

# The Declaration Against Arbitrary Detention in State-to-State Relations: A New Means of Addressing Discrimination Against Foreign and Dual Nationals?

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## INTRODUCTION

The Universal Declaration of Human Rights (“UDHR”) establishes that “[n]o one shall be subjected to arbitrary arrest, detention or exile.”<sup>1</sup> The International Covenant on Civil and Political Rights (“ICCPR”) contains a similar requirement that “[n]o one shall be subjected to arbitrary arrest or detention,” and imposes an obligation on States Parties to ensure that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>2</sup> These provisions reaffirm the prohibition of arbitrary detention, which is recognized under international and regional treaty law, as well as customary international law, and constitutes a *jus cogens* norm.<sup>3</sup>

Despite this strong normative foundation, arbitrary arrest and detention remains a global problem that knows no boundaries. In recent years, governments have been increasingly concerned about an emerging form of arbitrary detention: when foreign and dual nationals are detained by one State for the purpose of exercising leverage over, or seeking to compel action by,

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\* Member of the UN Working Group on Arbitrary Detention (2015-2022; Chairperson 2020-2021). To the best of the Author’s knowledge, this Commentary does not contain information relating to any communication or request for review currently before the Working Group. It discusses the Working Group’s jurisprudence without suggesting any action that it may take in any specific case. The views expressed are those of the Author alone.

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948) [hereinafter UDHR].

2. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 9(1) (Dec. 16, 1966) 999 U.N.T.S. 171 [hereinafter ICCPR].

3. See U.N. Working Group on Arbitrary Detention, *Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under Customary International Law*, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012), ¶¶ 42–51; see also the African Charter of Human and Peoples’ Rights, art. 6, 1520 U.N.T.S. 217 (June 27, 1981); American Convention on Human Rights, art. 7, 1144 U.N.T.S.143 (Nov. 22, 1969); Arab Charter on Human Rights art. 14 (May 22, 2004), reprinted in 12 Int’l Hum. Rts. Rep. 893 (2005); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, 213 U.N.T.S. 221 (Nov. 4, 1950).

another State.<sup>4</sup> This practice of detaining foreign and dual nationals in order to obtain a diplomatic, political, or other advantage over another State has become so prevalent that States have recognized the need to protect their citizens from being arbitrarily detained in another country. In February 2021, Canada launched the Declaration Against Arbitrary Detention in State-to-State Relations (“Declaration”) in order to enhance international cooperation in deterring the detention of foreign and dual nationals for the purpose of diplomatic coercion, and to address this form of detention whenever and wherever it occurs.<sup>5</sup> The Declaration is the first of its kind in seeking to address the specific challenge of the arbitrary detention of foreign and dual nationals and their use as “bargaining chips in international relations.”<sup>6</sup> Importantly, although breaking new ground, the Declaration reaffirms the established principle that arbitrary arrest and detention is contrary to international human rights law, including the UDHR and ICCPR.<sup>7</sup>

This Commentary considers the new Declaration, arguing that it is a promising initial response to the urgent need for the international community to denounce the detention of individuals because of their status as foreign or dual nationals. To highlight the prevalence of the arbitrary detention of foreign and dual nationals and the urgency of addressing it, this Commentary reviews recent opinions of the UN Working Group on Arbitrary Detention (“Working Group”). In all of the opinions reviewed, the Working Group found that foreign and dual nationals had been arbitrarily detained due to discrimination based on their nationality, or because they were not afforded their right to consular assistance. The Working Group has welcomed the Declaration, noting that “[i]ts aims and purposes relate closely to the concerns expressed by the Working Group in the past” and that it stands ready, within the remit of its mandate, to support this initiative and to engage with States that have endorsed it.<sup>8</sup> This Commentary takes a similar approach in welcoming the Declaration, while being mindful that States must take action to implement its principles. This Commentary concludes by exploring what options may exist at the international level to implement the Declaration, so that it effectively addresses

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4. See U.N. Working Group on Arbitrary Detention, *Arbitrary Detention*, U.N. Doc. A/HRC/48/55 (Aug. 6, 2021), ¶¶ 61–63 (noting the recent prevalence of the detention of foreign and dual nationals in order to gain leverage over another State).

5. See Government of Canada, *Declaration Against Arbitrary Detention in State-to-State Relations* (Feb. 15, 2021), [https://www.international.gc.ca/news-nouvelles/arbitraire\\_detention-detention\\_arbitraire-declaration.aspx?lang=eng](https://www.international.gc.ca/news-nouvelles/arbitraire_detention-detention_arbitraire-declaration.aspx?lang=eng) [<https://perma.cc/DTW5-798B>] [hereinafter Declaration].

6. Government of Canada, *Arbitrary Detention in State-to-State Relations*, [https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/human\\_rights-droits\\_homme/arbitraire\\_detention-detention\\_arbitraire.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/arbitraire_detention-detention_arbitraire.aspx?lang=eng) [<https://perma.cc/L78Z-NDWB>] (last updated Feb. 12, 2021).

7. Declaration, *supra* note 5, at ¶ 1.

8. *Arbitrary Detention*, *supra* note 4, at ¶ 63.

the challenges and risks that foreign and dual nationals experience when “traveling, working and living abroad.”<sup>9</sup>

## I. OVERVIEW OF THE DECLARATION AGAINST ARBITRARY DETENTION

The text of the Declaration commences by reaffirming that arbitrary arrest and detention is contrary to international law.<sup>10</sup> Within this broad reaffirmation, and guided by the UN Charter, the Declaration lays out eight key principles intended to enhance international cooperation in putting an end to arbitrary arrest, detention, or sentencing practices employed by some States against other governments.<sup>11</sup>

The Declaration expresses grave concern about the use of detention to exercise leverage over foreign governments, as this undermines cooperation between States and the obligation to settle international disputes by peaceful means.<sup>12</sup> The Declaration also raises human rights issues, calling on States to uphold their fair trial obligations, to respect the obligation to provide consular access, including under the Vienna Convention on Consular Relations (“VCCR”),<sup>13</sup> and to take concrete steps to prevent and put an end to harsh detention conditions, denial of access to counsel, and torture and other ill-treatment of individuals who have been arbitrarily detained to exercise leverage over foreign governments.<sup>14</sup>

A high level of determination to give effect to these principles and combat arbitrary detention across all jurisdictions worldwide is evident from the text of the Declaration. The Declaration is a pithy, two-page document consisting of eight paragraphs that recognize the pressing need for a coordinated international response and call for urgent action by States, rather than attempting to introduce any legal obligations of the kind typically found in treaties and conventions.<sup>15</sup> The Declaration is available in Arabic,<sup>16</sup> Chinese,<sup>17</sup> English,<sup>18</sup> French,<sup>19</sup> Russian,<sup>20</sup> and Spanish,<sup>21</sup> signaling a clear intention to make the content accessible to a broad audience.

9. This is the language used in the introductory paragraph of the Declaration, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.* at ¶¶ 1–3.

13. Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Apr. 24, 1963) [hereinafter VCCR].

14. Declaration, *supra* note 5, at ¶¶ 4–7.

15. *Id.* at ¶¶ 1–8.

16. For an Arabic translation of the Declaration, see [https://www.international.gc.ca/news-nouvelles/arbitrary\\_detention-detention\\_arbitraire-declaration.aspx?lang=ara](https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=ara) [https://perma.cc/4KUY-BREU].

17. For a Chinese translation of the Declaration, see [https://www.international.gc.ca/news-nouvelles/arbitrary\\_detention-detention\\_arbitraire-declaration.aspx?lang=zh-cn](https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=zh-cn) [https://perma.cc/TJ8V-X544].

18. Declaration, *supra* note 5.

19. For a French translation of the Declaration, see [https://www.international.gc.ca/news-nouvelles/arbitrary\\_detention-detention\\_arbitraire-declaration.aspx?lang=fra](https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=fra) [https://perma.cc/C4Y6-U5ZU].

Notably, the Declaration calls for the immediate release and provision of an effective remedy to individuals who have been subjected to this form of arbitrary detention.<sup>22</sup> It concludes with a statement of solidarity with States whose nationals have been arbitrarily arrested, detained, or sentenced by other States seeking to exercise leverage over them, as well as an acknowledgement of the need to work collaboratively to address this issue of mutual concern at the international level.<sup>23</sup>

The Declaration has several unique features that set it apart from other human rights instruments. It is a non-binding agreement between States to reaffirm established principles of human rights, the rule of law, the independence of the judiciary, and the rules-based international order.<sup>24</sup> Importantly, it does not mention or target any country or region, which likely enhances its credibility and acceptability to the international community, and may increase the likelihood of successful resolution through diplomatic channels of State-to-State cases of arbitrary detention. This approach is consistent with the reality that this form of detention is a global phenomenon not confined to any region, and is practiced in both developing and developed countries. Unlike other human rights instruments, the Declaration focuses only on one subset of arbitrary detention, specifically the arrest and detention of individuals for the purpose of diplomatic leverage, gain, or coercion.<sup>25</sup>

On February 15, 2021, Canada launched the Declaration through a virtual event hosted from Ottawa and attended by representatives of States, international organizations, and civil society.<sup>26</sup> The initiative has gained wide acceptance in all regions of the world, with sixty-eight endorsements from a range of governments and the European Union at the date of this Commentary,<sup>27</sup> demonstrating that the human rights principles articulated in the Declaration, as well as the need for action to be taken to implement those principles, has strong support by States worldwide. The international solidarity shown at this early stage may be an important factor in whether States work together in the future to implement the Declaration when con-

20. For a Russian translation of the Declaration, see [https://www.international.gc.ca/news-nouvelles/arbitrary\\_detention-detention\\_arbitraire-declaration.aspx?lang=rus](https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=rus) [https://perma.cc/H578-6KQM].

21. For a Spanish translation of the Declaration, see [https://www.international.gc.ca/news-nouvelles/arbitrary\\_detention-detention\\_arbitraire-declaration.aspx?lang=spa](https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=spa) [https://perma.cc/S5HR-AWZS].

22. Declaration, *supra* note 5, at ¶ 7.

23. *Id.* at ¶ 8. An asterisk to this paragraph recognizes that the Declaration seeks to address the arbitrary detention of dual nationals in accordance with the endorsing countries' laws on nationality. *Id.*

24. See Government of Canada, *Arbitrary Detention in State-to-State Relations*, *supra* note 6.

25. The diplomatic concessions extracted through arbitrary detention may include prisoner swaps, the settlement of bilateral disputes, or other economic and political benefits. Thomson Reuters Foundation, *Held Hostage? A Legal Report on Hostage-Taking by States in Peacetime and the Victim Protection Gap*, 8 (2018).

26. See Government of Canada, *Launch of Declaration Against Arbitrary Detention in State-to-State Relations* (Feb. 15, 2021), <https://www.canada.ca/en/global-affairs/news/2021/02/launch-of-declaration-against-arbitrary-detention-in-state-to-state-relations.html> [https://perma.cc/D9HH-ZSWN].

27. See *Arbitrary Detention in State-to-State Relations*, *supra* note 6.

fronted with real situations involving the arbitrary detention of their nationals or the nationals of other endorsing States.

The Declaration also has the support of prominent public figures, such as former UN Secretary-General Ban Ki-moon<sup>28</sup> and Amal Clooney, an international human rights lawyer who spoke at the launch.<sup>29</sup> Members of the Working Group were also present at the launch, with several delegations commending its work in addressing arbitrary detention.

At the launch event, the then-Canadian Minister of Foreign Affairs, Marc Garneau, introduced the Declaration by referencing the strong commitment from Canada to put an end to this form of arbitrary detention, stating that “[a]ll cases of arbitrary detention, whether they target Canadian nationals, dual nationals, nationals of partners and other states, are unacceptable. We will continue the fight against arbitrary detention in state-to-state relations, now and for the future.”<sup>30</sup>

## II. THE UN WORKING GROUP ON ARBITRARY DETENTION

The Working Group was established by the UN Commission on Human Rights in March 1991 and given a mandate of “investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.”<sup>31</sup>

In exercising this mandate, the Working Group carries out five main activities<sup>32</sup>: (i) adopting opinions on cases of alleged arbitrary detention

28. *Id.*

29. See Government of Canada, *Opening Remarks by Minister Garneau at the Launch of Declaration Against Arbitrary Detention in State-to-State Relations* (Feb. 15, 2021), [https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/human\\_rights-droits\\_homme/2021-02-15-opening\\_remarks-mot\\_d\\_ouverture.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/human_rights-droits_homme/2021-02-15-opening_remarks-mot_d_ouverture.aspx?lang=eng) [<https://perma.cc/4WRA-B9BD>].

30. *Arbitrary Detention in State-to-State Relations*, *supra* note 6.

31. Commission on Human Rights Res. 1991/42, U.N. Doc. E/CN.4/RES/1991/42, at ¶ 2 (Mar. 5, 1991). The mandate was most recently renewed by the Human Rights Council for a period of three years in September 2019. Human Rights Council Res. 42/22, U.N. Doc. A/HRC/RES/42/22, at ¶ 13 (Sept. 26, 2019).

32. These activities, as well as the Working Group’s mandate more generally, have been discussed extensively in human rights commentaries and literature. See generally American University Washington College of Law Center for Human Rights & Humanitarian Law, *Annex 1: The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015–2018): An Introduction for Practitioners* (Oct. 2021) (identifying trends and patterns in arbitrary detention); JARED GENSER, *THE UN WORKING GROUP ON ARBITRARY DETENTION: COMMENTARY AND GUIDE TO PRACTICE* (Cambridge University Press, 2020) (analyzing key principles derived from opinions, country visits, and deliberations on arbitrary detention); Leigh Toomey, *Addressing the Situation of Women Deprived of Liberty: Recent Practice of the UN Working Group on Arbitrary Detention*, 13 J. HUM. RTS. PRAC. 145 (2021) (offering insights on potential responses to gender-based detention); Áquila Mazzinghy, *Please, Set Me Free! The Right to Challenge an Unlawful Detention: Scrutinizing the Practice of the United Nations Working Group on Arbitrary Detention*, 5 PERTH INT’L L. J. 63 (2020) (providing an overview of arbitrary detention and fair trial violations); Leigh T. Toomey, *Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention*, 50 COLUM. HUM. RTS. L. REV. 185 (2018)

brought to it by individuals worldwide; (ii) undertaking country visits to States to offer technical assistance and advice on good practice; (iii) addressing urgent appeals and other communications to States on individuals in detention; (iv) developing deliberations on thematic areas of detention to provide guidance to States and stakeholders,<sup>33</sup> and (v) conducting follow-up on the implementation of its recommendations.<sup>34</sup>

One of the challenging aspects of the mandate is determining whether a person has been arbitrarily deprived of their liberty.<sup>35</sup> As Article 9 of the UDHR and Article 9(1) of the ICCPR recognize, not every arrest and detention will violate the prohibition of arbitrary detention.<sup>36</sup> Defining when detention becomes arbitrary requires careful analysis of the circumstances of each case.<sup>37</sup> As a guiding principle, the Working Group has explained that the notion of arbitrary detention “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>38</sup> The

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(exploring unresolved issues in alleged cases of discrimination); David S. Weissbrodt & Brittany Mitchell, *The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence*, 38 HUM. RTS. Q. 655 (2016) (examining the evolving approach to arbitrary detention in the global human rights context); Jared M. Genser & Margaret K. Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice*, 39 COLUM. HUM. RTS. L. REV. 101 (2008) (considering four case studies on arbitrary detention and their impact); Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT’L L. 709 (1991) (discussing the significance of establishing a worldwide human rights mechanism on arbitrary detention).

33. Deliberations are similar to the General Comments or Recommendations adopted by the UN treaty bodies, drawing on recurring issues in the Working Group’s jurisprudence or country visits, or contemporary themes. Recent deliberations have focused on women deprived of liberty, detention during public health emergencies, and reparations for arbitrary detention. See U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., *Deliberations*, <https://www.ohchr.org/EN/Issues/Detention/Pages/Deliberations.aspx> [https://perma.cc/K52P-S8VY].

34. U.N. Working Group on Arbitrary Detention, *Revised Fact Sheet No. 26*, at 8 (Feb. 8, 2019), <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf> [https://perma.cc/GS3E-N74K] [hereinafter *Revised Fact Sheet No. 26*].

35. The Working Group refers to “deprivation of liberty” to include all situations in which persons are detained without their free will, such as pretrial and post-trial detention, administrative detention, protective custody, house arrest, rehabilitation through labor, retention in centers for non-nationals, or involuntary detention in hospitals, psychiatric, or other medical facilities. Report of the U.N. Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, ¶ 9, U.N. Doc. A/HRC/30/37 (July 6, 2015).

36. See ICCPR, *supra* note 2, at art. 9(1) (stating that no one shall be deprived of liberty “except on such grounds and in accordance with such procedure as are established by law”) The Human Rights Committee has provided further guidance on when detention may be considered arbitrary under Article 9 and other provisions of the ICCPR: See U.N. Human Rights Commission, General Comment No. 35, art. 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35, Views adopted by the Committee at its 112th session, ¶¶ 10–23 (Oct. 7–31, 2014).

37. See U.N. Working Group on Arbitrary Detention, *Revised Fact Sheet No. 26*, *supra* note 34, at 5–7 (giving examples of when detention may become arbitrary).

38. U.N. Working Group on Arbitrary Detention, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, *supra* note 3, at ¶ 61 (citing the Human Rights Committee in *Mukong v. Cameroon*, Communication No. 458/1991, ¶ 9.8, Views adopted on July 21, 1994.).

Working Group has further developed this analysis through its own framework for assessing whether detention is arbitrary based on five categories set out in its Methods of Work<sup>39</sup>:

1. “When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her (category I).”<sup>40</sup> For example, the Working Group has recently stated that when a person was kept in detention after a judicial order for his release on bail had been made, the period of detention following the order had no legal basis and was arbitrary.<sup>41</sup>
2. “When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13–14, and 18–21 of the [UDHR] and, insofar as States parties are concerned, by articles 12, 18–19, 21–22, and 25–27 of the [ICCPR] (category II).”<sup>42</sup> In a recent example, the Working Group found that the detention of a human rights defender, who had criticized governmental efforts in her country to assist citizens affected by tropical storms, was arbitrary because the detention resulted from her exercise of the right to freedom of opinion and expression under Article 7 of the UDHR and Article 26 of the ICCPR.<sup>43</sup>
3. “When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the [UDHR] and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).”<sup>44</sup> There are many fair trial violations that might result in a category III finding. The Working Group determined that one such violation, consisting of a failure by the authorities to ensure that a detainee had access to a lawyer

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39. See Human Rights Council, *Methods of Work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/36/38, ¶ 8 (July 13, 2017) [hereinafter *Methods of Work*]; see also Leigh Toomey, *The Right to Conscientious Objection to Military Service: Recent Jurisprudence of the United Nations Working Group on Arbitrary Detention*, 19 HUM. RTS. L. REV. 787, 791–94 (2019) (explaining the process used by the Working Group to consider individual cases).

40. See *Methods of Work*, *supra* note 39, at ¶ 8(a).

41. See U.N. Working Group on Arbitrary Detention, Op. No. 27/2020 concerning Omoyele Sowore, ¶ 54, U.N. Doc. A/HRC/WGAD/2020/27 (Oct. 6, 2020).

42. *Methods of Work*, *supra* note 39, at ¶ 8(b).

43. See U.N. Working Group on Arbitrary Detention, Op. No. 6/2021 concerning Houayheuang Xayabouly, ¶ 59, U.N. Doc. A/HRC/WGAD/2021/6 (May 31, 2021).

44. See *Methods of Work*, *supra* note 39, at ¶ 8(c).

during his interrogation in a criminal case, resulted in the detention being arbitrary.<sup>45</sup>

4. “When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV).”<sup>46</sup> Although cases falling within this category are not as common as the other categories, the Working Group determined in a recent case that a detainee who was subjected to indefinite detention for over eight years because of his migratory status, without the possibility to challenge the legality of his detention before a judicial body, had been arbitrarily detained.<sup>47</sup>
5. “When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).”<sup>48</sup> As an example, the Working Group analyzed the situation of three young women living in rural areas with limited access to health services who had suffered obstetric emergencies, but were charged with alleged aggravated homicide offenses. The Working Group found that the women’s incarceration was arbitrary, as it amounted to discrimination against the women on the basis of their sex or gender and socioeconomic status.<sup>49</sup>

The Working Group has adopted many opinions in which foreign and dual nationals, as well as individuals who had been granted permanent residency in one State,<sup>50</sup> were alleged to have been arbitrarily detained by another State. Initially, the opinions focused on assessing whether the

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45. See U.N. Working Group on Arbitrary Detention, Op. No. 43/2020 concerning Serikzhan Bilash, ¶ 84, U.N. Doc. A/HRC/WGAD/2020/43 (Dec. 14, 2020).

46. See *Methods of Work*, *supra* note 39, at ¶ 8(d).

47. See Opinion No. 17/2021 concerning Mirand Pjetri, Working Grp. on Arbitrary Det. at its ninetieth session (3–12 May 2021), ¶ 119, U.N. Doc. A/HRC/WGAD/2021/17 (June 4, 2021).

48. See *Methods of Work*, *supra* note 39, at ¶ 8(e).

49. See U.N. Working Group on Arbitrary Detention, Op. No. 68/2019 concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández and Evelyn Beatriz Hernández Cruz, ¶ 116, U.N. Doc. A/HRC/WGAD/2019/68 (Mar. 4, 2020).

50. See, e.g., U.N. Working Group on Arbitrary Detention, Op. No. 51/2019 concerning Nizar Zakka, U.N. Doc. A/HRC/WGAD/2019/51 (Oct. 8, 2019) (permanent residency in the United States); U.N. Working Group on Arbitrary Detention, Op. No. 32/2019 concerning Saeed Malekpour, U.N. Doc. A/HRC/WGAD/2019/32 (Sept. 9, 2019) (permanent residency in Canada); U.N. Working Group on Arbitrary Detention, Op. No. 92/2017 concerning Ahmadrza Djalali, U.N. Doc. A/HRC/WGAD/2017/92 (Dec. 20, 2017) (permanent residency in Sweden).



detention was arbitrary under categories I, II, and III of the Methods of Work.<sup>51</sup> More recently, the Working Group has considered the arrest and detention of foreign and dual nationals through the lens of discrimination.

Over the last five years, the Working Group's jurisprudence has focused on whether foreign and dual nationals have been arrested and detained on the basis of "national or social origin."<sup>52</sup> If so, the detention will be considered arbitrary under category V of the Methods of Work.<sup>53</sup> This focus came about as a result of the Working Group's identification of an emerging pattern of discrimination against foreign and dual nationals in several cases brought before the Group, particularly when there was no other plausible explanation for the individual's detention.<sup>54</sup> The Working Group has, however, only been willing to make this finding when there is a sufficient factual basis to conclude that the alleged victim of arbitrary detention was specifically targeted on the basis of the individual's status as a foreign or

51. See, e.g., U.N. Working Group on Arbitrary Detention, Op. No. 58/2017 concerning Taysir Hasan Mahmoud Salman, U.N. Doc. A/HRC/WGAD/2017/58 (Oct. 20, 2017); U.N. Working Group on Arbitrary Detention, Op. No. 21/2017 concerning Mohamad Ismat Mohamad Shaker Az, U.N. Doc. A/HRC/WGAD/2017/21 (July 13, 2017); U.N. Working Group on Arbitrary Detention, Op. No. 50/2016 concerning Robert Levinson, U.N. Doc. A/HRC/WGAD/2016/50 (Jan. 17, 2017); U.N. Working Group on Arbitrary Detention, Op. No. 12/2016 concerning Phan (Sandy) Phan-Gillis, U.N. Doc. A/HRC/WGAD/2016/12 (June 22, 2016); U.N. Working Group on Arbitrary Detention, Op. No. 51/2015 concerning Salim Alaradi et al., U.N. Doc. A/HRC/WGAD/2015/51 (Mar. 29, 2016); U.N. Working Group on Arbitrary Detention, Op. No. 44/2015 concerning Jason Rezaian, U.N. Doc. A/HRC/WGAD/2015/44 (Mar. 11, 2016); U.N. Working Group on Arbitrary Detention, Op. No. 35/2015 concerning Mahmoud Abdulrahman al-Jaidah, U.N. Doc. A/HRC/WGAD/2015/35 (Dec. 21, 2015); U.N. Working Group on Arbitrary Detention, Op. No. 2/2015 concerning Andargachew Tsige, U.N. Doc. A/HRC/WGAD/2015/2 (July 6, 2015); U.N. Working Group on Arbitrary Detention, Op. No. 56/2014 concerning Saleh Farag Dhaifullah et al., U.N. Doc. A/HRC/WGAD/2014/56 (Jan. 29, 2015); U.N. Working Group on Arbitrary Detention, Op. No. 28/2013 concerning Amir Nema Hekmati, U.N. Doc. A/HRC/WGAD/2013/28 (Jan. 14, 2014); U.N. Working Group on Arbitrary Detention, Op. No. 18/2013 concerning Saeed Abedinialangashi, U.N. Doc. A/HRC/WGAD/2013/18 (Jan. 14, 2014).

52. Recent Working Group opinions on this topic are discussed in Part III, *infra*. "National, ethnic or social origin" is one of the grounds of discrimination listed in category V.

53. The detention will also be in violation of the UDHR, *supra* note 1, at arts. 2 and 7, and, in the case of States parties, the ICCPR, *supra* note 2, at arts. 2(1) and 26. Article 2 of the UDHR and Articles 2(1) and 26 of the ICCPR guarantee to all persons protection against discrimination on any ground such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

54. See, e.g., U.N. Working Group on Arbitrary Detention, Op. No. 75/2020 concerning Muhammad Iqbal, U.N. Doc. A/HRC/WGAD/2020/75 (Jan. 29, 2021); U.N. Working Group on Arbitrary Detention, Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50; U.N. Working Group on Arbitrary Detention, Op. No. 32/2019 concerning Saeed Malekpour, *supra* note 50; U.N. Working Group on Arbitrary Detention, Op. No. 52/2018 concerning Xiyue Wang, U.N. Doc. A/HRC/WGAD/2018/52 (Sept. 21, 2018); U.N. Working Group on Arbitrary Detention, Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, U.N. Doc. A/HRC/WGAD/2017/49 (Sept. 22, 2017); U.N. Working Group on Arbitrary Detention, Op. No. 7/2017 concerning Kamal Foroughi, U.N. Doc. A/HRC/WGAD/2017/7 (May 30, 2017); U.N. Working Group on Arbitrary Detention, Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, U.N. Doc. A/HRC/WGAD/2016/28 (Sept. 21, 2016). See also U.N. Working Group on Arbitrary Detention, Op. No. 29/2021 concerning Aras Amiri, U.N. Doc. A/HRC/WGAD/2021/29 (Oct. 1, 2021); U.N. Working Group on Arbitrary Detention, Op. No. 27/2021 concerning Kamran Ghaderi, U.N. Doc. A/HRC/WGAD/2021/27 (Oct. 8, 2021).

dual national.<sup>55</sup> The following Part of this Commentary considers several cases in which discrimination was established on the facts of each case.

### III. EXAMPLES OF THE ARBITRARY DETENTION OF FOREIGN AND DUAL NATIONALS

#### A. Discrimination

According to the UDHR and ICCPR, every person is entitled to the rights set forth in those instruments without distinction of any kind, including on the basis of “national or social origin.”<sup>56</sup> The ICCPR also obliges each State party to ensure to “all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”<sup>57</sup> Foreign and dual nationals are thus clearly entitled to the protections found in both instruments, including the rights to liberty and freedom from arbitrary arrest or detention, as well as to equality before the law, and the equal protection of the law without discrimination.<sup>58</sup>

In determining whether detention was motivated by the nationality of the alleged victim, the Working Group takes into account a range of factors, based upon the information provided by the petitioner and the State in question.<sup>59</sup> When making findings on questions of fact, the Working Group applies an evidentiary standard under which the petitioner has to present a *prima facie* case of arbitrary detention, at which point the burden of proof shifts to the State to refute the allegations.<sup>60</sup> This approach is taken because the State will usually have access to relevant information and documents (such as an arrest warrant, indictment, investigation, and court records) to support its actions in detaining a person.<sup>61</sup> When there are con-

55. See U.N. Working Group on Arbitrary Detention, Op. No. 56/2016 concerning Abdul Fatah and Sa'id Jamaluddin, ¶ 54, U.N. Doc. A/HRC/WGAD/2016/56 (Jan. 23, 2017); Genser, *supra* note 32, at 427.

56. UDHR, *supra* note 1, at art. 2; ICCPR, *supra* note 2, at arts. 2(1) and 26.

57. ICCPR, *supra* note 2, at art. 2(1).

58. UDHR, *supra* note 1, at art. 7; ICCPR, *supra* note 2, at art. 26. Discrimination refers to any “distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” Office of the High Commissioner for Human Rights, CCPR General Comment No. 18: Non-discrimination, ¶ 7 (Nov. 10, 1989). When the State is not party to the ICCPR, the Working Group applies the UDHR in its analysis of the detention.

59. The Working Group does not conduct its own investigations but relies upon the written submissions of the petitioner or party initiating the case (known as “the source”) and any response submitted by the State in question. Some States do not submit any response to the source’s allegations, whereas others deny the allegations or simply assert that lawful procedures have been followed without specifically addressing the allegations. In these circumstances, the Working Group will base its findings on the *prima facie* case submitted by the source. Rep. of the U.N. Working Group on Arbitrary Detention, U.N. Hum. Rts. Council at its nineteenth session, ¶ 68, U.N. Doc. A/HRC/19/57 (Dec. 26, 2011).

60. *Id.*

61. See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 2010 I.C.J. 639, ¶ 55 (Nov. 30).

flicting statements in the written submissions by the parties, the Working Group will consider the overall credibility of the submissions, including whether the Working Group has identified a similar pattern of arbitrary detention in the State concerned,<sup>62</sup> as well as relevant findings of other Special Procedures mandate holders.<sup>63</sup>

Foreign and dual nationals are often charged with serious national security offenses, such as espionage or collaboration with a foreign government,<sup>64</sup> or terrorism-related offenses. A key issue for the Working Group is whether there is any information to suggest that the detained individual was involved in the alleged offenses. When there is no indication that the individual was present in the detaining State for any reason other than a legitimate purpose, the Working Group has found that the detention resulted from discrimination on the basis of national or social origin.<sup>65</sup> Indeed, in several cases, the individuals had no previous criminal history,<sup>66</sup> or had previously spent time in the detaining state without incident,<sup>67</sup> making it unlikely that they were involved in the alleged offenses. A disproportionately heavy sentence imposed on foreign and dual nationals may also suggest that they have been targeted.<sup>68</sup>

In addition, the relationship between detained foreign and dual nationals and their employers can be relevant in determining whether they were targeted for arrest and detention. The Working Group has been able to establish that foreign and dual nationals were arbitrarily detained because of their nationality when they were employed by or associated with an organi-

62. Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, *supra* note 54, at ¶ 48.

63. Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 82.

64. *See, e.g.*, Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, at ¶ 24 (cooperation with a foreign country); Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 14 (espionage and collaboration with a hostile state); Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, *supra* note 54, at ¶ 10 (collusion with an enemy state); Op. No. 7/2017 concerning Kamal Foroughi, *supra* note 54, at ¶ 9 (espionage).

65. *See, e.g.*, Op. No. 32/2019 concerning Saeed Malekpour, *supra* note 50, at ¶¶ 7, 48 (family visit); Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶¶ 81–82 (dissertation research); Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, *supra* note 54, ¶ at 45 (family visit); Op. No. 7/2017 concerning Kamal Foroughi, *supra* note 54, at ¶ 40 (business travel, no evidence of espionage presented at trial); Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, *supra* note 54, at ¶ 49 (family visit).

66. *See, e.g.*, Op. No. 32/2019 concerning Saeed Malekpour, *supra* note 50, at ¶ 48; Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 81; Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, *supra* note 54, at ¶ 45; Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, *supra* note 54, at ¶ 49.

67. *See, e.g.*, Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 81 (previous visits to the detaining State for research purposes); Op. No. 7/2017 concerning Kamal Foroughi, *supra* note 54, at ¶ 40 (regular travel to the detaining State since the early 1990s); Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, *supra* note 54, at ¶ 5 (arrest following a family visit that took place without any problems).

68. *See, e.g.*, Op. No. 32/2019 concerning Saeed Malekpour, *supra* note 50, at ¶ 48 (death penalty commuted to life sentence); Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 81 (ten years' imprisonment).

zation based in another State.<sup>69</sup> In some cases, the nature of the employment itself appears to have been a risk factor in the detention of foreign and dual nationals, particularly when the work gives the detained individual access to (and presumably a degree of influence over) a large audience in and outside the detaining State, or is otherwise perceived as a threat.<sup>70</sup>

Similarly, public statements made by the authorities in relation to the detained individual, or the manner in which the individual has been portrayed by the media, may suggest that he or she was targeted for discriminatory reasons. For example, the Working Group found that a dual national had been targeted on the basis of her “national or social origin” following the release of a statement by the authorities referring to her “English background,” as well as her alleged role as “one of the key ringleaders connected to foreigners, who had performed various missions for furthering the malicious goals of the enemies of the regime.”<sup>71</sup> In another case, a dual national was found to have been targeted for his nationality following the publication of a video online by the state-run judicial news service in which images of his arrest were “directly juxtaposed” with an image of his foreign passport and “a montage of anti-American-themed images.”<sup>72</sup> In a third case, one year after the detention of a foreign national, a news service with alleged ties to the judiciary of the detaining State published an account of the case, claiming that foreign research centers and a “spider web” of connections had deployed the foreign national to collect classified documents under the cover of legitimate scholarly activities.<sup>73</sup>

Finally, the manner in which the detained individual is treated may indicate discrimination on the basis of nationality. In a recent case, the authorities required an elderly dual national with serious health problems to speak only in the language of the detaining State when communicating with his

69. See, e.g., Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, at ¶¶ 76, 79 (detainee’s employer allegedly received funding from a foreign government and an overseas organization); Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶ 81 (charges linked to detainee’s relationship with academic institutions in another country); Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, *supra* note 54, at ¶¶ 34, 43 (affiliation with Western organizations and institutions).

70. See, e.g., Op. No. 75/2020 concerning Muhammad Iqbal, *supra* note 54, at ¶¶ 6, 71 (threat of economic competition by a non-national); Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, at ¶¶ 5, 44–46, 79 (detainee was an advocate for internet freedom, with leadership roles in relevant organizations); Op. No. 32/2019 concerning Saeed Malekpour, *supra* note 50, at ¶¶ 4, 23, 48 (detainee was a software engineer and freelance website designer who created software to improve the uploading of internet images).

71. Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe, *supra* note 54, at ¶¶ 18, 47, 50 (also finding that the statement undermined the detainee’s right to the presumption of innocence).

72. Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi, *supra* note 54, at ¶¶ 34, 43–45, 49–50 (also finding that the video undermined the detainee’s right to the presumption of innocence).

73. Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, at ¶¶ 17, 81.

family. The Working Group found that this was one of several factors indicating a discriminatory attitude toward him as a dual national.<sup>74</sup>

The Working Group does not make a finding of discrimination lightly, and takes into account a range of factors in determining whether foreign and dual nationals have been targeted for arrest and detention. These factors include: the nature of the charges and any sentence imposed; whether the detained individual was present in the detaining state for a legitimate purpose, including employment by a foreign employer; any statements made by the authorities in relation to the case; and the manner in which the detained individual was treated.

### B. Consular Assistance

When reviewing submissions involving the arrest and detention of foreign and dual nationals, the Working Group may also consider whether there has been a violation of the right to consular assistance<sup>75</sup> as part of its overall determination of whether the detained individual was afforded a fair trial.<sup>76</sup> The Working Group has found that the right to consular assistance was violated when the detaining State did not inform a foreign national without delay of his rights under the VCCR,<sup>77</sup> or did not inform the other State without delay that its national was in detention.<sup>78</sup> Other violations of the right to consular assistance have occurred when the detained individual was denied access to consular officials, or the access was delayed or insuffi-

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74. Op. No. 7/2017 concerning Kamal Foroughi, *supra* note 54, at ¶¶ 23, 40 (noting that the detainee's family members were based in another State and had limited knowledge of the language spoken in the detaining State).

75. VCCR, *supra* note 13, at art. 36 (codifying the right to consular assistance under customary international law). States parties to the VCCR are only required to afford the benefits of Article 36 to nationals of other states parties. *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 6(3), 1465 U.N.T.S. 85 (Dec. 10, 1984); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 16(7), 2220 U.N.T.S. 3 (Dec. 18, 1990) [hereinafter ICMW]; G.A. Res. 43/173, ¶ 16(2), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988); G.A. Res. 70/175, ¶ 62, U.N. Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (Jan. 8, 2016).

76. The Working Group regards access to consular assistance as a human right, as well as an element of the right to a fair trial. This is also the approach of other U.N. Special Procedures mandates. *See, e.g.*, Special Rapporteur of the Hum. Rts. Council on extrajudicial, summary or arbitrary executions, *Application of the death penalty to foreign nationals and the provision of consular assistance by the home State*, ¶¶ 20–31, U.N. Doc. A/74/318 (Aug. 20, 2019).

77. *See, e.g.*, U.N. Working Group on Arbitrary Detention, Op. No. 34/2020 concerning Abdullah Awad Salim al-Shamsi, ¶ 56, U.N. Doc. A/HRC/WGAD/2020/34 (Oct. 14, 2020). The VCCR refers to the detaining State as the “receiving State.” VCCR, *supra* note 13.

78. *See, e.g.*, U.N. Working Group on Arbitrary Detention, Op. No. 55/2019 concerning Abdulmalik Mohammad Ahmad Mohammad al-Mukhanqi and Abdullah Mohammad Ahmad Attiah, ¶ 42, U.N. Doc. A/HRC/WGAD/2019/55 (Sept. 19, 2019). The VCCR refers to the other State as the “sending State.” VCCR, *supra* note 13.

cient,<sup>79</sup> or the consular visits did not take place in circumstances that would guarantee confidentiality of the discussions.<sup>80</sup>

Through its jurisprudence on consular assistance, the Working Group has reinforced its position that effective access to consular officials is an essential means of securing a fair trial for foreign and dual nationals, particularly those who may be unfamiliar with the local laws, customs, and language.<sup>81</sup> Regular and unrestricted consular access may constitute the only avenue for the detained individual to be informed about the individual's rights and how to exercise them, to access legal representation and interpretation services, to obtain any exculpatory evidence, to minimize the individual's exposure to the risk of torture and ill-treatment, to benefit from independent trial monitoring by consular officials, and to ensure the provision of evidence on past good character at sentencing.<sup>82</sup> Consular assistance can have a significant impact in securing the release of foreign and dual nationals who are arbitrarily detained abroad,<sup>83</sup> and may also enhance international cooperation between States:

[T]he institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.<sup>84</sup>

When finding a violation of the right to consular assistance, the Working Group often considers the detention to be arbitrary under category III of the Methods of Work<sup>85</sup> because of the non-observance of fair trial stan-

79. See, e.g., U.N. Working Group on Arbitrary Detention, Op. No. 31/2020 concerning Abdullah Hani Abdullah, ¶ 50, U.N. Doc. A/HRC/WGAD/2020/31 (July 2, 2020) (one contact with consulate, five years after arrest and two years after sentencing); U.N. Working Group on Arbitrary Detention, Op. No. 28/2019 concerning Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker, ¶ 28, U.N. Doc. A/HRC/WGAD/2019/28 (Oct. 21, 2019) (no access until a year after arrest); Op. No. 2/2015 concerning Andargachew Tsige, *supra* note 51, at ¶ 12 (a brief visit fifty days after arrest).

80. See, e.g., U.N. Working Group on Arbitrary Detention, Op. No. 72/2019 concerning Mark Swidan, ¶¶ 30, 44–45, U.N. Doc. A/HRC/WGAD/2019/72 (Feb. 5, 2020) (judicial officers present at consular meetings, no discussion permitted of case-related facts); U.N. Working Group on Arbitrary Detention, Op. No. 45/2017 concerning Hasnat Karim, ¶¶ 15(d), 29, U.N. Doc. A/HRC/WGAD/2017/45 (Sept. 15, 2017) (supervised consular visits).

81. See Report of the U.N. Working Group on Arbitrary Detention, ¶¶ 50–58, U.N. Doc. A/HRC/39/45 (July 2, 2018); see also Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, at ¶ 72.

82. Report of the U.N. Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 55–57.

83. *Id.* at ¶ 57.

84. Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, ¶ 72.

85. As noted earlier, category III requires a finding that the violation “is of such gravity as to give the deprivation of liberty an arbitrary character.” *Methods of Work*, *supra* note 39, ¶ 8(c). See, e.g., Op. No. 34/2020 concerning Abdullah Awad Salim al-Shamsi, *supra* note 77, ¶ 56; Op. No. 31/2020 concerning Abdullah Hani Abdullah, *supra* note 79, ¶ 50; U.N. Working Group on Arbitrary Detention, Op. No. 82/2019 concerning Waleed Antoine Moubarak, ¶ 82, U.N. Doc. A/HRC/WGAD/2019/82 (Feb. 14, 2020); Op. No. 72/2019 concerning Mark Swidan, *supra* note 80, ¶¶ 44–45; Op. No. 55/

dards.<sup>86</sup> The Working Group may find that the detention is arbitrary under category III and category V,<sup>87</sup> or under category III alone, if discrimination on the basis of “national or social origin”<sup>88</sup> was not established on the facts of the case. In all cases involving the alleged violation of the right to consular assistance, the Working Group considers whether the detaining State informed the foreign national of their rights under the VCCR; whether the detaining State notified the other State that its national was in detention, and whether there has been prompt, unrestricted, and confidential consular access to the foreign national.

#### IV. IMPLEMENTATION OF THE DECLARATION AGAINST ARBITRARY DETENTION IN STATE-TO-STATE RELATIONS

As illustrated in the Working Group’s jurisprudence, the arbitrary detention of foreign and dual nationals presents a serious threat to the well-being of individuals, to international relationships between States, and to the universality of international human rights norms that States have agreed to uphold for the benefit of all people. The Declaration represents a positive step in addressing arbitrary detention in State-to-State relations. Nonetheless, it is clear that further political and legal work is needed to convert the pressure of numerous endorsements of this initiative,<sup>89</sup> as well as strong statements by States and others denouncing this form of detention,<sup>90</sup> into tangible results. As Canada’s Foreign Minister acknowledged, “[t]his is only the beginning. Now we must turn our attention to finding

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2019 concerning Abdulmalik Mohammad Ahmad Mohammad al-Mukhanqi and Abdullah Mohammad Ahmad Attiah, *supra* note 78, ¶¶ 42–43; Op. No. 28/2019 concerning Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker, *supra* note 79, ¶¶ 71–76.

86. UDHR, *supra* note 1, at arts. 9, 10, 11(1); ICCPR, *supra* note 2, at arts. 9(1), 14(1) and (3).

87. *See, e.g.*, Op. No. 51/2019 concerning Nizar Zakka, *supra* note 50, ¶¶ 68–73, 75–79; U.N. Working Group on Arbitrary Detention, Op. No. 84/2018 concerning Andrew Craig Brunson, ¶¶ 67–72, U.N. Doc A/HRC/WGAD/2018/84 (Feb. 15, 2019); Op. No. 52/2018 concerning Xiyue Wang, *supra* note 54, ¶¶ 79(b), 80–82.

88. There may also be other grounds of discrimination listed in category V applicable to the arrest and detention of foreign and dual nationals. *See, e.g.*, Op. No. 75/2020 concerning Muhammad Iqbal, *supra* note 54, ¶¶ 71–73 (foreign national detained because of his national origin and owing to his economic status).

89. *See* Emilia Currey, *Canada’s joint declaration against arbitrary detention needs teeth*, Australian Strategic Policy Initiative, THE STRATEGIST (Feb. 25, 2021), <https://www.aspistrategist.org.au/canadas-joint-declaration-against-arbitrary-detention-needs-teeth/> [<https://perma.cc/KX7C-KS3P>] (arguing that political pressure will have more impact than the content of the Declaration).

90. *See, e.g.*, Statement by Michelle Bachelet, UN High Commissioner for Human Rights, at the 44th session of the Human Rights Council, *Global update on human rights and the impact of the COVID-19 pandemic* (June 30, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26015&LangID=E> [<https://perma.cc/359Y-ZPF7>] (calling for action to uphold foreign detainees’ rights to consular assistance). *See also* Joint Statement on Arbitrary Detention delivered under Item 8 at the 45th session of the Human Rights Council by Sweden on behalf of 35 States (Oct. 1, 2020), <https://www.dfat.gov.au/international-relations/joint-statement-arbitrary-detention-item-8-delivered> [<https://perma.cc/GDA9-3STA>] (expressing concern at the politically-motivated arrest, detention, and sentencing of foreign nationals).

constructive ways to build and sustain international momentum to put an end to arbitrary detention.”<sup>91</sup>

Canada has released a Partnership Action Plan establishing six voluntary measures that States may take in demonstrating their commitment to this initiative.<sup>92</sup> Canada has also offered to facilitate the convening and exchanging of views on the Partnership Action Plan with countries that have endorsed the Declaration.<sup>93</sup> In May 2021, the G7 Foreign and Development Ministers Communiqué reaffirmed support for the Declaration and announced the Partnership Action Plan, inviting endorsing States and like-minded partners to take part in the voluntary cooperation outlined in the Plan.<sup>94</sup>

The Declaration is a non-binding instrument that seeks to raise the diplomatic cost for States that engage in the arbitrary detention of foreign and dual nationals. Action to enforce its key principles will be needed in deterring arbitrary detention in State-to-State relations. At the political level, human rights experts and international observers have called upon more States to endorse the Declaration and to impose targeted, multilateral travel bans, asset freezing or seizure, and financial sanctions against governments that continue this practice.<sup>95</sup> Sanctions may include *Magnitsky* laws directed at political leaders and officials who commit gross human rights abuses overseas.<sup>96</sup> *Magnitsky* laws, which were initially implemented in the United States, involve the imposition of targeted sanctions—such as freezing bank accounts, seizing property, and enacting travel bans—on individuals who engage in human rights abuses so that they are not able to seek safe haven in the country imposing the sanctions.<sup>97</sup>

91. Hon. Marc Garneau, former Minister of Foreign Affairs, Canada. See Government of Canada, *Launch of Declaration Against Arbitrary Detention in State-to-State Relations*, *supra* note 26.

92. The proposed voluntary measures are: (i) advocacy and raising awareness of the Declaration through regional and international mechanisms; (ii) research and analysis on the prevalence of arbitrary detention in State-to-State relations; (iii) sharing information on specific cases and exploring lessons learned in their resolution; (iv) engaging civil society and other stakeholders on arrest and detention issues; (v) supporting targeted media and social media campaigns; and (vi) meeting to assess the Plan and its effectiveness. See Government of Canada, *Arbitrary detention in state-to-state relations – Partnership Action Plan* (last modified May 3, 2021), [https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/arbitraire-detention-arbitraire-action\\_plan.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/arbitraire-detention-arbitraire-action_plan.aspx?lang=eng) [https://perma.cc/3XSC-YH9C].

93. *Id.*

94. Government of Canada, *Group of Seven Foreign and Development Ministers Communiqué*, ¶¶ 58–60, (May 5, 2021), [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/g7/documents/2021-05-05-foreign\\_affairs\\_dev-affaires\\_etrangeres\\_dev.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/g7/documents/2021-05-05-foreign_affairs_dev-affaires_etrangeres_dev.aspx?lang=eng) [https://perma.cc/2W3Y-BQAU].

95. See e.g., Thomson Reuters Foundation, *supra* note 25, at 16–17. See also Mike Blanchfield, *Canada creates coalition with 57 countries to declare arbitrary detentions immoral*, GLOBAL NEWS (Feb. 15, 2021), <https://globalnews.ca/news/7641177/canada-arbitrary-detention-coalition-2-michaels/> [https://perma.cc/PF9V-VL4F].

96. Thomson Reuters Foundation, *supra* note 25, at 16, 19.

97. *Id.* at 16.



Any political action would depart markedly from the current “country-agnostic” stance of the initiative,<sup>98</sup> and would likely lead to the deterioration of diplomatic and economic relationships, at least in the short term.<sup>99</sup> Appropriately targeted sanctions or diplomatic interventions might, however, serve as a sufficient disincentive for States and individuals to engage in arbitrary detention in some cases. Other actions at the political level might involve States whose nationals are detained summoning the ambassadors from States who practice coercive detention in diplomatic protest, or refusing diplomatic immunity for any consulate official whose government engages in arbitrary detention of foreign and dual nationals.<sup>100</sup>

At the legal level, further steps could be taken to formalize the statements of principle made in the Declaration into an international treaty or convention.<sup>101</sup> An international treaty would impose binding legal obligations upon States Parties, as opposed to the non-binding Declaration whose sanctions are largely limited to diplomatic and political pressure.<sup>102</sup> Treaty obligations would usually include reporting requirements for States Parties to provide detailed information on progress to a supervising treaty body, which may assist in determining the impact of the treaty. However, it is unclear whether a new treaty or convention would add significant value to the current normative framework, including the UDHR and ICCPR, which has been analyzed and interpreted over many years by the UN treaty bodies and special procedures.

That said, more recent multilateral international conventions have applied existing rights (including the rights to liberty, freedom from arbitrary arrest and detention, and fair trial) to specific groups, such as children, migrant workers, and persons with disabilities.<sup>103</sup> A similar approach could be taken through a new convention applicable to foreign and dual nationals. An advantage of this option would be a renewed focus on the pervasive

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98. See *Blanchfield*, *supra* note 95 (quoting former Foreign Minister Marc Garneau in discussing the Declaration).

99. Thomson Reuters Foundation, *supra* note 25, at 17.

100. *Id.* at 20.

101. See, e.g., Emilia Currey, *supra* note 89 (noting that Canada took similar steps in relation to the campaign against landmines, which also started out as a declaration).

102. The distinction between the Declaration and a treaty. Unlike the ICCPR, the UDHR is not a legally binding instrument, though it has gained authoritative moral force over the years, with some of its provisions considered to either qualify as, or to constitute evidence of, customary international law. See ADAM MCBETH, JUSTINE NOLAN & SIMON RICE, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 22–24 (2011).

103. Convention on the Rights of the Child, arts. 37, 40, 1577 U.N.T.S. 3 (Nov. 20, 1989); ICMW, *supra* note 75, arts. 16–19; Convention on the Rights of Persons with Disabilities, arts. 13–14, 2515 U.N.T.S. 3 (Dec. 13, 2006). Although the ICMW has not been widely ratified by States (with only fifty-six States Parties at the date of this Commentary), the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities have been widely ratified, suggesting a willingness by States to commit themselves to the obligations toward children and persons with disabilities in these treaties. For the ratification status of each treaty, see <https://treaties.un.org/> [<https://per.ma.cc/RB2M-GSHT>].

nature of discrimination based on nationality, and greater elaboration of the scope of human rights in this context.<sup>104</sup> A convention focused on foreign and dual nationals might also be seen as entailing a narrower range of responsibilities than older international conventions, such as the ICCPR, which extends rights to all persons. States may be more willing to ratify a new convention with a limited focus, and perhaps with fewer reservations to specific articles. Moreover, with the resumption of international travel following the COVID-19 pandemic, it might be politically advantageous for States to be seen as demonstrating their commitment to protecting their nationals abroad through a convention that specifically addresses the situation of foreign and dual nationals. It is unlikely that States that engage in coercive detention practices would ratify such a convention, though a critical mass of States Parties may itself be a significant isolating factor for those that choose not to join.

There are also other existing options available to implement the Declaration at the international level, though these have significant limitations. Petitioners will continue to bring individual cases of alleged arbitrary detention before UN human rights mechanisms, such as the treaty bodies and special procedures, using the norms found in existing treaties and conventions. It is likely that these human rights mechanisms will refer to the statements of principle found in the Declaration, given that the Declaration affirms existing human rights law on arbitrary detention. Although these human rights mechanisms are influential and may play a key role in building pressure to put an end to arbitrary detention, they lack real enforcement power. Moreover, some of their mandates may not be well suited to addressing arbitrary detention for diplomatic gain. For example, it has been argued that the arbitrary detention of foreign and dual nationals amounts to unlawful hostage-taking of civilians, and that a specific UN Special Procedures mandate—such as a special rapporteur or new working group, or revision of the Working Group’s mandate to include hostage-taking—is needed to fill this protection gap.<sup>105</sup> Given the financial constraints and limited availability of personnel within the UN to support a new or significantly revised mandate, it seems unlikely that creating a new mechanism to address the arbitrary detention of foreign and dual nationals would be progressed by States.

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104. A new convention could be extended to other situations involving the detention of foreign nationals, such as immigration detention, detention pursuant to counter-terrorism efforts, and detention in the context of drug-control policies. See, e.g., Report of the U.N. Working Group on Arbitrary Detention, *Revised deliberation No. 5 on deprivation of liberty of migrants*, *supra* note 81, annex; U.N. Working Group on Arbitrary Detention, Op. No. 70/2019 concerning Mohammed al Qahtani, ¶¶ 53–55, U.N. Doc. A/HRC/WGAD/2019/70 (Jan. 30, 2020) (citing the Working Group’s jurisprudence on Guantánamo Bay); Study of the U.N. Working Group on Arbitrary Detention, *Arbitrary detention relating to drug policies*, U.N. Doc. A/HRC/47/40 (May 18, 2021).

105. See Thomson Reuters Foundation, *supra* note 25, at 2–3, 17.

In addition, States and civil-society stakeholders can provide information on individual cases during the Universal Periodic Review (“UPR”) of a State that has been identified as engaging in arbitrary detention in State-to-State relations.<sup>106</sup> However, if the detaining State does not accept the relevant recommendations, it is unclear whether the UPR itself would yield any lasting results beyond brief public condemnation of the practice. Moreover, given that each State is only reviewed once in every UPR cycle—which currently takes more than four years to complete<sup>107</sup>—opportunities to use this peer review mechanism to draw attention to detention practices in a particular State are limited.

Finally, it has also been suggested that States could pursue State-to-State claims before the International Court of Justice (“ICJ”) based on alleged consular access violations under the VCCR.<sup>108</sup> A State may initiate a case before the ICJ within its compulsory jurisdiction provided that both States are parties to the VCCR and its Optional Protocol.<sup>109</sup> For example, in a recent case before the ICJ, India alleged violations of the VCCR in the detention and trial of an Indian national who was accused of espionage and terrorism and sentenced to death by a military court in Pakistan.<sup>110</sup> The ICJ found that Pakistan had committed several violations of the VCCR.<sup>111</sup> The ICJ ordered Pakistan to inform the Indian national of his rights and to allow India consular access to him, to review the conviction and sentence so that full weight is given to the effect of the VCCR violations, and to implement a continued stay of execution for the effective review and reconsideration of the conviction and sentence.<sup>112</sup> However, at the date of this Commentary, there were only fifty-two States Parties to the Optional Protocol.<sup>113</sup> As a result, this avenue for States to seek review of cases involving the detention of foreign and dual nationals will not be available for most disputes arising between States Parties to the VCCR.

Beyond implementation options at the international level, other multi-lateral and regional options may emerge to effectively implement the Dec-

106. *Id.* at 17.

107. The calendar of UPR reviews for the first, second, third, and fourth cycles can be found at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx> [https://perma.cc/5X4E-8WRP]. For example, the reviews of Canada in the UPR process took place in February 2009 (first cycle), April 2013 (second cycle), and May 2018 (third cycle). It is due to participate in the fourth cycle in October–November 2023. Canada’s participation in the UPR is used as an illustrative example here given its lead role in developing the Declaration.

108. Thomson Reuters Foundation, *supra* note 25, at 18.

109. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, at art. I, 596 U.N.T.S. 487 (Apr. 24, 1963). For a recent example, see *Kulbhushan Sudhir Jadhav (India v. Pakistan)*, Judgment, 2019 I.C.J. 418 (July 17).

110. *Kulbhushan Sudhir Jadhav (India v. Pakistan)*, Judgment, 2019 I.C.J. 418 (July 17).

111. *Id.* at ¶¶ 102, 113, 119. Namely, the failure to inform the detained Indian national of his rights under Article 36(1)(b), failure to inform India without delay of the detention of its national in accordance with Article 36(1)(b), and denial of consular access by India to its national in violation of Article 36(1)(a) and (c) of the VCCR.

112. *Id.* at ¶ 149.

113. See Optional Protocol, *supra* note 109.

laration. Making the practice untenable will require multilateral action by States, acting in solidarity and reacting together to individual cases, to raise the actual and perceived pressure, costs, and risks of violating the Declaration's principles.<sup>114</sup>

Despite the initial optimism surrounding the launch of the Declaration, it remains to be seen whether States will actually be willing and able to act together. Taking action will involve diplomatic and other risks for States that seek to challenge the arbitrary detention of their nationals by other States, including potentially having their own human rights records brought under scrutiny.<sup>115</sup> As noted earlier in this Commentary, determining whether detention is arbitrary requires careful analysis, and States that seek to intervene may be met with claims that they are violating the sovereignty of the third State,<sup>116</sup> or that the detained foreign and dual nationals have committed an offence in the detaining State and were lawfully detained.<sup>117</sup> In the past, lack of coordination among States has been a major impediment to addressing individual cases of arbitrary detention by a third State.<sup>118</sup> The extent to which each State that has endorsed the Declaration is prepared to implement it may be purely a matter of self-interest, depending on whether the State's own nationals are arbitrarily detained abroad or there is a well-founded concern that they may be subjected to arbitrary detention.

Keeping the principles of the Declaration on the agenda at the UN and other fora, such as the G7 meetings, will be important in bringing States together in a common purpose. The families of foreign and dual nationals detained abroad and civil society will also continue to play a major role in highlighting individual cases and bringing pressure to bear on States to take concerted action. Some have suggested that States with nationals detained abroad could convene meetings with the families of the detained persons at the national level, as well as with the families of detained persons in other States, to build momentum in multiple jurisdictions and coordinate joint action.<sup>119</sup> Another option to bring like-minded States together is to form regional partnerships between States committed to implementing the Declaration, perhaps based on existing diplomatic and trade relationships. Working together with partners within and across regions will be essential in ensuring that the initiative does not become, and is not per-

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114. Emilia Currey, *supra* note 89 (proposing a coordinated and joint approach to the problem).

115. *Id.* (referring to a situation in which a State accused of arbitrarily detaining foreign nationals of another State retaliated by referring to specific cases of detention in the other State and questioning its practice of "hostage diplomacy").

116. Thomson Reuters Foundation, *supra* note 25, at 9.

117. *Id.* at 2.

118. Emilia Currey, *supra* note 89 (noting that States did not take concerted action even when the nationals of their allies were detained and have not responded quickly to alleged cases of arbitrary detention of foreign and dual nationals).

119. Thomson Reuters Foundation, *supra* note 25, at 17–20.

ceived as, a Western initiative,<sup>120</sup> rather than a truly global condemnation of the arbitrary detention of foreign and dual nationals.

Effective action will also require extensive awareness-raising of the nature and extent of this form of arbitrary detention, as envisaged in the Partnership Action Plan, as well as dissemination of the Declaration as a tool for States and stakeholders to use in their diplomacy and advocacy.

## CONCLUSION

The arbitrary arrest and detention of foreign and dual nationals is a worldwide problem that requires urgent attention by the international community. Whether this problem is framed as attempts to exercise diplomatic leverage over other States, or discrimination against foreign and dual nationals, the result is the same: individuals who travel, work, study, and live abroad are at heightened risk of being detained because of their nationality. The Declaration and its Partnership Action Plan set out a clear roadmap to respond to the challenges that arbitrary detention in State-to-State relations poses for individuals, international cooperation, and the peaceful settlement of disputes. This Commentary has considered options to build on this call to action. None of these options is likely to be effective alone, but a combination of cooperative international action driven by States, along with measures harnessing the power of both political and legal pressure, could offer the best chance of addressing arbitrary detention in all its forms.

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120. This perception appears to have been conveyed in some of the reporting on the Declaration. See e.g., James Marson & Jacquie McNish, *West Unites Against Detention of Foreign Nationals in Signal to China*, WALL ST. J. (Feb. 15, 2021), <https://www.wsj.com/articles/west-unites-against-detention-of-foreign-nationals-in-signal-to-china-11613397836> [<https://perma.cc/HW56-GNKG>].

