing communication with family members in hostage-taking situations. They also mandated the creation of new offices within the Executive Branch charged with handling and responding to situations of hostage-taking. The DOS Foreign Assistance Manual also outlines specific actions that Foreign Service officers should take (or are prohibited from taking) in assisting families of individuals being detained or held hostage.

The U.S. also enacted the Global Magnitsky Act in 2016, which provides the U.S. with a tool to sanction hostage-taking when such hostage-taking is committed by a foreign official for a listed purpose. However, the U.S.'s Global Magnitsky Act is not specifically directed at hostage-taking and targets the assets of corrupt officials who have committed gross human rights violations.

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