

INDEPENDENT HIGH LEVEL PANEL OF LEGAL EXPERTS ON MEDIA FREEDOM

Appointed by Lord Neuberger of Abbotsbury at the request of
the Governments of the United Kingdom and Canada



A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk

Drafted by: the Honourable Professor Irwin Cotler, PC, OC, OQ

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Drafted by: the Honourable Professor Irwin Cotler, PC, OC, OQ

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Endorsements



Committee to Protect Journalists



**JAMES W. FOLEY
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Executive summary

The importance and imperative of press freedom – and the particular salience of consular assistance in securing it – is exposed and expressed in the context of the current pandemic. While the world witnesses the rapid spread of Covid-19, there is an equally virulent pandemic of assaults on media freedom, underpinned by a crisis of democratic recession and global resurgence of authoritarianism.

Consequently, journalists and media organisations have been increasingly targeted due to the crucial, though often under-appreciated, role they play in ensuring a free and informed society. To prevent the press from exposing human rights violations and promoting public scrutiny of government action, a growing number of States have engaged in both overt and covert efforts to censor, discredit and silence their work.¹

Indeed, every day, journalists and media personnel around the world fall victim to arbitrary detention, violence or intimidation on account of their work.² These attacks resonate beyond their individual cases, being not only attacks on free expression, but also exponential assaults that silence the subjects of the reporting and deprive the public of their stories. By threatening and targeting journalists, States seek to send a dissuasive message, suppressing those who would report on their wrongdoings.

A free press is essential for exercising human rights and fundamental freedoms; it lies at the core of democratic values. In order for citizens to hold their governments to account, they need free and independent news sources to provide them with accurate information and informed analysis.³ Accordingly, any attempt to threaten the independence or safety of journalists is fundamentally anti-democratic.⁴

The States that interfere with the vital work of international journalists do so, most predictably, because they fear this free flow of information. They know that if journalists cannot report on their abuses, such crimes can continue with impunity.

But while the global crackdown on media freedom may be more pronounced in authoritarian regimes, democracies are certainly not immune. According to the Committee to Protect Journalists (CPJ), between 29 May to 1 June 2020 at least 125 press freedom violations were reported throughout the United States by journalists and media workers covering the nationwide protests over the killing of George Floyd

1 A G Sulzberger, 'The Growing Threat to Journalism Around the World' (The New York Times, 23 September 2019).

2 See Amal Clooney, 'The Use of Targeted Sanctions to Protect Journalists' (IBA 2020) p 5; CPJ, Data of Journalists and Media Workers Killed between 2018 and 2020 (as of 17 January 2020) https://cpj.org/data/killed/?stat-us=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start_year=1992&end_year=2020&group_by=year.

3 See 'Statement by the Media Freedom Coalition on its first meeting' (Government of Canada, 26 February 2020) www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/2020-02-25-media_freedom-liberte_medias.aspx?lang=eng.

4 IBAHRI, Freedom of Expression Bulletin Issue 3 (IBA, 5 May 2020) p 12 www.ibanet.org/Document/Default.aspx?DocumentUid=0afd40bc-ab84-4cd6-9c7b-354387ec57f6.

by Minneapolis police.⁵ CNN journalists were arrested live on air while reporting on the protests in Minneapolis,⁶ and Australian journalists were attacked by police during a live newscast while covering the demonstrations in Washington, DC.⁷ As of 7 September 2020, the US Press Freedom Tracker counted a total of 746 press freedom incidents targeting journalists in the context of the George Floyd protests alone.⁸

The global decline in media freedom has been intensified by the coronavirus pandemic.⁹ As the United Nations High Commissioner for Human Rights has reported, 'some States have used the outbreak of the new coronavirus as a pretext to restrict information and stifle criticism'.¹⁰

State actors are lashing out at journalists who are critical of their government's crisis response, or who have merely referenced the extent of the crisis in their countries.¹¹ Since the coronavirus outbreak, journalists across the globe 'have been berated at news conferences, had their credentials revoked, the printing of their newspapers banned and their news outlets closed'.¹² Other journalists have gone missing¹³ after publishing coverage critical of public health responses, and whistleblower healthcare professionals have been found dead after reporting on the dire conditions in their countries.¹⁴

5 CPJ, 'At least 125 press freedom violations reported over 3 days of U.S. protests' (CPJ, 1 June 2020) <https://cpj.org/2020/06/at-least-125-press-freedom-violations-reported-over-3-days-of-us-protests>.

6 Jason Hanna and Amir Vera, 'CNN crew released from police custody after they were arrested live on air in Minneapolis' (CNN, 30 May 2020) www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html.

7 Angus Watson, 'Australia will investigate attack on journalists by police in Washington' (CNN, 2 June 2020) www.cnn.com/2020/06/02/media/australia-journalists-protests-washington/index.html.

8 US Press Freedom Tracker, 'Press Freedom in Crisis' (last updated 21 October 2020) <https://pressfreedomtracker.us/george-floyd-protests>.

9 IBAHRI, Freedom of Expression Bulletin Issue 3 (IBA, 5 May 2020) p 18 www.ibanet.org/Document/Default.aspx?DocumentUid=0afd40bc-ab84-4cd6-9c7b-354387ec57f6.

10 UN News, "'No time to blame the messenger'" warns UN rights chief, amidst media clampdowns surrounding COVID-19' (UN, 24 April 2020) <https://news.un.org/en/story/2020/04/1062522>.

11 Numerous journalists have reported being harassed, attacked or arrested for reporting on Covid-19. E.g., Mahmoud al-Jaziri in Bahrain (<https://cpj.org/2020/04/bahrain-puts-imprisoned-journalist-in-solitary-con.php>); Sovann Rithy in Cambodia (<https://cpj.org/2020/04/cambodian-journalist-sovann-rithy-detained-for-quo.php>); Elena Milashina in Chechnya (<https://cpj.org/2020/04/chechen-leader-threatens-journalist-elena-milashin.php>); Andrew Sam Raja Pandian in India (<https://cpj.org/2020/04/police-in-indias-tamil-nadu-State-arrest-journalis.php>); Masoud Heydari and Hamid Haghjoo in Iran (<https://cpj.org/2020/04/iran-arrests-2-journalists-for-allegedly-sharing-c.php>); Peter Okutu and Chijioke Agwu in Nigeria (<https://cpj.org/2020/04/nigerian-police-arrest-2-journalists-governor-canc.php>); Fayia Amara Fayia in Sierra Leone (<https://cpj.org/2020/04/sierra-leone-security-forces-attack-and-detain-2-j.php>); and George Steinmetz in the US (<https://pressfreedomtracker.us/all-incidents/police-seize-drone-photojournalist-documents-mass-graves-new-york>).

12 IBAHRI, Freedom of Expression Bulletin Issue 3 (IBA, 5 May 2020) p 2 www.ibanet.org/Document/Default.aspx?DocumentUid=0afd40bc-ab84-4cd6-9c7b-354387ec57f6.

13 Nectar Gan and Natalie Thomas, 'Chen Quishi spoke out about the Wuhan virus. Now his family and friends fear he's been silenced' (CNN, 10 February 2020) www.cnn.com/2020/02/09/asia/wuhan-citizen-journalist-intl-hnk/index.html; and Lily Kuo, "'They're chasing me": the journalist who wouldn't stay quiet on Covid-19' (The Observer, 1 March 2020) www.theguardian.com/world/2020/mar/01/li-zehua-journalist-wouldnt-stay-quiet-covid-19-coronavirus.

14 Isabelle Khurshudyan, 'Three Russian doctors have fallen from hospital windows in two weeks, amid reports of dire conditions' (Washington Post, 6 May 2020) www.washingtonpost.com/world/europe/three-russian-doctors-have-fallen-from-hospital-windows-in-two-weeks-amid-reports-of-dire-conditions/2020/05/06/c3ca73f4-8f88-11ea-a9c0-73b93422d691_story.html.

The coronavirus pandemic has underscored the pivotal role that the press plays in preventing the spread of the virus by promoting transparency and accountability.¹⁵ The capacity swiftly and adequately to respond to this public health crisis largely depends on the ability of journalists to communicate accurate and reliable information to the public.¹⁶ Therefore, the personal safety of journalists and media workers is paramount. In these exceptional times, it is vital that journalists have unencumbered access to their networks, and that international audiences have unencumbered access to journalists. Although false information about Covid-19 can have dangerous – or even deadly – consequences, the use of oppressive laws to silence critical reporting under the guise of curtailing the spread of misinformation is also particularly dangerous to public health and undermines the democratic health of societies.¹⁷

Moreover, with Covid-19 infections rampant throughout prisons, journalists detained on account of their work are facing the additional risk of contracting the potentially fatal coronavirus while in custody.¹⁸ Such journalists are often detained in prisons that are otherwise already plagued by overcrowding and unhygienic conditions. In many countries, authorities are unwilling or unable to implement adequate health and safety measures to contain the spread of the virus in detention centres.¹⁹ The UN has thus urged governments to release ‘every person detained without sufficient legal basis, including political prisoners, and those detained for critical, dissenting views’.²⁰ While some journalists have been released, many remain behind bars. At least two journalists – Mohamed Monir in Egypt and David Romero Ellner in Honduras – have died as a result.²¹

The importance and imperative of consular assistance as a tool to protect journalist nationals at risk abroad: towards a legal paradigm of home State obligation

As journalists work and travel internationally in increasing numbers and to politically fraught locations, the importance of consular assistance for helping journalists facing risks and challenges abroad has become all the more salient.

Consular assistance refers to the help, advice and support that diplomatic agents of a country provide to citizens of that country who are travelling or living abroad. Journalists, especially those living in democracies, expect their governments to provide them with the

15 Moez Chakchouk, ‘UNESCO stresses importance of safety of journalists amid COVID-19 pandemic’ (UNESCO, 27 March 2020) <https://en.unesco.org/news/unesco-stresses-importance-safety-journalists-amid-Covid-19-pandemic>.

16 IBAHRI, Freedom of Expression Bulletin Issue 2 (IBA, 21 April 2020) p 1 www.ibanet.org/Document/Default.aspx?DocumentUid=5bb7f050-9c28-4d0a-9cd6-49e202e43443.

17 IBAHRI, Freedom of Expression Bulletin Issue 3 (IBA, 5 May 2020) p 18 www.ibanet.org/Document/Default.aspx?DocumentUid=0afd40bc-ab84-4cd6-9c7b-354387ec57f6.

18 Joel Simon, ‘UN’s Guterres must renew call to free jailed journalists amid pandemic’ (CPJ, 11 September 2020) <https://cpj.org/2020/09/uns-guterres-must-renew-call-to-free-jailed-journalists-amid-pandemic>.

19 Joel Simon, ‘UN’s Guterres must renew call to free jailed journalists amid pandemic’ (CPJ, 11 September 2020) <https://cpj.org/2020/09/uns-guterres-must-renew-call-to-free-jailed-journalists-amid-pandemic>.

20 UN News, ‘Political prisoners should be among first released in pandemic response, says UN rights chief’ (UN, 3 April 2020) <https://news.un.org/en/story/2020/04/1061002>.

21 Joel Simon, ‘UN’s Guterres must renew call to free jailed journalists amid pandemic’ (CPJ, 11 September 2020) <https://cpj.org/2020/09/uns-guterres-must-renew-call-to-free-jailed-journalists-amid-pandemic>.

minimum protections available in their countries of citizenship and under international law if they encounter troubles abroad while performing their duties. Access to consular assistance is especially important in situations where journalists are operating in countries that do not have the same legal and judicial standards as their countries of citizenship. In some instances, the only available remedy to journalist nationals at risk abroad may be consular assistance and diplomatic protection, particularly in places where there is no adequate legal system to protect people from arbitrary detention, torture and ill-treatment, incommunicado detention in unknown places (enforced disappearance) or prolonged detention by non-State authorities (abduction or trafficking where monetary or non-monetary ransoms are demanded).

When dealing with journalists reporting abroad, the behaviour of two States is directly at issue: the host State (where the journalist is reporting), and the home State (where the journalist is a national). *Home States must accept their responsibility to protect and defend their reporters working abroad; home States cannot defer to host States when it comes to the treatment of international reporters.* Going beyond the host and home States, it is also clear that protecting journalists across international borders is a responsibility shared by the international community. The work of journalists working abroad benefits everyone, and the deficit in international accountability will be felt by everyone if journalists continue to be systematically hampered in their reporting. According to an annual report on freedom and the media by Freedom House, ‘if democratic powers cease to support media independence at home and impose no consequences for its restriction abroad, the free press corps could be in danger of virtual extinction’.²²

A legal approach to consular assistance for journalists at risk abroad

The traditional paradigm for consular support has allowed home States to abdicate their obligations under international law in the name of comity. *Such abdication of responsibility by home States is misplaced, outdated and should have no role in 21st-Century international relations.*

The traditional paradigm operates from the perspective of States: when a host State infringes the human rights of a foreign national, this infringement is seen as a violation of the rights of the home State.²³ The traditional paradigm can lead to two key fallacies: (1) that the only rights at issue belong to the home State and not the foreign national; and (2) that the home State has rights but not obligations when dealing with its national abroad. The traditional paradigm therefore risks removing agency from the individual and leaving the protection of his/her rights entirely dependent on the inclinations and biases of the home State.

22 Sarah Repucci, ‘Freedom and the Media 2019: A Downward Spiral’ (Freedom House, June 2019), p 2.

23 See *Mavrommatis Palestine Concessions Case (Jurisdiction)*, [1924] PCIJ (ser A) No 2, 112, in John Dugard, ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) *AUYrBkIntLaw* 6; (2005) 24 *Australian Year Book of International Law* 75. The Vienna Convention on Consular Relations (1963) largely, though not exclusively, follows this paradigm as well. The traditional approach to consular relations is discussed below in the sections ‘Consular support as a State right’ and ‘Traditional approach to consular support as a State obligation’.

The traditional paradigm can no longer justify excluding nationals from the category of rights-holders, if it ever truly did.²⁴ In all other areas, it is widely accepted that individuals possess human rights under international law. The same must be said for consular assistance. Applied to the cases of journalists working abroad, the central focus should always be placed on the individual whose rights are being compromised. *Only by focusing on the rights of the journalist, and not the home State, can the issue of consular assistance move from the political to the juridical. The rights of a journalist working abroad should never be subject to the political whims, allegiances or alliances that exist between the home State and the host State.*

The right to consular access is itself a human right worthy of protection. Allowing – and indeed facilitating – such access is an obligation on the part of both the host State and the home State. From the perspective of the host State, inhibiting consular assistance certainly breaches its obligations towards the home State, but it also breaches its obligations owed separately and independently to the foreign national.²⁵ Accordingly, the home State does not have the juridical authority to waive its national's right to consular assistance or pardon the host State's violation. Failure to respect an individual's consular rights violates the due process of law in the host State and taints the purported judicial process that follows.²⁶

From the perspective of the home State, the right to consular access implies that the home State must take concrete action in order to (a) ensure the active flow of information and communications from its national; and (b) protect its national from human rights violations on the part of the host State.²⁷ The home State's obligations are not limited to situations where the host State is cooperative. Where the host State refuses to allow the home State to communicate with its national and defend his/her interests, the home State becomes a further perpetrator – deficient in fulfilling its own obligation towards its national – if it does not escalate the matter and advocate on behalf of its national.²⁸

Many States have enshrined their obligations as being home States towards their nationals travelling abroad. Such obligations can be found in State constitutions, legislative acts, administrative policies and practices.²⁹ Flowing from such obligations,

24 See below: 'Contemporary developments in consular support as a State obligation'.

25 See, e.g., *LaGrand Case (Germany v United States of America), Judgment, ICJ Reports 2001*, p 466, para 89; and IACtHR, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99', 1 October 1999, paras 84 and 137.

26 IACtHR, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99', 1 October 1999, para 137.

27 Refer below to 'Consular support as a home State obligation'.

28 With respect to *jus cogens* norms, see, e.g., Report of UN Working Group on Arbitrary Detention ('UNWGAD Report'), A/HRC/39/45, 2 July 2018, paras 50–58.

29 With respect to constitutional protections, see: Constitution of Bulgaria, Art 25(5); Constitution of China, Art 50; Constitution of Estonia, Art 13; Constitution of Guyana, Art 31; Constitution of Hungary, Art 69 (3); Constitution of Latvia, Art 98; Constitution of Lithuania, Art 13; Constitution of the Republic of Korea, Art 2(2); Constitution of Poland, Art 36; Constitution of Portugal, Art 14; and Constitution of Romania, Art 17. Further elaboration on the situation in other States is outlined below.

nationals have meaningful, enforceable rights against their home States where their rights to consular assistance are violated.

The legal perspective on consular assistance cannot therefore be limited to those obligations that are owed by host States to home States. An impoverished view of consular assistance, based on such a restrictive paradigm, leads to the false conclusion that nationals have no more rights to consular assistance than their home State is willing to give them. In fact, *the right to consular assistance exists in international law independent of the home State's willingness to enforce it.*³⁰

Journalists' underlying rights when working abroad

An approach that starts from the premise that journalists working abroad have a right to consular access coheres with the fundamental nature of the underlying rights that they enjoy under international law. Consular assistance serves to safeguard these rights. Conversely, threats to international journalists frequently take the form of violations of these rights.

Four fundamental rights are worthy of particular consideration:

- freedom of expression and freedom of the press;
- the right to be free from arbitrary detention;
- the right to be free from torture and inhuman treatment; and
- the right to life, liberty and security of the person.

Freedom of expression and freedom of the press are the cornerstones of informed public participation and debate. Both are inherently beneficial to democratic society, and instrumental in disseminating information and promoting transparency.³¹ Journalists are the key actors that allow the international press to function and to satisfy its important goals. Citizens also rely on journalists to keep the public informed, to ensure governments remain accountable for their actions, and to promote the search for and attainment of truth. Attacks on journalists – especially attacks targeted at journalists – are attacks on freedom of the press.

The right to be free from arbitrary detention is a right that is lamentably violated frequently for journalists working abroad. Detention based solely on an individual's participation in public affairs is necessarily arbitrary, as is detention of an accused in an unknown location. The right to be free from arbitrary detention dovetails with an individual's due process rights, which ensure *inter alia* prompt review by a judicial authority.³²

30 This is expanded upon further in the report in Section III, p 49.

31 See below, 'Freedom of the Press'.

32 See below, 'Arbitrary Detention'.

The right to be free from torture and inhuman treatment, and the right to life, liberty and security of the person, are among the most basic human rights protected in international law. States must ensure that their officials do not engage in any form of torture or extrajudicial executions.³³

These fundamental rights are the ones most often implicated in consular cases involving journalists working abroad. The mere prospect of their violation by the host State triggers consular obligations on the part of the home State. Accordingly, *the responsibility of home States to protect these rights does not end at their borders.*

What can be done to protect journalists working abroad?

While silence breeds impunity, transparency breeds accountability. If the international community is to favour accountability over impunity for human rights violators, and to favour transparency over the cover of silence, then it must do more to protect – and openly signal its support for – the journalists on the front lines and online. Now more than ever, we need a sincere global commitment to protect journalists so that they can carry out their important work without the threat of harassment, intimidation, false imprisonment, torture or death.

Consular assistance is one of the most important ways in which States can protect the international free press and the fundamental human rights held and enabled by journalists reporting abroad. In some cases, consular assistance may be the only way to protect journalists against human rights violations, particularly when working in countries with poor human rights records.

This report recommends a series of measures both internationally and domestically that will add clarity and accountability to the current paradigm of consular support. Inconsistency and its close relative, arbitrariness, should have no place in an international system that respects a free press and intends meaningfully to protect its purveyors.

TOWARDS A CHARTER OF RIGHTS FOR DETAINED JOURNALISTS: A NEW RIGHTS-BASED PARADIGM³⁴

A Charter of Rights for Detained Journalists should be established to solidify the law and provide for clear obligations for both host and home States. This Charter would recognise:

1. Journalists have a right to be free from arbitrary detention and benefit from the same rights and protections as other individuals in detention.
2. Journalists subject to detention benefit from the same rights and protections as other individuals in detention.

33 See below, 'Torture and Inhuman Treatment'.

34 Refer to The particular situation of dual national in this report.

3. Upon detention of a journalist foreign national or dual national, the host State must immediately contact the consulate of the journalist's home State. The detention of a journalist immediately triggers responsibilities on the part of the journalist's home State and the host State must put the home State in a position to fulfil these responsibilities.
4. Journalists subject to detention in a foreign State have a right to meaningful consular assistance. This includes the right to have confidential contact with the consulate of the home State, the right to have a representative of the home State present during legal proceedings, and the right to have one's conditions of detention monitored regularly. Because meaningful consular assistance depends on the cooperation of both the host State and the home State, this right involves obligations on both their parts.
5. The journalist's home State has an obligation to employ its best possible efforts in ensuring that the detention meets international standards. This obligation is not and cannot be outsourced to the host State. If the home State has a reasonable basis to believe that international standards are not being met, it has an obligation to escalate the matter and advocate on behalf of its national.
6. The home State must also advocate on behalf of a journalist detained abroad to ensure his/her treatment is consistent with the rights protected by the domestic law of the home State. Domestic legal obligations still apply to consular officials operating on foreign territory. They should advocate on behalf of their national for treatment abroad that would match his/her rights at home.
7. Where there is a substantial concern that the journalist's rights will not be protected by the host State, the home State has an obligation to advocate in favour of the journalist's return home.
8. In turn, the host State must repatriate a journalist where it cannot guarantee that his/her rights will be respected. This obligation is proactive on the part of the host State, and although it should follow from a request from the journalist if one can reasonably be communicated, it does not depend on a formal request by the home State.
9. The home State has an obligation to communicate with the journalist's designated contacts – including, where applicable, the journalist's publisher – in order to ensure they are kept abreast of material developments. The obligation is ongoing in nature.
10. The journalist has the right to communicate with his/her home State's consular officials confidentially. Communications should occur in person. Where the journalist is not allowed confidential communications, the home State should take this as a strong indicator of abuse.
11. Journalists subject to detention have a right to publicise their detention.

12. A journalist's reporting materials must be preserved upon detention, with an inventory thereof being provided to the journalist and the consular officials of the home State. Detention cannot be used as a strategy to silence a journalist and seize material relating to their work and sources.
13. If requested by the home State, the host State must provide it with a copy of the detained journalist's reporting materials or justify its refusal under national laws. Upon release, the journalist should regain possession of his/her materials.

PROTECTING JOURNALISTS' RIGHTS ABROAD: ENSHRINING A CODE OF CONDUCT FOR THE PROVISION OF CONSULAR ASSISTANCE BY THE HOME STATE³⁵

This report elaborates minimum standards that represent the bare obligations that home States owe their journalist nationals abroad – obligations that should not be subject to compromise based on political vicissitudes. Indeed, from the home State's perspective, the protection of journalists' rights abroad are often calculated as part of a cost-benefit analysis in which the counterbalancing factor is the home State's diplomatic relationship with the detaining State. This is a false equation that encourages inaction on the part of the home State, thereby systematically undervaluing the human rights of the journalists at issue.

There are five areas upon which home States can focus to ensure that they meet their obligations to provide meaningful consular support:

1. Consular preparation. The consular officials of the home State must study the general landscape in the host State and be ready to provide legal and practical support if and when called upon by a journalist encountering difficulties abroad.
2. Consular training. The consular officials of the home State must engage in specialised learning that focuses on the issues likely to be confronted by journalists, including but not limited to training to detect signs of torture or mistreatment.
3. Consular investigation. The home State must establish whether the host State officially recognises the detention of the journalist. If so, it must ascertain the legal and factual basis for the detention and the procedural framework that applies thereto. If, on the other hand, the home State suspects a detention is occurring that the host State is not acknowledging, the home State must investigate the matter further. So long as it is not reasonable to believe the response provided by the host State, the home State must continue its investigation into the matter.
4. Provision of consular support. This obligation involves:

³⁵ Refer to *Freedom of expression and freedom of the press* in this report.

- a) monitoring the conditions of detention and the journalist's legal proceedings. Monitoring must be active, timely and consistent;
 - b) communicating with and visiting the journalist detained abroad. Contact should be confidential and in person. So long as there are no confidential communications with the journalist, the home State must proceed on the premise that the conditions of the journalist's detention are significantly worse than they may appear;
 - c) legal representation of, and medical assistance for, the journalist;
 - d) attendance at legal proceedings;
 - e) providing notice and reports to designated contacts, and being responsive to their concerns, requests and questions. A journalist's designated contacts will often include his/her publisher;
 - f) escalating the situation where the circumstances so require. For instance, where there exist reasonable grounds to believe the detained journalist may or has been subjected to torture or inhuman treatment, the matter must be escalated to the highest offices of the home State (i.e., the head of government);
 - g) engaging in advocacy on behalf of the detained national. Journalists working abroad are often detained where the foreign State seeks to avoid transparency and accountability. The active advocacy of the home State can help ensure the cost-benefit analysis of detention is reversed;
 - h) making a repatriation request where the circumstances so require. In particular, this obligation is triggered where there are reasonable grounds to believe that the journalist was or will be subject to arbitrary detention, torture or inhuman treatment; and
 - i) reporting cases to relevant international bodies.
5. Ensuring accountability. Home States must enact independent mechanisms of oversight to review the performance of consular officials, including the appointment of independent monitors, performance reviews and public reporting.

In addition to the foregoing minimum standards:

- 6. Home States should put pressure on foreign States detaining their journalist nationals through the calculated use of sanctions.
 - a) at the State level, this means enacting and implementing legislation similar to the Magnitsky Acts found in the US and Canada, which allow for individual

foreign abusers to be sanctioned in line with international human rights law;³⁶ and

b) at the individual level, this means clearing legal hurdles (such as State immunity acts) that prevent those individuals directly harmed by serious human rights abuses of foreign States from obtaining redress in national courts.³⁷

7. States should maintain and publicise lists of the news agencies around the world whose content is determined or dictated by States that suppress free reporting. The goal of these State-run news agencies is often to drown out the voices of a free press through propaganda.
8. States should implement policies to support those journalists who foreign governments try to silence. This can involve the direct provision of financial resources, protective equipment and support to journalists working abroad; grants to add further investigatory resources to stories on which detained journalists have worked; and support to lawyers and non-governmental organisations working in common cause with journalists abroad.

Global accountability through an international commissioner

An international commissioner specifically tasked with monitoring respect of the above rights should be appointed. Such an independent commissioner would bring neutrality to the otherwise politicised process of calling both home and host States to account. The commissioner should be endowed with investigative powers and would provide an additional line of communication with detained journalists.

The establishment of an independent commissioner would complement and work in concert with existing international remedies, including the relevant UN Special Procedures, such as the special rapporteurs and the UNWGAD.

Journalists working abroad have rights. This report calls for a structure – both domestic and international – that will announce States' obligations with consistency and coherence, and allow journalists working abroad meaningfully to assert their rights when on assignment away from home. The international protection of freedom of the press demands no less.

36 Amal Clooney, 'The Use of Targeted Sanctions to Protect Journalists' (IBA 2020) www.ibanet.org/Article/NewDetail.aspx?ArticleUid=904b021d-c945-49df-81bf-63138105f093.

37 See, e.g., Bill C-632, 'An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture)' Second Session, Forty-first Parliament, 62–63 Elizabeth II, 2013–2014 www.parl.ca/Content/Bills/412/Private/C-632/C-632_1/C-632_1.pdf.

I. Scope and acknowledgements

This report takes a rights-based approach to consular assistance for international journalists encountering arbitrary arrest, detention and/or ill-treatment while reporting outside of their State of nationality.³⁸ This approach is anchored in international human rights law and inspired by the experiences of the author of this report.

Though some of the case studies from which this report draws its lessons are the stories of non-journalists, this report is focused only on journalists and the particular threats that they face on the international stage. The focus on journalists in this report is not meant to detract from, or minimise, the rights of all foreign nationals. To the contrary, much of what is written herein will be equally applicable. However, this report does not purport to provide an exhaustive analysis of contemporary problems in consular assistance, diplomatic protection or the protection of all human rights defenders from arbitrary detention or violence.

In the process of researching and preparing this report, the author greatly benefited from consulting with, and drawing on the experience and expertise of, a number of leading institutions and individuals, including:

Institutions

- Amnesty International
- Canadian Journalists for Free Expression
- CPJ
- Freedom House
- Human Rights Foundation
- James W Foley Legacy Foundation
- Journalists for Human Rights
- PEN America
- PEN Canada
- REDRESS
- Reporters Without Borders

³⁸ This report will not be assessing tools for the protection of local journalists. The situation of local journalists living and working in countries with poor human rights records who are at risk will be examined in future reports, such as Mr Can Yeğinsu's report on how immigration and refugee law can help non-citizen journalists abroad.

Representatives of international organisations

- Zeid Ra'ad Al Hussein (former UN High Commissioner for Human Rights)
- Luis Almagro (Secretary-General of the Organization of American States)
- Agnès Callamard (Special Rapporteur on extrajudicial, summary or arbitrary executions)
- Bernard Duhaime (former Chair of the UN Working Group on Enforced or Involuntary Disappearances)
- Felice Gaer (former Vice-Chair of UN Committee Against Torture)
- David Kaye (former UN Special Rapporteur on Freedom of Opinion and Expression)
- Yuval Shany (former Chair of the UN Human Rights Committee)

Individuals

LEGAL

- Robert Badinter (former Minister of Justice of France; former President of the Constitutional Council of France)
- William Crosbie (Assistant Deputy Minister Consular, Security and Legal at Global Affairs Canada)
- Tatyana Eatwell (Barrister, Doughty Street Chambers)
- Harold Koh (Sterling Professor of International Law at Yale Law School, former Legal Adviser of the US Department of State)

MEDIA

- Rayhan Asat, sister of Ekpar Asat (Uyghur media founder with US connections; victim of enforced disappearance)
- Ensaf Haidar, wife of Raif Badawi (Saudi Blogger with Canadian connections; political prisoner)
- Maziar Bahari (Iranian-Canadian journalist; former political prisoner)
- Mohamed Fahmy (Egyptian-Canadian journalist; former political prisoner)
- Percy Bratt, lawyer for Dawit Isaak (Eritrean-Swedish journalist; political prisoner)

- Vladimir Kara-Murza (Russian-American journalist and public intellectual; survivor of attempted assassination)

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Personal history with consular assistance: consular assistance and protection in international law

CONSULAR ASSISTANCE AND PROTECTION FOR DETAINEES IMPRISONED ABROAD: PERSONAL REFLECTIONS AND LESSONS LEARNED THROUGH THE LOOKING GLASS OF CASE STUDIES

This report is anchored in – and draws upon – the author's five decades of involvement in various and overlapping roles as law professor, international legal counsel, parliamentarian, Minister of Justice and Attorney General and Chair of international human rights NGOs, such as the Raoul Wallenberg Centre for Human Rights.

In each and all of these capacities, I encountered the increasing important responsibility of consular assistance and protection for nationals imprisoned abroad, including the imprisoned journalists among them. Indeed, in a world in which we are experiencing not only a global Covid-19 pandemic but a global political pandemic – a pandemic characterised by a resurgent global authoritarianism and democratic backsliding with its concomitant assault on media freedom – the primary need, if not imperative, for consular protection for imprisoned journalists emerges as a lynchpin for media freedom, if not democracy itself.

Accordingly, may I summarise my involvement in the various roles and the respective lessons for consular support for imprisoned journalists as follows.

ROLE AS LAW PROFESSOR

As a law professor involved in teaching, scholarship and advocacy in constitutional and international human rights concerns, I found the subject matter of this paper was not very present in legal academe and related policy agendas, a matter confirmed in consultation with legal academics for this Report. If the best form of constitutional and international law practice is a good grounding in theory, and the best test of theory is its application in practice, the theory and practice of consular support – let alone protection remedies for that purpose – have been deficient.

Accordingly, whether viewed from the perspective of the home State of the imprisoned journalist, or the host State detaining the journalist, the academic inquiry has been somewhat inchoate and undeveloped, while the rights of the detained journalists are marginalised if not ignored in the focus on state actors, be it the home State or the host State.

In fact, the traditional approach has been that the provision of consular assistance and protection is ‘discretionary’ and not obligatory, and often is bound up more with geopolitics than legal obligation. In this context, the host State is thereby relieved of any obligations, while the targeted journalist at risk is often not even acknowledged as a relevant actor. Thus further marginalising or excluding any rights-based remedies for the targeted journalist.

ROLE AS INTERNATIONAL LEGAL COUNSEL TO POLITICAL PRISONERS AND TARGETED JOURNALISTS

In acting as legal counsel to political prisoners across the world, I have witnessed both exemplary and ineffective Canadian approaches to consular support for journalists at risk. The effectiveness of Canadian diplomatic intervention can be measured in whether freeing detained journalists and protecting media freedom is a priority as a matter of principle and policy, or whether the plight of political prisoners or detained journalists is marginalised or ignored, and media freedom is compromised or forfeited in the process.

Accordingly, as international legal counsel to Soviet political prisoners in the 1970s and 1980s – including the cause célèbre of Moscow Helsinki Watch and human rights leader, Anatoly Sharansky, I witnessed up close – using Canada as a case study – how government action on behalf of dissidents and the journalists amongst them, not only resulted in the liberation of captives, but transformed history.

Anatoly Sharansky in the mid-1970s was at the forefront of five human rights movements in the Soviet Union: the founding of Moscow Helsinki Watch Groups as authorised by the Helsinki Final Act adopted in 1975, where Canada had a principal role in its adoption, and where Principle VII conferred ‘the right to know and act upon one’s rights’; the leader of the struggle for Soviet Jewry – of the right of Soviet Jews to live as Jews or leave the Soviet Union, itself protected in the Helsinki Final Act; a leader in the democracy movement headed by the Father of the Dissident Movement, Nobel Peace Laureate Andrei Sakharov, and serving as its media coordinator responsible for communications with international journalists; leading advocate for ethnic and religious right groups like

the Ukrainians, the Baptists and Pentecostals; and advocate on behalf of other political prisoners, particularly those imprisoned in psychiatric detention.

In 1977, Sharansky was arrested, detained incommunicado and tried and convicted in July 1978 of both the charges of 'treason' (Article 64a) of the Soviet Constitution) and 'anti-Soviet slander and agitation' (Article 70 of the Soviet Constitution).

The persecution and prosecution of Sharansky – as set forth in my 800-page brief³⁹ of legal argument and supporting witness testimony and documentary evidence pertaining to Sharansky's case – exposed twenty major violations of Soviet constitutional law and criminal procedure. Violations of such magnitude that the charges should have been quashed even before the trial began; and if there was to be a trial, the legal brief sought to document the falsity, if not absurdity of these charges. For example, Sharansky was accused of treason for conveying state secrets to an American journalist, Robert Toth. The Brief included an affidavit from another dissident, Dina Beilina, to the effect that it was she who transferred the information to the journalist, but that there was nothing in that information that was secret; and if the Soviet authorities wanted to charge anyone for the conveyance of such information, they should charge her, a testimony as much to her courage as to Sharansky's innocence.

At the same time, the Brief included an affidavit from journalist Robert Toth, corroborating the fact that Sharansky had never conveyed any such information to him; that the Soviet authorities tried to coerce a false and incriminating confession from him to implicate Sharansky in 'acts of treason'; and that he was prepared to testify on Sharansky's behalf, which the Soviets refused.

As for the charge of 'anti-Soviet slander and agitation', it was organised around Sharansky's leadership of the Moscow Helsinki Watch Group, and the dissemination of public documents by that group – itself authorised by the very Helsinki Treaty in which the Soviet Union was a State party. Sakharov summed it up: 'the Helsinki Final Act was our human rights manifesto. The Soviet Union has turned it into a prosecutorial club'.

Another 'evidentiary' allegation of Soviet authorities regarding this charge relied upon a congratulatory letter sent by Sharansky to then-US President Gerald Ford on the occasion of the US bicentennial in 1976. We researched this with the help of my students at McGill Law School at the time, and found that then-Chairman of the Supreme Soviet of the USSR, Nikolai V. Podgorny, also sent an even more congratulatory message to President Ford, a copy of which was included in our brief, and which was endorsed by other members of the Presidium including Soviet President Leonid Breznev.

As I set forth in the Brief, the conclusion was inescapable that 'if the Soviet Union wishes to use a congratulatory letter sent by Anatoly Sharansky as evidence to support the charge of anti-Soviet slander and agitation against him, then, having regard to the Soviet principle of equality before the law, the authorities must use the Podgorny letter as evidence to support a charge of anti-Soviet slander and agitation against Podgorny

39 The Sharansky Case (Montreal), McGill University, Faculty of Law (1978)

himself and all other members of the Presidium who had signed the letter.' The humour of this was lost on the Soviet authorities.

In 1978, the then-Canadian Prime Minister, Pierre Elliott Trudeau, met with Sharansky's wife Avital and myself in Ottawa, where we shared with him the 800-page Brief. The Prime Minister said that he would take the Brief for the weekend, read it and said, 'if it is good, you will have my support on Monday morning. If it's lousy, I will kick your ass in for wasting my weekend'.

On Monday morning, the Prime Minister advised us that he was supporting the case, had arranged for the brief to be served on the Soviet Embassy in Ottawa, would be making direct representations to the Soviet authorities, and authorised us to hold a press conference in that regard.

In 1979, after the Progressive Conservative government defeated the Liberal government, the new Prime Minister, Joe Clark, continued the representations to the Soviet Union as if there had been no change in government, and facilitated arrangements for my appearance in the Soviet Constitutional Court on behalf of Sharansky. As with the Liberal government, the Progressive Conservative government anchored their representations in the Helsinki Final Act and its Article VII.

As it happened, a day before I was to appear in the Soviet Court, and after all arrangements had been made, I was arrested, detained, expelled and driven to the Moscow Airport to be boarded onto a Japanese airliner, which fortunately was departing to London. As I boarded the plane, shepherded by KGB agents to the surprise of the Japanese flight attendants, I asked them to advise the Canadian Embassy in Moscow that I was being expelled, and to advise Dan Fisher, Moscow correspondent for the *Los Angeles Times*, that I would not be able to join him for dinner.

During the five-hour flight, I was anguished over the Soviet seizure of all my documentary evidence, witness testimony and pleadings intended for the court hearing. I was particularly concerned how the Soviets might target the brave Soviet witnesses and human rights defenders who had provided me with evidence; and would target the journalists with whom I had been in contact with, let alone the leaders of the Soviet dissident movement, like Andrei Sakharov.

On arrival in London, I quickly telephoned my wife and said to her: 'Ariela, I just landed in London, I've been expelled from Moscow, don't say anything'. She replied: 'What do you mean don't say anything? It's all over the news'. Dan Fisher had broken the story headlined 'Sharansky's lawyer expelled' and it was featured in all of the international media. No one knew who I was, but everyone knew who Sharansky was. As Andy Warhol put it, 'everyone can be famous for 15 minutes,' though the important message here is the crucial role of the media in exposing and unmasking Soviet criminality.

My wife added that, 'Canadian diplomatic officials are looking for you at the airport'. They caught up with me, and told me that Canadian Foreign Minister Flora MacDonald asked the Canadian High Commission in London to hold a press conference for me so

as to counter the Soviet disinformation that I was a 'spy masquerading as a lawyer' who had gone to the Soviet Union on an 'espionage mission' on behalf of the 'spy' Anatoly Sharansky, and had been consorting with 'hooligans' like Andrei Sakharov, which were the counterpart headlines in Soviet media like 'Izvestia' and 'Pravda'. In a word, the Canadian government's intervention was as timely as it was critical.

The Canadian government protective action did not end there. When I arrived back in Canada, I was met at the airport by Foreign Minister MacDonald who announced that Canada was suspending all bilateral Helsinki agreements with the Soviet Union, in response to the Soviet Union's unjust imprisonment of Sharansky, the expulsion of his lawyer and their violation of the fundamental rights contained in Principle VII of the Helsinki Final Act.

The Progressive Conservative government of Joe Clark was short-lived – was defeated by the Liberals some nine months later – and the Liberal government of Pierre Elliot Trudeau returned to power. But the sustained representation on behalf of Sharansky continued, and the Canadian government then conferred on him Permanent Resident Status so as to further anchor and enhance their governmental and consular diplomatic assistance and protection.

Historically, as had been the case up until that point, Canadian support – and especially proactive remedies – had been viewed as the discretionary prerogative of the State, and therefore not obligatory. This policy, which saw the State as a primary actor, ignored thereby the right of the imprisoned detainee. It also ignored or diminished the obligations of the host State, as well as the home State, as set forth in the Vienna Convention on Consular Relations, and in the supporting international jurisprudence of the International Court of Justice in this regard.

Moreover, the Canadian government's provision of consular assistance and protection was underpinned and enhanced by the All-Party Parliamentary involvement, where the Canadian Parliamentary Committee for Soviet Jewry took up Sharansky's case and cause and included more than 200 members, the largest support group of its kind in any Parliamentary setting.

It was underpinned also by the internationalisation of support, with Sharansky's case being taken up and advanced both by US Presidents Jimmy Carter and Ronald Reagan, respectively; by the State parties to the Helsinki Final Act who saw in Sharansky's imprisonment a standing violation by the Soviet Union of its undertakings under this Treaty, and where the Soviet Union had sought to showcase its economic and security components, but was violating its central human rights principles; and by the political mass of civil society engagement – women, students, lawyers, scientists, artists and journalists who enlisted in Sharansky's case and cause.

The leadership role of the Canadian government and its sister democracies as seen through the looking glass of the Sharansky case, can be characterised as the gold standard in the manner of the provision, inter alia, of all forms of support, assistance and protection to a political prisoner who was also a journalist. This support extended also to

the other Soviet political prisoners whose case and cause I undertook in the light of, and alongside, the Sharansky case.

In a word, I became a ‘Lawyer for the Refuseniks’;⁴⁰ those who had applied to emigrate, were refused, lost their job, and were then charged with ‘parasitism’ or other charges for not having a job. This included the ‘Mother of Refuseniks’ Ida Nudel, who was charged with ‘malicious hooliganism’; Vladimir Slepak, one of the founders of the Refusenik movement, also charged with ‘malicious hooliganism’; and educator / writer, Joseph Begun, who was charged with ‘parasitism’ after losing his job upon his emigration application. Each of these Refuseniks – let alone the Soviet Human Rights Movement as a whole – were the beneficiaries of the Canadian, international, governmental, parliamentary and civil society support, the whole leading to the ‘withering away’ (if I may use a Marxist metaphor) of the Soviet Union. All this found expression in a song titled ‘A Small Group Has Changed the World’. That was the Soviet Human Rights Revolution, and that was the finest hour for Canadian global leadership.

My work on behalf of Soviet political prisoners and the journalists among them – was paralleled by, and presaged, my global involvement on behalf of political prisoners and imprisoned journalists, including:

- Serving as counsel to imprisoned Argentinian journalist Jacobo Timmerman, whose book ‘Prisoner Without a Name, Cell Without a Number’ captured the plight and pain of Timmerman’s unjust imprisonment; and where my encounters with him upon his release exposed me to the terror of the disappeared and the compellability of both press freedom and the imperative of consular access and protection.
- Similarly, acting as Canadian counsel for Nelson Mandela, following my arrest in South Africa in 1981, while calling for Mandela’s release in a speech titled ‘If Sharansky, Why Not Mandela’, and which resulted in an incredible intersection of the two cases and causes, as I describe in a recent essay;⁴¹ and where the Canadian government took a leadership advocacy role in Mandela’s case and cause, with Mandela making his first overseas visit upon his release to Canada and the Canadian Parliament in 1990, and becoming Canada’s second Honourary Citizen after Raoul Wallenberg.
- As it happened, I was serving in 1977 as Chair of the Canadian Professors for Peace in the Middle East – had participated in two US-Canada Academic Peace Missions to the Middle East in 1975 and 1976 – and had lectured and written extensively on these visits at the time. I was now leading the Canadian Academic Peace Mission to the Arab countries, the Palestinian territories and Israel.

40 Ken Becker, ‘The Soviet dissidents have a lawyer—in Montreal’ *Maclean’s* (Toronto 30 April 1979).

41 Irwin Cotler, ‘Mandela: Hero of Humanity’ *Medium* (3 November 2018) <https://medium.com/@irwincotler/mandela-hero-of-humanity-4d4d11d604b0>.

Before my departure, which was to include also academic positions during that period at the Institute for Political and Strategic Studies in Al-Ahram in Egypt (where I had lectured in 1975 and 1976) and at the Hebrew University in Jerusalem (where I had lectured in 1975 and 1976). I was approached by groups affiliated with Amnesty International Canada who had been familiar with my work regarding the Middle East, and asked me to take up the case of a Palestinian detainee, Tasir Al-Aruri, who was under administrative detention in Israel. It so happened that while teaching at the Hebrew University as a Visiting Professor in that spring/summer semester of 1977, I worked out of the office of Professor Aharon Barak, whom I knew, and who had recently been appointed Attorney General of Israel.

Through the good offices of the Canadian Ambassador to Israel at the time, Edward 'Ted' Graham Lee, I met with Attorney General Aharon Barak and made representations to him on behalf of detainee Al-Aruri, and also my legal appreciation of the 'due process' concerns related to administrative detention.

Shortly thereafter, I was advised by Attorney General Barak that Al-Aruri had been freed from detention. I later learned that Al-Aruri was scheduled to be released in any case after six months of administrative detention, so that my representations only modestly contributed to his release, but my representations regarding the policy and practice of administrative detention continued. This case provides another looking glass into the conduct of home and host States – and where the responsiveness of host States is often distinguishable when they are democracies as distinct from authoritarian states, where such access, let alone representations (as described in this Report), can be challenging. This case – and my involvement in the Middle East – foreshadowed my later involvement with the Palestinian Human Rights Monitoring Group, where I took up the cases of Palestinian detainees under the Palestinian Authority as well as Israel; and also presaged my later representation of political prisoners like Egyptian Saad Eddin Ibrahim, and others described in this Report.

More importantly, all of the above cases determined for me then – and it has only been amplified by my involvement since that period – of the need to always factor in, as a priority, the plight of the detainee as a central actor in the 'State actors' configuration. This is the whole underpinning of the proposal in this Report for a Charter of Rights on behalf of Detained Journalists and a Protocol for the training of consular official for their work.

ROLE AS PARLIAMENTARIAN ON BEHALF OF POLITICAL PRISONERS AND JOURNALISTS

If my international legal involvement as counsel to political prisoners – including journalists – alerted me to the importance, indeed imperative, of Canadian parliamentarians in support for the case and cause of political prisoners, my own role as a parliamentarian has served as a participatory looking glass into the roles of the home and host State, and the crucial role of parliamentarians when the government of the host State views consular assistance and protection as somehow 'discretionary,' or as a matter of 'comity' and 'interests', and where the host State can thereby act with impunity.

Professor Kunlun Zhang

As it happens, shortly after my election to Parliament in November 1999, after having spent 30 years as a law professor and 25 years during that period in the defence of political prisoners, I was asked, perhaps because of my prior involvements, to take up the case of an imprisoned Chinese Canadian Professor Kunlun Zhang, who had been a colleague of mine at McGill University.

Professor Zhang, a Falun Gong practitioner, had been arrested for practicing Falun Gong exercises on a visit to China, was then held incommunicado, tortured and imprisoned.

Accordingly, one of my first undertakings now as a parliamentarian, acting also as international legal counsel to Professor Zhang, was to organise an all-party parliamentary group on his behalf, following the precedent used for Soviet political prisoners, and to convene a press conference calling for his release. But the provision of consular assistance and protection by the government – let alone their taking up of his case and making direct representations to Chinese authorities on his behalf, which had been done for Soviet political prisoners – was not initially forthcoming. Indeed, as the Canadian media reported at the time, I was advised by the Canadian Government against taking up his case, lest it complicate Canada-China relations and forthcoming trade negotiations. As I responded at the time, ‘there is no contradiction between promoting trade and human rights – the contradiction is promoting trade at the expense of human rights’. Indeed, I then found myself making representations to the home State – Canada – about the importance of consular assistance and protection at the same time as I was making representations to the Chinese authorities – the host State – of their international legal obligations.

But the Parliamentary involvement was strong and sustaining, and the government, however belatedly, made appropriate representations, secured consular visits and assistance, and Professor Kunlun Zhang was released prior to the Canadian trade mission to China.

Regrettably, the approach of the Canadian Government, in a series of Chinese Canadian political prisoners whom I have been representing over the years – both while as an MP and since my retirement through the Raoul Wallenberg Centre for Human Rights – has been one of the government viewing their role as State’s rights – a discretionary approach – rather than through the obligations of home States and host States.

This was something repeated and reflected in the actions – or lack of action – of other democratic governments, whom I would seek to enlist on behalf of the political prisoners of their respective home States. Canada was better than most, but the approach continued to be one of the Vattelian fiction, of government action as discretion rather than obligation, with the rights of the detainee as an afterthought.

A snapshot of three case studies may help frame this understanding.

Dr. Wang Bingzhang

Dr. Wang Bingzhang was a Chinese doctor who came to Canada in 1979 and received his degree in 1982. His parents, siblings and daughter Ti-Anna – born in 1989 and named after the Tiananmen uprisings – are all Canadian citizens. Dr. Bingzhang decided to forego a medical career in order, as he put it, to ‘advance democracy in China’ and founded the US-based Chinese democracy movement.

In 2002, while on a visit to Vietnam, he was abducted and taken back to China, where in a sham and secret trial, in which he was denied the right to a fair trial, he was convicted on both the charges of treason and terrorism, and sentenced to life imprisonment in solitary confinement, and remains one of the longest-serving political prisoners in China today.

I became counsel to Dr. Bingzhang in 2003, and petitioned the UN Working Group on Arbitrary Detention, which ruled that his detention was ‘illegal’ and called for his release. While Wang Bingzhang has had all-party parliamentary support – including all-party press conferences with his family members and ongoing calls for his release – and including representations that I made to the Chinese Embassy in Ottawa, the Canadian Government’s action has been rather muted in his case, contrasting sharply with Canada’s involvement on behalf of Soviet political prisoners. There have been no public government calls for his release, no public representations of his case and cause, no public demarche to Chinese authorities. During his imprisonment, he suffered a series of debilitating strokes, while his daughter Ti-Anna was repeatedly denied visas to visit him in prison. Finally, when she was given a visa after a decade of requests, she was detained with her infant daughter upon arrival in China and deported back to Canada, a continuation of the cruel and inhumane treatment by Chinese authorities.

Recently, the student Wallenberg Advocacy group at McGill University has taken up his case and cause, produced a white paper documenting violations under international and domestic law by Chinese Authorities and arranged for the signing of a public letter by six former Canadian Ministers calling for his release, the first concerted and public governmental action.

Huseyin Celil

Huseyin Celil is a Chinese-Canadian Uighur who was arrested in Uzbekistan in 2006, and brought to China, where he was detained in a secret location, denied access to family, counsel and Canadian consular visits; and convicted following a coerced confession, again without any Canadian consular presence, and has been languishing in solitary confinement for the past 14 years. I first took up his case and cause as a parliamentarian along with my parliamentary colleagues, and we held hearings of our Foreign Affairs Subcommittee on the situation of the Uighurs, and Huseyin Celil’s imprisonment in the immediate aftermath of his conviction in 2006. But the Canadian Government’s involvement – pursuant to obligations of the home State for ongoing consular assistance and protection – has been somewhat wanting. Indeed, in February 2020, in testimony to the Canadian Parliamentary Committee on Canada-China relations, the Canadian Ambassador to China when asked about his case did not even know that Huseyin Celil

was a Canadian citizen, acknowledging thereby the lack of any consular assistance or protection in his case – resulting in a corrective response by Canadian Foreign Minister Francois-Philippe Champagne. As Uighur leader Mehmet Tohti told me ‘if they don’t even know he’s a Canadian, how will they take up his case?’

It has taken the dramatic revelations of the mass atrocities targeting the Uighurs – including acts constitutive of genocide – underpinned by the recent hearings of the Foreign Affairs Subcommittee on Human Rights to unmask the horrors, and to call specifically for Huseyin Celil’s immediate release and return to Canada to be reunited with his family.

Sun Qian

Sun Qian is a Canadian Falun Gong practitioner, who was arrested on a visit to China in February 2017, detained and tortured in prison to secure a false confession, and sentenced recently to eight years in prison. I was asked to take up her case upon her arrest and have worked with a succession of brave lawyers in China, who have themselves been arrested, disappeared or otherwise threatened such that they were forced to drop their representation. But what was most disturbing was their conveying to me, and also as reported in the media, that they had tried to meet or communicate with the Canadian Ambassador to China during Sun Qian’s arrest and imprisonment without success. Regrettably, yet another example of consular assistance and protection being denied for reasons of ‘comity’ or not otherwise wishing to remind the host State, China, of the breach of its obligations to the home State Canada, let alone of its violations of the rights of the detainee.

This is not to say that Canadian consular assistance and protection has been, or is, singularly wanting. It reflects, as I have mentioned above, the Vattelian Fiction engaged in by other democracies and demonstrates the ‘pressing need’ underpinning this report regarding the urgency for a new juridical paradigm, one anchored in the recognition of the legal obligations of the home State to provide consular assistance and protection; and the need to hold the host State accountable for their breach; and in particular, to adopt a rights-based paradigm inspired by and anchored in, the rights of the detained journalist – and hence the proposal in this report of the need for a Charter of Rights for Detained Journalists – and an acknowledgement also by the host State of its obligations under international human rights law.

Moreover, there are other case studies, as set forth in this report, where the Canadian Government has been more proactive, such as in the cases of Canadian journalist Mohamed Fahmy, represented in an exemplary fashion by Barrister Amal Clooney; Saudi blogger Raif Badawi, where the Saudi authorities reacted in fury in response to Canada’s call for the release of the Badawis from prison; and the representations of Canadian authorities on behalf of Saeed Malekpour, a Canadian Permanent Resident imprisoned in Iran.

As one who acted as counsel to each of the above as a parliamentarian, and enjoyed the support of my fellow parliamentarians, I can attest to the need for a new rights-

based juridical paradigm on behalf of detained journalists and an obligation-mandating paradigm for both the home State and the host State.

Finally, the experience of taking up the cases of political prisoners and journalists as a parliamentarian, while acting also in a concurrent role as international legal counsel, as in the Malekpour and Badawi cases, has demonstrated for me the importance, if not indispensable, contribution of parliamentarians to the provision of consular assistance and protection for journalists at risk, including: speaking up and acting when the home State is reluctant and unwilling to do so; holding parliamentary hearings and adopting parliamentary resolutions to raise awareness of the targeted journalist case and cause and provide 'cover' for a home government preoccupied with geopolitical considerations rather than legal obligation; making representations to the host State, and holding them accountable for the breach of their international obligations; exposing and unmasking the violations by the host State of the rights of the targeted journalist; supporting, advancing, and underpinning consular assistance and protection; mobilising fellow parliamentarians in other countries and internationalising the support and advocacy on behalf of the targeted journalist; proposing legislation to anchor the obligation of consular assistance and protection in the domestic law of the home State; communicating with the family of the detainee and to let them know – and let the detainee know – that they are not forgotten, that they are not alone and that Parliament will not relent in its advocacy until they are free.

Finally, as I learned while acting as legal counsel before being a parliamentarian, Parliament can be an indispensable support to legal counsel in defence of the imprisoned journalist; and indispensable also to the work of the Minister of Justice and Attorney General of Canada, and in a word can be the omnipresent link, as it was for me in my various roles as legal counsel Minister of Justice and NGO head.

ROLE AS MINISTER OF JUSTICE AND ATTORNEY GENERAL: MAHER ARAR AS A CASE STUDY

I became involved in matters of consular assistance and protection almost immediately upon my becoming Minister of Justice and Attorney General of Canada in December 2003, when one of my first acts was to recommend to then-Prime Minister Paul Martin the establishment of a Commission of Inquiry into the case of Maher Arar, whose case is discussed more fully in the body of the report.

Maher Arar was a Syrian-Canadian citizen, who was interrogated and detained by US immigration authorities during a stopover in New York on his way to Canada in December 2002. His detention was based in part on false information received from Canadian intelligence services that Arar was a member of Al-Qaeda. He was held for two weeks in solitary confinement in the US with no charges laid, no notice provided to the Canadian authorities of his detention, no notice to Maher Arar of his right to consular assistance, and no right to consular assistance provided. He was deported by the US to Syria, where he was imprisoned, tortured in detention, and held for more than a year before he was returned to Canada in November 2003. This deportation took place

though Syria was on the US list of state-sponsors of terrorism, and where the US knew that detainees are tortured in Syrian prisons.

Indeed, the precipitating factors in the litany of violations of Maher Arar's rights – and Syria's breaches of international law – began with the US breaches of its obligations under the Vienna Convention on Consular Relations, including not notifying the Canadian consulate of its detention of Arar in violation of Article 36.1 of the Convention; and not advising Mr. Arar of his consular rights, and the obligation, as the jurisprudence of the International Court of Justice has shown in the Lagrand case and others, owing to Mr. Arar and to Canada as the home State; and effectively preventing and precluding Mr. Arar from even communicating with Canadian consular authorities, which was as much Maher Arar's right as it was the US obligation to authorise such communication without delay. And finally, the breaches by the US of its own domestic laws and policy by deporting Maher Arar to Syria.

Accordingly, in my testimony in September 2003 before the Canadian Foreign Affairs Committee together with Arar's wife Monia Masigh, whose compelling testimony underpinned the appreciation of the breaches of international law by both the US and Syria, I sought to identify the consular assistance and protection remedies the Canadian Government should be engaged in, this a year after Maher Arar's unlawful imprisonment and torture in detention.

Maher Arar was released and returned to Canada in November 2003, and I was appointed Minister of Justice and Attorney General in December 2003. One of my first recommendations to Prime Minister Paul Martin – based on my experience as counsel to Maher Arar while a parliamentarian, as described above – was that a Commission of Inquiry be established in all matters relating to Maher Arar's detention and interrogation by US officials; the breach of obligations owed to Canada and Maher Arar under the VCCR; the provision of false information by Canadian intelligence to American authorities; the rendition to Syria in breach of US law and policy; and the arrest, imprisonment and torture in detention of Maher Arar in Syria; the whole as constituent parts of a comprehensive Commission of Inquiry, and in which I characterised the matter as being a frontal assault on the rule of law and the rights of the detainee Maher Arar.

The Prime Minister agreed to establish such an Inquiry and asked me to organise it for these purposes. But shortly thereafter, the Deputy Minister of Justice, for whom I had the highest respect, asked me to recuse myself from all matters relating to the Inquiry – including any cabinet discussions on the matter – due to my prior involvement as counsel to Maher Arar while a parliamentarian. I agreed, somewhat reluctantly, because I felt that recusing myself would preclude my participation in Cabinet decisions and general government decision-making on this matter – as well as in representations before the Commission of Inquiry.

It soon became apparent to me that my recusal from these discussions was not helpful. Moreover, I became increasingly concerned that if I had to recuse myself in this case, given my decades-long involvement in defending political prisoners, and the panoply of human rights causes that underpinned them, I might similarly be asked to recuse myself

again and again, and then would be unable to responsibly discharge my responsibilities as Minister of Justice and Attorney General. Accordingly, I then went to Prime Minister Paul Martin and told him that this was the first – and last – recusal on my part. The Prime Minister then told me that he was surprised I recused myself, saying that he had appointed me largely because of my involvement in human rights. I then spoke with the Deputy Minister and other senior officials in the Department of Justice, and conveyed to them that while I understood their request for a recusal, I could not do this again, lest I not be able to be effectively involved on the human rights agenda and the pursuit of justice in our work.

ROLE AS CHAIR OF RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS: CASES OF SAEED MALEKPOUR AND RAIF BADAWI, JOURNALISTS UNDER ARBITRARY DETENTION AND TORTURE

As a parliamentarian who engaged in the defence of imprisoned journalists – also as their legal counsel – I became increasingly aware of the dangers faced by journalists – particularly in authoritarian states where they risked harassment, arrest, arbitrary detention, torture in detention and even execution.

The arrest by the Iranian authorities of Saeed Malekpour, while visiting his ailing father in Iran in 2008 – under spurious charges of ‘insulting the Supreme Leader’ – is a case study of the criminalisation of freedom of expression; of torture in detention to secure a false confession; and of silencing and deterring other journalists, let alone the criminalisation of media freedom on the whole, as appears more fully in this Report.

I first took up Malekpour’s case as a parliamentarian as part of the Iranian Political Prisoner Advocacy Project, where parliamentarians adopt a political prisoner and use all remedies, both within and without Parliament to secure the prisoner’s release.

Malekpour’s case is also a looking glass into two complicating factors that can arise with authoritarian governments: first, the Iranian government does not recognise dual nationals and – as illustrated in the case of Nazanin Zaghari-Ratcliffe, elsewhere described in this Report – seeks to leverage dual nationals as part of hostage diplomacy; second, Canada had terminated diplomatic relations in 2012, and closed the Canadian embassy in Iran, which impeded Canada’s capacity to have any access, let alone provide consular assistance and protection.

Nevertheless, advocacy by Canada to secure Malekpour’s release, and hold the Iranian authorities accountable, continued even after the termination of diplomatic relations, and, at a parliamentary level, even intensified. The Foreign Affairs Subcommittee on International Human Rights, on which I sat as Vice Chair, unanimously adopted a resolution condemning Malekpour’s unjust imprisonment and calling for his release; Canadian Foreign Ministers of both Conservative and Liberal governments, with whom I met regularly to advocate on Malekpour’s behalf, were neither deterred by Iran’s disregard for Malekpour’s Canadian status, nor their rejection of any representation made by third parties on Canada’s behalf; and the advocacy continued after I left Parliament, now taken up also by the RWCHR, and underpinned by the selfless and sustained

advocacy by his sister Maryam, who had fled from Iran to Canada, and was now a Canadian citizen.

The UN Working Group on Arbitrary Detention – to whom the RWCHR and myself had petitioned on Malekpour’s behalf – found that Malekpour’s deprivation of liberty was arbitrary and in contravention of international law, and suggested that Iranian conduct might even constitute a crime against humanity. Shortly thereafter, as a result of sustained advocacy from the Canadian government, Parliament, the UN, and civil society organisations like Amnesty International, Malekpour was released on a temporary furlough, escaped to a third country, his Permanent Resident Status was quickly reinstated by Canadian authorities, and his safe return to Canada was facilitated in August 2019.

Malekpour is a case study of effective partnership in the pursuit of justice, and consistent consular support and protection, all of which contributed to his release.

The case of Saudi blogger Raif Badawi

Another compelling case study is of Raif Badawi. I first became involved in his case in my last year as a parliamentarian in 2014 at the request of his wife Ensaf Haidar, who with her three children, had fled to Canada as refugees, and had taken up residence in Sherbrooke, Quebec.

Raif Badawi’s case and cause is chronicled more fully later in this Report. It is a case study of the assault on media freedom through the criminalisation of fundamental freedoms of expression and religion, arbitrary detention, deprivation of liberty and torture in detention through flogging; and of the violations by the host State, in this case Saudi Arabia, which were in breach both of their domestic law and international law obligations, including also the denial of consular access to diplomats of concerned States.

More importantly, it is also a case study of the denial of rights of the detained journalist, and demonstrating yet again the need for a Charter of Rights for Detained Journalists, as set forth in this Report; and a case study of the diplomatic protection and remedies engaged in by the home State, in this case Canada, now the state of citizenship of Ensaf Haidar and her three children.

Saudi Arabia carried out its first flogging of Badawi with fifty lashes on 9 January 2015, which generated international outrage and caused the Saudi authorities to postpone subsequent sessions. Saudi Arabia has since ended the use of flogging.

Shortly thereafter, the Foreign Affairs Subcommittee on Human Rights, on which I served as Vice-Chair, unanimously condemned Badawi’s illegal imprisonment and torture, and called for his release. The House of Commons then unanimously adopted a similar motion, an initiative that is difficult to secure as any opposition from one Member of the House would defeat the motion. The Canadian Foreign Minister made representations to the Saudi authorities, and the UN Working Group on Arbitrary Detention determined that Raif Badawi’s imprisonment was illegal and called for his release, while the UN Special Rapporteurs also expressed outrage and called for Badawi’s release.

Following my retirement from Parliament, I established the Raoul Wallenberg Centre for Human Rights (RWCHR), named in memory of Raoul Wallenberg – Canada’s First Honourary Citizen – who demonstrated how one person with the compassion to care and the courage to act can confront evil and prevail. Wallenberg, a non-Jewish Swedish diplomat, was a beacon of light during the darkest days of the Holocaust, and his inspiration remains so today. Prior to his arrival in the Swedish legation in Budapest in mid-July 1944, some 440,000 Hungarian Jews had been deported to Auschwitz in ten weeks – the fastest, cruelest and most efficient mass murder of the Holocaust. Yet Wallenberg rescued some 100,000 Jews in Hungary in the last six months of 1944.

First, in the distribution of ‘schutzpasses’ – diplomatic passports conferring protective immunity on their recipients – and in the establishment of safe houses conferring diplomatic sanctuary on their inhabitants, Wallenberg is credited with saving 50,000 Jews by these means alone. His heroic deeds affirmed and validated the principle of diplomatic immunity – the remedy of diplomatic protection – a foundational principle of international law and model of the diplomatic capacity to save lives.

Second, in his singular protection of civilians amid the horrors of the Holocaust, he manifested the best of what we today call international humanitarian law.

Third, in his organisation of hospitals, soup kitchens and orphanages – the staples of international humanitarian assistance that provided women, children, the sick and the elderly with a semblance of dignity in the face of the worst of all horrors and evils – Wallenberg symbolised the best of what we today would call international humanitarian intervention.

Fourth, in saving Jews from certain death, deportation and atrocity, he symbolised what today we would call the Responsibility to Protect doctrine, of which Canada is the architect.

Finally, Wallenberg’s last rescue was perhaps his most memorable. As the Nazis were advancing on Budapest and threatened to blow up the city’s ghetto and liquidate the remaining Jews, he put the Nazi generals on notice that they would be held accountable and brought to justice, if not executed, for their war crimes and crimes against humanity. The Nazi generals desisted from their assault and some 70,000 more Jews were saved, thanks to the indomitable courage of one person prepared to confront radical evil. In so warning the Nazi generals that they would be held responsible for their war crimes, Wallenberg was a forerunner of the Nuremberg principles and what today we would call international criminal law.

Regrettably, rather than being recognised for his heroism, Wallenberg was arrested by Soviet authorities, held as a political prisoner and disappeared in the Soviet Gulag. This hero of humanity, who saved so many, was not saved by so many who could, including the diplomatic remedies that could have been exercised on behalf of a fellow diplomat whom the UN has called the ‘greatest humanitarian of the 20th century’.

Accordingly, defending political prisoners is a priority on the Raoul Wallenberg Centre's justice agenda along with the protection of media freedom as a cornerstone of effective diplomatic action; and the importance of diplomatic protection – as Raoul Wallenberg dramatised – as essential to protecting a rules-based international order.

Raif Badawi's case was the first taken up by the RWCHR under its Political Prisoner Advocacy Project; and as Chair of the RWCHR and international legal counsel for Badawi, we put in place the advocacy model first developed on behalf of Anatoly Sharansky as referenced earlier in this report, which included the following:

1. Exposing and unmasking the violations of the human rights violator. As Andrei Sakharov, the father of the dissident movement had put it, the 'mobilization of shame against the human rights violators'.
2. Legal representations to the Saudi authorities. As it happened, I had been a Member of the first Canadian Parliamentary Delegation to the Middle East, including Saudi Arabia, and understood the importance of Islamic Law in the Saudi legal system; and therefore anchored my petition for clemency in the violation of Saudi Arabia of its own law and Islamic Law in the prosecution and persecution of Raif Badawi, with the call for clemency anchored in the Islamic principles of compassion, mercy and justice.
3. Invocation of the support and protection of the home State – Canada – and which has included direct representations by Prime Minister Justin Trudeau to both Saudi King Salman and then later with Saudi Crown Prince Mohammed bin Salman at the G-20, and calling also publicly for his release in the press conference that followed.
4. Direct representations were made also by Foreign Ministers Stephane Dion and Chrystia Freeland, respectively to their Saudi counterparts, as more fully described in the Badawi case history in this report.
5. Invocation of the support of the Quebec National Assembly which unanimously called for the release of Badawi; for the Canadian government to seek his release; and itself granted a 'special certificate of humanitarian selection' to facilitate Badawi's immigration to Canada, of particular relevance given the joint federal and Quebec responsibility for immigration. Similarly, Badawi was granted Honourary Citizenship by the City of Montreal, an award that the city stated was intended to demonstrate the widespread support for his release, to increase pressure on Saudi officials to free Badawi, and on Canadian officials to renew their efforts in that regard.
6. Engagement by Canadian parliamentarians – apart from the unanimous resolutions referenced earlier calling for his release – and which included All-Party Parliamentary press conferences and public appeals for Badawi's release, and similar initiatives by the Raoul Wallenberg All-Party Parliamentary Caucus on Human Rights.

7. The internationalisation of advocacy through visits and representations made to both Democratic and Republican Senators and Members of Congress, including the respective Chairs of the Senate and House Foreign Affairs Committee; and where I was accompanied by Ensaf Haidar and Brandon Silver, Director of Policy and Projects for the RWCHR, and our ongoing point of contact with the Senate and Congressional officials.
8. The internationalisation of advocacy beyond the United States to include representations to European governments and parliaments, which have equally called for Badawi's release.
9. Representations, again similar to that made to the European Union, to the US International Commission on Religious Freedom, which in turn has directly taken up Badawi's case with Saudi officials, including making representations directly to the Crown Prince on a visit to Saudi Arabia.
10. Representations to and subsequent international declarations from UN Special Procedures, including the UN Special Rapporteurs on Freedom of Expression, and on Torture, calling for Badawi's release.
11. The involvement of international human rights NGOs including the Gulf Centre for Human Rights, Amnesty International and others.
12. The involvement of international journalists associations, like Reporters Without Borders; Badawi being made an honorary member of the Quebec Federation of Journalists; the support given to Badawi's case by the *Canadian Press* in both English and French, and the *Globe and Mail* with its focused reporting on Saudi Arabia and the case of Raif Badawi.

The foregoing is a snapshot of the critical mass of advocacy in which the RWCHR and this author have been engaged in, and which understandably invited the not un-cynical retort – 'what has all this accomplished, Raif Badawi is still imprisoned'. In that connection, I am reminded of the response given by Avital Sharansky after her husband Anatoly had been held in a Soviet prison for eight years, notwithstanding the global advocacy on his behalf. She said, 'you are right, my husband is still in prison. But he is alive – he has not disappeared – his case is not forgotten and if we continue our advocacy, we will yet witness his release'.

One year later, Sharansky was released. But there is an interesting epilogue to his release, one that is relevant to advocacy for political prisoners like Raif Badawi.

Several years after Sharansky's release, I was on a conference panel with Soviet President Mikhail Gorbachev. I mentioned to him that Sharansky was released within months of Gorbachev becoming President. I wondered, therefore, what involvement he had in Sharansky's release. He then told me the following story, which Sharansky also recounted to the *Wall Street Journal*. Gorbachev told me, 'this might surprise you, but before I became President, I was Secretary of Agriculture in the Soviet Union and, frankly, in that

capacity, I had not heard of Sharansky. I made my first foreign trip to Canada and the Canadian Parliament shortly after becoming President. I appeared before the Canadian Parliamentary Committee on Agriculture, which, after asking me a few questions about agriculture, began to ask me about this Anatoly Sharansky. I did not know what they were speaking about. When I left the Parliament buildings, there was this mass demonstration calling for the release of Sharansky, a scene repeated in different encounters during my visit to Canada. I then was hosted by the Minister of Agriculture, Eugene Whelan, and, yes, we talked about agriculture, but he continued to bring up the case of Anatoly Sharansky. One year after my visit to Canada, I became President of the Soviet Union. I ordered up Sharansky's file. Yes, he was a troublemaker – but he wasn't a criminal – and it was costing us politically, economically, diplomatically to keep him in prison, so I ordered his release in our own self-interest'.

The point of all this is that representations on the basis of the injustice of the human rights violator are important and necessary, but the 'tipping point' will be reached when the violator realises that it's in their self-interest to release the political prisoner – and it's our responsibility to bring about that tipping point.

Charting a path forward

My experiences as described above underscored the necessity to refine and enshrine in law the rights of nationals to consular assistance and protection from their home government, to ensure transparency and accountability in their implementation. Accordingly, on several occasions in my parliamentary tenure, I tabled Bills – the 'Protecting Canadians Abroad Act' – proposing the establishment of such a system of support. Indeed, as I said on those occasions, this Bill was 'in support of the foundational principle that all Canadian citizens, without discrimination, deserve the protection of the Government of Canada while detained, stranded, captured or disappeared abroad' and that 'this legislation, the first ever of its kind in Canada, would affirm these rights and obligations, including rights to consular access, consular visits and repatriation; reporting requirements for Canadian officials when they suspect a Canadian detained or captured abroad has been or may be tortured; and requiring that the government request the repatriation of a Canadian detained abroad in situations where there are reasonable grounds to believe that the Canadian has been or may be tortured, is being subjected to conditions constituting cruel or unusual punishment, or is being arbitrarily detained'. While these proposals have not yet been enshrined in law, I hope that this report may serve as a catalyst for their timely adoption by Canada and other countries.

II. Introduction

A pressing concern

This report focuses on journalists at risk abroad because these individuals have a particular, pressing need for consular assistance. Information has globalised. What happens halfway around the world reverberates often with as much force as what happens next door. Our need for accurate information and our capacity to receive it have never been greater, but journalists – as the source of this information – find themselves under threat.

While technology continues to enhance journalists' ability to report across borders, States' restrictions on the press now represent the greatest limitation on the free flow of information. Such State restrictions can vary from the extreme (e.g., arbitrary detention and torture) to the more subtle (e.g., travel restrictions and denial of access); their common thread is the goal of limiting oversight.

The coronavirus outbreak has exacerbated contemporary problems with press freedom across international boundaries. Indeed, it constitutes a dual danger to human rights, as it works as both a basis to infringe civil liberties and a cover for States looking to curb reporting on such infringements. Disturbingly, media freedom has declined as a result of the coronavirus outbreak not only in authoritarian regimes, but in democracies as well.

A free press protects human rights

Reports on human rights abuses against journalists generally focus on three actors: the violating State, the journalist and the State of which that journalist is a national. But other actors are harmed when journalists are silenced: the journalist's audience (at home and around the world) and the victims of the underlying injustice whose stories are no longer being told.

Journalists give a voice to the voiceless. Their reporting is itself a public good that promotes the international transmission of information and can serve as a call to action to defend the oppressed. Any commitment to human rights requires a commitment to the preservation of a free press.

Minority rights are also protected by a diverse media that is able to express the opinions of all sections of society, providing an outlet of expression for ethnic, linguistic or other minorities.⁴²

Two fundamental human rights as defined in the International Covenant for Civil and Political Rights⁴³ (ICCPR) and the Universal Declaration⁴⁴ rely directly on a free press for

42 UN Human Rights Committee, General Comment No 34, 102nd Session, CCPR/C/GC/34 (2011) at para 14.

43 ICCPR, GA Res 2200A (XXI) of 16 December 1966, Arts 19 and 25.

44 UDHR, Arts 19 and 21.

their full expression: individual freedom of expression and democratic participation. Journalists facilitate the free expression of other community members.

But human rights more generally cannot be protected in a State that discourages transparency and denies access to information. It is crucial that the media be able to operate in a climate open to the spread of information, otherwise governments and other authorities will avoid accountability for their actions. As stated by the UN Special Rapporteur on Freedom of Opinion and Expression, 'an attack against a journalist is not only a violation of his or her right to impart information, but also undermines the right of individuals and society at large to seek and receive information'.⁴⁵ The European Court of Human Rights celebrates the 'vital public watchdog role of the press' and has established that there must be a high level of protection for journalists who are reporting on matters of public interest.⁴⁶ The rights of the whole community are compromised when journalists are silenced.

Beyond their vital role in ensuring accountability, a free press is inherently linked to the enjoyment of other rights, such as political rights. A denial of press freedom restricts the ability of the public to stay informed about social and political issues. The UN Human Rights Committee has affirmed that the media must be able to comment on public issues without censorship or restraint in order to inform public opinion, which is particularly important for the full enjoyment of political rights.⁴⁷ In the absence of sufficient protections to guarantee the right to expression, political discourse will be stifled and, in extreme circumstances, criticism of government policies and programmes could be illegitimately outlawed.

For these reasons, a free press is one of the pillars of democracy.⁴⁸ Democratic States have a crucial interest in protecting and promoting journalistic activities and the journalists who are under the protection of those States.

The UN Special Rapporteur on Freedom of Opinion and Expression has emphasised that:

'attacks on journalism are fundamentally at odds with protection of freedom of expression and access to information and, as such, they should be highlighted independently of any other rationale for restriction. Governments have a responsibility not only to respect journalism but also to ensure that journalists and their sources have protection through strong laws, prosecutions of perpetrators and ample security where necessary'.⁴⁹

45 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Human Rights Council on the Protection of Journalists and Media Freedom, UN Human Rights Council, 20th Session, UN Doc A/HRC/20/17 (2012) at para 54

46 *Goodwin v the United Kingdom* (1996) 2 ECHR (Ser A) at para 39.

47 UN Human Rights Committee, General Comment No 25, CCPR/C/21/Rev.1/Add (1996) at para 25.

48 General Comment 34 on Art 19 of the ICCPR, para 2.

49 Report of the UN Special Rapporteur, on the promotion and protection of the freedom of expression, UN General Assembly, 71st Session, UN Doc A/71/373 at para 35, citing Security Council resolutions 2222 (2015) and 1738 (2006) www.un.org/ga/search/view_doc.asp?symbol=A/71/373; and UNESCO International Programme for the Development of Communication, 'UN Plan of Action on the Safety of Journalists and the Issue of Impunity' (UNESCO, 2012) <https://en.unesco.org/un-plan-action-safety-journalists>.

The safety of journalists is at the core of a free press

Journalists are uniquely and particularly vulnerable to violations of their human rights. This is because journalism is the vocation of seeking out and disseminating the truth and giving voice to dissenting or unpopular opinions. Speaking truth to power comes with risks, especially when the power at issue is the power of the State.

Very often, journalists and media outlets are the targets of State attacks specifically because of their role in exposing human rights violations.⁵⁰ In surveying the cases of journalists killed or imprisoned in 2019, the CPJ has demonstrated that ‘politics was the beat most likely to land journalists in jail, followed by human rights and corruption’.⁵¹ This is in direct conflict with the call of the UN General Assembly for States to maintain a safe environment for journalists to work independently and without undue interference.⁵²

There are many recent examples of journalists who have been arbitrarily arrested or detained, subjected to torture or other forms of inhuman treatment, or otherwise harmed or threatened with harm due to the journalist’s investigation or publication of politically sensitive or unpopular material.

Case study: Mohamed Fahmy

On 29 December 2013, Egyptian authorities arrested Egyptian-Canadian journalist Mohamed Fahmy.⁵³ Fahmy, who was serving as Bureau Chief for Al Jazeera Egypt, was arrested along with two of his Al Jazeera colleagues, Australian correspondent Peter Greste and Egyptian producer Baher Mohamed. All three were accused of supporting the Islamist Muslim Brotherhood and of fabricating footage in order to undermine Egypt’s national security. Fahmy’s Canadian passport was seized by the arresting officers and never recovered.

Their trial began over a year later, in February 2014. All three journalists pleaded not guilty. At their trial, they shouted from the box that their prison conditions were ‘psychologically unbearable’.⁵⁴

50 Report of the UN Special Rapporteur on the situation of Human Rights Defenders, ‘Elements of a Safe and Enabling Environment for Human Rights Defenders’, UN Human Rights Council, 25th Session, UN Doc A/HRC/25/55 (2013) at para 91.

51 CPJ, ‘At least 250 journalists jailed worldwide for fourth straight year’ (CPJ, 11 December 2019) <https://cpj.org/2019/12/at-least-250-journalists-jailed-worldwide-for-four.php>.

52 See ‘The Safety of Journalists and the Issue of Impunity’, GA Res 68/163, UNGAOR, 68th Session, UN Doc A/RES/68/163 (2013); and ‘The Safety of Journalists and the Issue of Impunity’, GA Res 69/185, UNGAOR, 69th Session, UN Doc A/RES/69/185 (2015).

53 Tahiat Mahboob, ‘Fahmy vs Egypt: Six Key Moments That Took Mohamed Fahmy From Press To Prison’ (CBC, [no date specified]) www.cbc.ca/cbcdocs/pov/features/fahmy-vs-egypt-six-key-moments-that-took-mohamed-fahmy-from-press-to-prison.

54 CTV News, ‘Timeline: The two trials of Mohamed Fahmy’ (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

At the time the trial began, journalists and human rights defenders from around the world had called for the prisoners' release.⁵⁵ The Egyptian, Canadian and Australian governments were all pressured to intervene to free the prisoners, to investigate allegations of inhuman treatment, and to condemn the charges as violations of free expression.

On 23 June 2014, the court convicted the three journalists, sentencing Greste and Fahmy to seven years in prison and Mohamed to 10 years.⁵⁶ When the judge released his reasons one month later, the reasons stated that the journalists had been brought together 'by the devil' to destabilise the country.⁵⁷

Days after the verdict was handed down, Canadian authorities, including the Minister of Foreign Affairs and the Prime Minister, expressed concern with the verdict and stated that they were working to secure Fahmy's release.⁵⁸ Progress was extremely slow, however; the new year saw Fahmy still in prison, and this despite the Egyptian Court of Appeal having ordered a retrial.

On 1 February 2015, Peter Greste was freed from prison and deported to Australia following a presidential 'approval'. The next day, Fahmy's family announced that he had relinquished his Egyptian citizenship, as the authorities had allegedly made it a condition for his freedom.⁵⁹ Even this did not secure Fahmy's immediate release.

The retrial began on 12 February 2015. The next day, he was at last released on bail after more than 400 days in prison.⁶⁰ He was required to report to a police station in Cairo every day during his bail period.

On 22 April 2015, Fahmy received a temporary Canadian passport. On 11 October 2015, he was able to travel back to Canada to be reunited with his family.⁶¹

On 29 August 2015, the court sentenced Fahmy and his two colleagues to three years in prison.⁶² A month later, on 23 September 2015, Egyptian President

55 CTV News, 'Timeline: The two trials of Mohamed Fahmy' (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

56 Al Jazeera, 'Outrage as Egypt jails Al Jazeera staff' (Al Jazeera, 24 June 2014) www.aljazeera.com/news/middleeast/2014/06/outrage-as-egypt-jails-al-jazeera-staff-2014623234322236195.html.

57 CTV News, 'Timeline: The two trials of Mohamed Fahmy' (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

58 CTV News, 'Timeline: The two trials of Mohamed Fahmy' (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

59 CTV News, 'Timeline: The two trials of Mohamed Fahmy' (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

60 Al Jazeera, 'Freed Al Jazeera journalists reunited with family' (Al Jazeera, 13 February 2015) www.aljazeera.com/news/2015/02/freed-al-jazeera-journalists-reunited-family-150213091531055.html.

61 CTV News, 'Timeline: The two trials of Mohamed Fahmy' (CTV News, 29 August 2015; last updated 13 October 2015) www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884.

62 Al Jazeera, 'Dark day for press freedom' (Al Jazeera, 29 August 2015) www.aljazeera.com/programmes/insidestory/2015/08/egypt-press-freedom-150829171949498.html.

Abdel Fattah al-Sissi pardoned Fahmy along with other prominent human rights activists.⁶³

Throughout the Canadian journalist's arbitrary detention by Egyptian authorities, Canada provided consular assistance, including requests for family visitation, support for legal interventions, and successfully appealed to Egyptian authorities for his clemency and deportation back to Canada. In the words of Fahmy's legal counsel, '[i]n terms of the support that I've had and that Mr. Fahmy has had on the ground, I think that has been exemplary'. However, the inconsistency and inadequacy of this government support, including a lack of high-level engagement from the government of Canada, was lamented.⁶⁴ Grounded in this experience, Fahmy has been advocating for the adoption of a 'protection Charter', outlining steps that the Canadian government should take more effectively to defend the rights of Canadians imprisoned abroad.⁶⁵ In particular, the Charter highlights the need to address the vicissitudes that arise from the discretionary provision of consular assistance – where there is a perception that some Canadians receive differential treatment based on familial, political, religious or ethnic background – by enshrining in law the obligation to provide consular assistance, and that it be provided equally to all Canadians⁶⁶

States that care about freedom of the press, freedom of expression and democracy must take all action they can to protect individual journalists whose human rights are violated or threatened in the course of their work.

Who is a journalist?

A preliminary question that must be answered before adequately protecting journalists is what constitutes a journalist?

Gone are the days in which only print media merited the label 'journalism'. Technological changes in the news media landscape, such as the rise of the internet and social media platforms, as well as diminished barriers to entry into the media space, have transformed the production, dissemination and consumption of news. In the rapidly evolving contemporary media environment, journalism is increasingly defined as an activity or pursuit rather than a profession or industry.

63 CTV News, "I can't wait to go back to Canada": Fahmy freed from Egyptian prison' (CTV News, 23 September 2015) www.ctvnews.ca/canada/i-can-t-wait-to-go-back-to-canada-fahmy-freed-from-egyptian-prison-1.2576782; www.ctvnews.ca/canada/timeline-the-two-trials-of-mohamed-fahmy-1.2538884

64 CBC, 'Mohamed Fahmy's lawyer Amal Clooney says Canada has formally applied for a pardon' (CBC News, 30 August 2015) www.cbc.ca/news/world/mohamed-fahmy-amal-clooney-1.3209075.

65 Amnesty International, 'Protection Charter: Mohamed Fahmy and Amnesty International propose more effective action to defend the rights of Canadians imprisoned abroad' (26 January 2016) www.amnesty.ca/news/protection-charter-mohamed-fahmy-and-amnesty-international-propose-more-effective-action-defend.

66 Amnesty International, 'Protection Charter' (Amnesty International) www.amnesty.ca/sites/default/files/CanadaProtectionCharter26January16.pdf

The pursuit of journalism is the pursuit of truth: journalists are those who seek out and disseminate information to the broader public, be it in print or online. Beyond traditional journalists, members of civil society organisations who conduct research and issue findings, as well as researchers, citizen journalists, bloggers and other media ‘non-professionals’ who engage in independent reporting are protected by Article 19 of the ICCPR.⁶⁷

Numerous international bodies and organisations have adopted broad definitions of journalism along these lines. The UN Special Rapporteur on Freedom of Opinion and Expression defines journalism as ‘the regular gathering of information, with or without formal training, accreditation or other government acknowledgement, with the intent to disseminate one’s findings in any form’.⁶⁸ The CPJ defines journalists as ‘people who cover the news or comment on public affairs in any media, including print, photographs, radio, television, and online’.⁶⁹

National systems may vary in their definitions of ‘journalism’ and ‘journalist’. In addition, specific definitions may be apt for one purpose but not another. For example, in Canada, section 39.1 of the Canada Evidence Act defines a journalist as ‘a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person’.⁷⁰ However, this definition was crafted for the purpose of offering the protection of anonymity for journalistic sources. The same definition might not be appropriate for all instances in which a definition of ‘journalist’ is required.

Freedom of the press is not a static concept covering a predetermined scope; it is adaptable to protect new and different forms of communication. New means of expression are also protected. Both online and offline content fall within the scope of freedom of expression in international law.⁷¹ Indeed, the UN Human Rights Committee has recommended that any limits or restrictions on permissible publications should be content-specific and technologically neutral.⁷²

In considering what constitutes a journalist from a functional perspective, it is also important to note that the identity of a journalist exists alongside, and intersects with, other identities that a given individual journalist may hold. For instance, journalists who are women, children or members of religious minorities may be at greater risk of violence,

67 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the General Assembly on the Protection of Sources and Whistleblowers, UN Human Rights Council, 20th Session, UN Doc A/70/361 (2015) at para 20; UNHRC, General Comment 34 at para 44.

68 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the General Assembly on the Protection of Sources and Whistleblowers, UN Human Rights Council, 20th Session, UN Doc A/70/361 (2015) at para 20; UNHRC, General Comment 34 at para 35.

69 CPJ, ‘Hundreds of journalists jailed globally becomes the new normal’ (CPJ, 13 December 2018) <https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia.php>.

70 Canada Evidence Act, RSC 1985, c C-5, s 39.1.

71 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Human Rights Council on the Protection of Journalists and Media Freedom, UN Human Rights Council, 20th Session UN Doc A/HRC/20/17 (2012) at para 64.

72 UNHRC, General Comment 34 at para 43.

threats of violence or other attempts to stifle their expressive activity. The definitions of journalist and what journalism entails should also be sensitive to the power dynamics at work in any given place: for instance, definitions of journalism that exclude bloggers – who may operate with little institutional backing – may be more likely to exclude marginalised voices from protections offered to journalists.

For the purposes of this report, a functional definition of ‘journalist’ has been adopted, based on the one used above by the UN Special Rapporteur on Freedom of Opinion and Expression. A journalist is anyone who participates in the regular gathering of information, with or without formal training, accreditation or other government acknowledgement, with the intent to disseminate his or her findings in any form.

Case study: Raif Badawi

Raif Badawi co-founded a website called the Liberal Saudi Network (or Free Saudi Liberals), based in Saudi Arabia.⁷³ The site provided a platform for expansive public and political discourse. Badawi used the platform to promote liberal reforms such as women’s right to drive and greater religious tolerance.⁷⁴

In June 2012, Badawi was arrested by Saudi authorities under a Saudi law against cybercrime, accused of creating and administering an internet site and publishing comments on his Facebook page that ‘infringe on religious values’.⁷⁵ Later that year he was also charged with apostasy, which is punishable by death. These charges were later dropped.⁷⁶ Badawi had been arrested by Saudi authorities for his journalistic activities in 2008, but had been released.⁷⁷

He was sentenced at first to seven and a half years in prison and 600 lashes.⁷⁸ In 2014, he lost his appeal and his sentence was increased to 10 years, 1000 lashes, a fine of 1 million Saudi riyals (over \$350,000 CAD), and a ban on travelling or using multimedia devices for 10 years.⁷⁹

73 Raoul Wallenberg Centre for Human Rights, ‘Summary of Legal Argument in Appeal for Release of Raif Badawi’ www.raoulwallenbergcentre.org/s/Legal-Brief-Summary-Raif-Badawi-version-with-logo.pdf.

74 Brandon Silver and Evelyne Abitbol, ‘One Way Crown Prince Mohamed bin Salman Can Prove He Is Sincere About His Reforms: Free Raif Badawi’ (*TIME*, 5 April 2018) <https://time.com/5228667/saudi-arabia-%20crown-prince-%20mohamed-bin-%20salman-raif-%20badawi>.

75 Raoul Wallenberg Centre for Human Rights, ‘Summary of Legal Argument in Appeal for Release of Raif Badawi’ www.raoulwallenbergcentre.org/s/Legal-Brief-Summary-Raif-Badawi-version-with-logo.pdf.

76 Frontline Defenders, ‘Case History: Raif Badawi’ www.frontlinedefenders.org/en/case/case-history-raif-badawi.

77 United States Commission on International Religious Freedom, ‘Raif Badawi’ www.uscirf.gov/religious-prisoners-conscience/current-rpocs/raif-badawi.

78 BBC, ‘Saudi blogger Raif Badawi sentence “a slow death”, says wife’ (*BBC News*, 12 June 2015) www.bbc.com/news/av/world-middle-east-33105945.

79 Raoul Wallenberg Centre for Human Rights, ‘Summary of Legal Argument in Appeal for Release of Raif Badawi’ www.raoulwallenbergcentre.org/s/Legal-Brief-Summary-Raif-Badawi-version-with-logo.pdf.

The first session of floggings was carried out against Badawi on 9 January 2015. Following major international outcry, Saudi authorities postponed subsequent sessions, citing medical reasons. Saudi Arabia has since ended the use of flogging.⁸⁰

In 2015 the UNWGAD determined that Badawi's imprisonment was illegal and called for his release.⁸¹ The UN Committee Against Torture has also condemned his treatment, and called for his release. A series of UN Special Rapporteurs — including the UN Rapporteurs on Torture and Freedom of Expression — have expressed outrage and called for Badawi to be released.⁸²

The treatment of Raif Badawi is in standing violation of domestic Saudi law and further obligations that Saudi Arabia has assumed under international law.⁸³ The Court that convicted Badawi lacked jurisdiction. The witnesses in his case were inadmissible. He was denied his right to counsel — his lawyer and brother-in-law Waleed Abu Al-Khair was himself imprisoned — and he was not informed of the charges against him, nor given the necessary time and means to prepare his defense. His sentence of lashings was itself illegal — as physical torture is prohibited under the Arab Charter on Human Rights, ratified by Saudi Arabia in 2009, and the UN's Convention Against Torture, which the nation ratified in 1997.⁸⁴

Meanwhile, in 2013, Badawi's wife, Ensaf Haidar, and their three children fled to Canada, where they were granted refugee status.⁸⁵ In 2018, Haidar and their children became Canadian citizens.⁸⁶ In May 2018, Raif Badawi was granted honorary citizenship by the Canadian City of Montreal, an award that the city stated was intended to demonstrate the widespread support for his case and to increase the pressure on Saudi officials to free Badawi, and on Canadian officials to

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- 80 Irwin Cotler, 'Do not allow Saudi Arabia's flogging ban to distract from the repression that still exists' (*The Globe and Mail*, 30 April 2020) www.theglobeandmail.com/opinion/article-do-not-allow-saudi-arabias-end-of-flogging-punishments-distract-from.
- 81 UNWGAD, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-third session, 31 August– 4 September 2015' A/HRC/WGAD/2015 www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%2038_SaudiArabia_Sheikh_al_Rashudi%20and%20et_final_AUV.pdf.
- 82 UN Human Rights Office of the High Commissioner, 'Saudi Arabia: UN rights experts outraged by extremely harsh sentence against blogger' (15 May 2014) www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14597&LangID=E; UN Human Rights Office of the High Commissioner, 'UN rights expert raises alarm over Saudi Arabia's growing clamp down on freedom of expression' (16 December 2015) www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16892&LangID=E.
- 83 Raoul Wallenberg Centre for Human Rights, 'Appeal for Clemency for Raif Badawi' www.raoulwallenbergcentre.org/s/Clemency-Appeal-Raif.pdf.
- 84 Brandon Silver and Evelyne Abitbol, 'One Way Crown Prince Mohamed bin Salman Can Prove He Is Sincere About His Reforms: Free Raif Badawi' (*TIME*, 5 April 2018) <https://time.com/5228667/saudi-arabia-%20crown-prince-%20mohamed-bin-%20salman-raif-%20badawi>.
- 85 Tristin Hopper, 'What did Raif Badawi write to get Saudi Arabia so angry?' (*National Post*, 16 August 2018) <https://nationalpost.com/news/canada/what-did-raif-badawi-write-to-get-saudi-arabia-so-angry>.
- 86 Morgan Lowrie, "'I'm a proud Canadian": Wife of jailed Saudi blogger sworn in as Canadian citizen' (*Global News*, 1 July 2018) <https://globalnews.ca/news/4307443/wife-of-jailed-saudi-blogger-to-be-sworn-in-as-canadian-citizen>.

renew their efforts in that regard.⁸⁷ This award followed the unanimous call of the Quebec National Assembly for Saudi Arabia to release Badawi and for the Canadian government to seek his release. The Quebec National Assembly granted a special 'certificate of humanitarian selection' to facilitate Badawi's immigration to Canada, of particular relevance given the joint Federal-Québec responsibility for immigration.⁸⁸

The Canadian House of Commons unanimously adopted a resolution calling on the government of Canada to seek and secure Badawi's release and enable him to be reunited with his family in Canada, as did the Foreign Affairs Subcommittee on International Human Rights.⁸⁹

In 2015, Canadian Foreign Minister John Baird raised Badawi's case in bilateral meetings with Saudi officials.⁹⁰ His successor as Foreign Minister, Stéphane Dion, also raised the case with his counterparts, though the Prime Minister had indicated that he was not willing to personally intervene at that time.⁹¹ In April 2018, Canadian Prime Minister Justin Trudeau directly raised Badawi's case in a phone call with the Saudi King.⁹²

In the summer of 2018, Badawi's sister, Samar Badawi, was arrested and imprisoned in Saudi Arabia for her comments regarding women's rights. Her arrest was part of a wider crackdown on peaceful reformers. At that time, Canada's then Foreign Minister, Chrystia Freeland, tweeted: 'Very alarmed to learn that Samar Badawi, Raif Badawi's sister, has been imprisoned in Saudi Arabia. Canada stands together with the Badawi family in this difficult time, and we continue to strongly call for the release of both Raif and Samar Badawi.'⁹³ The Canadian Embassy in Riyadh also released a Statement of their own calling for the release of Samar Badawi and all peaceful human rights activists detained in Saudi Arabia.⁹⁴

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- 87 The Staff, 'Jailed Saudi blogger Raif Badawi granted honorary Montreal citizenship' (Global News, 28 May 2018) <https://globalnews.ca/news/4236151/move-afoot-to-have-jailed-saudi-blogger-named-honorary-montreal-citizen>.
- 88 Irwin Cotler, 'Canada Has The Power To Seek Saudi Blogger Raif Badawi's Freedom' (Huffington Post, 11 September 2016) <https://tinyurl.com/y4ymgwo5>.
- 89 Irwin Cotler, 'Canada Has The Power To Seek Saudi Blogger Raif Badawi's Freedom' (Huffington Post, 11 September 2016) <https://tinyurl.com/y4ymgwo5>.
- 90 Jillian Kestler-D'Amours, 'Raif Badawi: John Baird protests blogger flogging to Saudi prince' (CBC, 23 January 2015) www.cbc.ca/news/politics/raif-badawi-john-baird-protests-blogger-flogging-to-saudi-prince-1.2929233.
- 91 Susana Mas, 'Raif Badawi's case raised by Stéphane Dion with Saudi counterpart' (CBC, 17 December 2015) www.cbc.ca/news/politics/raif-badawi-st%C3%A9phane-dion-1.3370658.
- 92 Justin Trudeau, Prime Minister Of Canada, 'PM Call with Custodian of the Two Holy Mosques, His Majesty King Salman bin Abdulaziz, of the Kingdom of Saudi Arabia' (24 April 2018) <https://pm.gc.ca/en/news/readouts/2018/04/24/pm-call-custodian-two-holy-mosques-his-majesty-king-salman-bin-abdulaziz>.
- 93 The Staff, 'Raif Badawi's sister arrested in Saudi Arabia: Amnesty International' (Global News, 2 August 2018) <https://globalnews.ca/news/4367523/raif-badawis-sister-arrested-in-saudi-arabia-amnesty-international>.
- 94 Jon Gambrell, 'Saudi Arabia expels Canadian ambassador, freezes trade in human rights dispute' (The Star, 6 August 2018) www.thestar.com/news/canada/2018/08/05/saudi-arabia-to-expel-canadian-ambassador-and-freeze-trade-in-human-rights-dispute.html.

Saudi Arabia retaliated by recalling its ambassador from Canada and demanding that Canada's ambassador leave Saudi Arabia within 24 hours, designating him a *persona non grata*. Saudi Arabia also froze all new trade and investment relations with Canada.⁹⁵ Not a single democracy came to Canada's defense when Canada was sanctioned for its Statements in support of human rights.⁹⁶ By indulging a culture of impunity surrounding Saudi Arabia's rights abuses and its punitive response to Canada's criticism, the international community empowered the Kingdom to continue its criminality, culminating in the brutal murder of Saudi journalist Jamal Khashoggi only two months later.⁹⁷

In December 2018, Canadian Prime Minister Justin Trudeau once again raised Badawi's case directly at the highest levels – discussing it with the Saudi Crown Prince at the G20 – and publicly calling for his release in the press conference that followed.⁹⁸

In late 2019, Raif Badawi went on two separate hunger strikes to protest the poor conditions in which he was being held.⁹⁹ At the time of writing, both Raif and Samar Badawi remain imprisoned in Saudi Arabia.

Badawi's case underscores the importance of unified action at all levels of government – legislative and executive, federal and provincial – in order to secure the safety of journalists. While the struggle for his freedom is ongoing, the consistent and concerted efforts on Badawi's behalf prevented further flogging and may have even contributed to ending the practice in Saudi Arabia.

As Raif Badawi's case demonstrates in great and gruesome detail, exercising the right to freedom of expression can lead to the targeting of bloggers for the same arbitrary arrest, unjust detention and torture that has been used against traditional journalists. A useful definition of a journalist must be purposive, encompassing any person who gathers information with the intent of publishing their findings in any medium, since any such person could be the target of abuse in order to snuff out their work.

95 Irwin Cotler, 'What Canada should do about Saudi Arabia' (*The Globe and Mail*, 10 August 2018) www.theglobeandmail.com/opinion/article-what-canada-should-do-about-saudi-arabia.

96 Arabian Business, 'UAE, Arab League voice support for Saudi Arabia in Canada dispute' (*Arabian Business*, 7 August 2018) www.arabianbusiness.com/politics-economics/402353-uae-arab-league-voice-support-for-saudi-arabia-in-canada-dispute; Steven Chase, 'U.S. refuses to back Canada in Saudi Arabia dispute' (*The Globe and Mail*, 7 August 2018) www.theglobeandmail.com/politics/article-us-sidesteps-getting-involved-in-escalating-saudi-canada-dispute.

97 Irwin Cotler, 'Do not allow Saudi Arabia's flogging ban to distract from the repression that still exists' (*The Global and Mail*, 30 April 2020) www.theglobeandmail.com/opinion/article-do-not-allow-saudi-arabias-end-of-flogging-punishments-distract-from.

98 Evan Dyer, 'Trudeau prods Saudi crown prince again on case that sparked Twitter row' (*CBC News*, 1 December 2018) www.cbc.ca/news/politics/trudeau-saudi-prince-mohammed-twitter-badawi-1.4929184.

99 Billy Perrigo, "'We Are Very Worried.'" Jailed Saudi Blogger Raif Badawi's Family Say They Have Not Heard From Him In Over a Month' (*TIME*, 18 February 2020) <https://time.com/5785742/raif-badawi-jailed-saudi-blogger>.

War correspondents

Because they report on violence, conflict and war, some journalists must work in conflict zones. Article 4 of the Geneva Convention (III) relative to the Treatment of Prisoners of War establishes the category of 'war correspondent'.¹⁰⁰ War correspondents are a distinct subset of journalists, working in international armed conflicts, who must have special identification documents that can identify them in the event they are captured. Article 4 of the Geneva Convention (III) relative to the Treatment of Prisoners of War States that war correspondents will have prisoner-of-war (POW) status in the event they are captured.

POW status has its limits, however. The status does not apply in non-international armed conflict, much less in contexts outside of armed conflicts altogether. Indeed, there are no provisions in the Geneva Conventions applicable to non-international armed conflicts that provide journalists with a special status because they are journalists.

Journalists who do not have war correspondent status are not without legal protection. Even under the Geneva Conventions, they are protected from direct attack – not because they are journalists, specifically, but because they are civilians. Accordingly, Article 79 of the Additional Protocol to the Geneva Conventions¹⁰¹ affirms that journalists are civilians and therefore protected from attack, even if they are embedded with the armed forces of a party to a conflict. This provision recognises that journalists travelling with armed forces in a conflict situation are particularly vulnerable to attack because they are together with those armed forces, the latter being legitimate military targets.

The Geneva Conventions, limited as they are to international armed conflicts, are not particularly helpful in defining who comprises a journalist in the 21st Century. But for that subset of journalists who do qualify as war correspondents, they offer additional legal protections. Equally important, they explicitly confirm respect for the work of journalists under international law.

¹⁰⁰ Geneva Conventions, 12 August 1949. In fact, the concept of war correspondent dates back even farther. Analogues are found in Article 13 of the Annex: Regulations concerning the Laws and Customs of War on Land to the Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

¹⁰¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 79.

III. Consular assistance and the protection of international journalists

Introduction

As journalists travel to and work in politically fraught locations in increasing numbers, the importance of consular assistance and diplomatic protection for helping journalists facing risks and challenges abroad has become all the more salient.

Consular assistance refers to the help, advice and support that diplomatic agents of a country provide to nationals who are travelling or living abroad. The provision of consular assistance is preventative and designed to ensure that the rights of nationals are protected. Traditionally, consular assistance is concerned with providing help of various kinds to nationals of the sending State in the receiving State, including help with testamentary matters, protecting the interests of children or others with limited capacity, and even arranging for legal representation for nationals of the sending State, all within the legal limits of the receiving State.¹⁰² When it comes to detention, consular assistance involves provision of certain rights of access to, and communication between, detainees and to consular officials of the detainee's nationality.

The provision of consular assistance is recognised in international law. The Vienna Convention on Consular Relations (1963) (VCCR) defines the framework for consular relations between independent States, though many commentators agree that the VCCR itself simply codified existing customary international law.¹⁰³ Indeed, with 180 States Parties, the treaty can be said to be representative of an international consensus on the subject.¹⁰⁴

Diplomatic protection, on the other hand, consists primarily of 'protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law' and 'negotiating with the Government of the receiving State'.¹⁰⁵ A State's right to exercise diplomatic protection is engaged only where the rights of that State are violated by the receiving State, including where the human rights of its nationals are violated, and all domestic remedies have been exhausted.¹⁰⁶

Diplomatic protection may be achieved by way of either 'diplomatic action' or 'international judicial proceedings'. The enforcement of VCCR rights invariably involves 'diplomatic protection' (usually but not always in the form of international judicial

102 See VCCR, Article 5.

103 Arts 5(a) and (e) State that consular functions consist of 'protecting in the receiving State the interests of the sending State and of its nationals' and 'helping and assisting nationals [...] of the sending State'; Redress, 'Beyond Discretion', (Redress, January 2018) p 16 https://redress.org/wp-content/uploads/2018/01/3CADP-Report_FINAL.pdf.

104 UN Treaty Collection, 'Privileges and Immunities, Diplomatic and Consular Relations' Ch III (Vienna, 24 April 1963) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3.

105 Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force on 24 April 1964), Art 3.

106 Redress, 'Beyond Discretion' (Redress, January 2018) p 60.

proceedings), since this is the legally recognised State-to-State process employed by the State of nationality when a national suffers ‘injury’ caused by the ‘internationally wrongful act’ of another State. That being said, John Dugard, former Special Rapporteur on Diplomatic Protection for the UN International Law Commission, has argued that diplomatic protection is not characterised by, and need not include, judicial proceedings. State action vis-à-vis another State on behalf of a national ought to be classified as diplomatic protection where ‘the general requirements of diplomatic protection have been met – i.e. that there has been a violation of international law for which the respondent State can be held responsible, that local remedies have been exhausted and that the individual concerned has the nationality of the acting State’.¹⁰⁷

‘Consular assistance’ can therefore be contrasted with ‘diplomatic protection’, as the latter involves the invocation of legal responsibility against another State. While consular assistance provides the framework to ensure that human rights are respected while a person is in custody, diplomatic protection provides the tools to seek to enforce that framework, and to seek redress when, despite the protections in place, mistreatment occurs.¹⁰⁸

At a practical level, the need for consular assistance arises when the individual concerned is still abroad, and serves mainly as a preventative and welfare function, whereas diplomatic protection becomes particularly relevant where violations have already occurred. Despite the clear theoretical distinctions between consular assistance and diplomatic protection, the two concepts are often blurred in practice.¹⁰⁹ Indeed, whether preventive or proactive, journalists – especially those living in democracies – should expect their governments to provide them with support against troubles abroad while performing their duties. We will use the broader terms ‘consular support’ to refer to all instances where consular officials of a home State assist nationals in a foreign State, whether or not there has been a documented breach of rights. It is crucial to emphasise that a documented breach of rights is not necessary to trigger a home State’s obligations vis-à-vis its nationals abroad.

The importance of consular support as a tool to protect nationals abroad

As outlined above, journalists are particularly at risk of becoming victims of arbitrary arrest and detention abroad. Often when this occurs, the only way for an unjustly detained journalist to avoid being subject to further human rights abuses and ultimately to be released from detention is for the home State promptly to provide him or her with effective consular assistance and, where required, diplomatic protection.¹¹⁰

Consular assistance is a critical tool that States can use to protect journalists detained abroad from torture and ill-treatment, especially in cases where they are being charged

107 John Dugard, ‘Seventh report on diplomatic protection, by Mr. John Dugard, Special Rapporteur’ (7 March 2006), para 16.

108 See, e.g., UNWGAD Report, A/HRC/39/45, 2 July 2018, paras 51–52.

109 Redress, ‘Beyond Discretion’ (Redress, January 2018) p 3.

110 Redress ‘Beyond Discretion’ (Redress, January 2018) p 4.

with alleged crimes against the receiving State, including terrorism, espionage or treason.¹¹¹ Although prisoners and detainees are generally vulnerable to torture, ill-treatment and other human rights violations, many foreign detainees face additional disadvantages. For example, they may not speak the local language, they may be unfamiliar with the country's legal system and culture, they often have limited ties to the local community, and they are usually separated from their friends and family.¹¹² According to the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Dr Agnès Callamard:

'Foreign nationals may be unaware of their rights when arrested, such as the privilege against self-incrimination or the right to remain silent, or their right to counsel and consular assistance. They may be asked to sign confessions written in a language they do not read. Oftentimes, they are not provided with access to interpretation services needed to ensure their meaningful participation in the trial proceedings. They may lack a local support network, such as family members, to help navigate the legal processes, cover the cost of effective legal defence or provide emotional support.'¹¹³

Consular rights, such as the right to be informed of the right to consular assistance at the time of arrest, the right to private visits by consular officers, and the right to legal representation are critical in preventing torture and ill-treatment of journalists detained abroad. The risk of torture and ill-treatment is far greater in cases where such rights are not provided to detainees, or are delayed.¹¹⁴ For example, the VCCR States that nationals should be 'free to communicate' with consular officials.¹¹⁵ The only way for detainees freely to communicate with consular officials about torture, ill-treatment or other abuse they have suffered is for consular visits to be conducted in private. If officials of the receiving State are monitoring interactions between detainees and consular officers, detainees may be hesitant to raise any allegations of incriminating conduct for fear of reprisal by the authorities who carried out the torture. Consular officers may also be prevented from documenting the torture or explaining to detainees what recourse they have.¹¹⁶

The UNWGAD has found that foreign detainees are also particularly vulnerable to violations of the right to a fair trial, and that access to consular assistance is an important component in securing a fair trial for such detainees.¹¹⁷ Indeed, oftentimes the only way a foreign detainee will be informed about how to exercise his or her fair trial rights is in meeting with a consular official. Consular officials can also provide detainees with access

111 UNWGAD Report, A/HRC/39/45, 2 July 2018, para 56.

112 Redress 'Beyond Discretion' (Redress, January 2018) p 7.

113 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnès Callamard on 'Application of the death penalty to foreign nationals and the provision of consular assistance by the home State' UN General Assembly 74th Session A/74/318, pp 6–7 <https://undocs.org/A/74/318>.

114 UNWGAD Report, A/HRC/39/45, 2 July 2018, para 56.

115 VCCR, Article 36(1)(a).

116 Redress 'Beyond Discretion' (Redress, January 2018) p 21.

117 UNWGAD Report, A/HRC/39/45, 2 July 2018, para 57.

to legal counsel, ensure that exculpatory evidence is introduced at trial, and attend and monitor the trials to ensure fair trial guarantees are in place or to document fair trial violations.¹¹⁸

In the UN Secretary General's 2017 report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, he noted that foreign detainees can be disproportionately affected by the death penalty and that access to consular assistance, as provided for in the VCCR, is an important facet of facilitating their protection.¹¹⁹

Access to consular support is especially important in situations where journalists are operating in countries that do not have the same legal and judicial standards as their countries of citizenship. In some instances, the only available recourse to journalist nationals at risk abroad may be consular support:

'Consular protection or assistance can act as a humanitarian safeguard and provide a crucial – and sometimes the only - link between the detainee and the outside world. It can help prevent human rights violations, including torture or other prohibited ill-treatment. States can enforce the rights of their nationals to consular assistance and to redress for human rights violations suffered abroad through diplomatic protection, a means for a State to take legal or related action against another State in respect of the injury caused to one of its nationals.'¹²⁰

One important connection between consular assistance and diplomatic protection is that if consular assistance is promptly and effectively provided to nationals detained abroad, there will already be a record of any torture, ill-treatment or other abuse that has taken place. Such a record would facilitate access to remedies at a later stage, including through the exercise of diplomatic protection where required.¹²¹ Thus, although consular assistance is typically thought of as a preventive instrument, it can also lay the groundwork for redress which might be pursued at a later stage. In cases where nationals suffer grave human rights violations abroad and where the home State helps survivors obtain redress, including by exercising diplomatic protection, not only can justice be more easily obtained for the victims, but there may be resounding impacts for other nationals detained abroad by strengthening the implementation of international norms.¹²²

118 UNWGAD Report, A/HRC/39/45, 2 July 2018, para 57.

119 UNWGAD Report, A/HRC/36/26, 22 August 2017.

120 Redress 'Beyond Discretion' (Redress, January 2018) p 1.

121 Redress 'Beyond Discretion' (Redress, January 2018) p 7.

122 Redress 'Beyond Discretion' (Redress, January 2018) p 7.

Case study: Dawit Isaak

Dawit Isaak is a Swedish-Eritrean writer and journalist who has been held incommunicado in Eritrean prisons for 19 years, the longest-jailed journalist in the world. In the 1990s, he became co-owner and reporter of *Setit*, an independent newspaper in Eritrea.¹²³ In September 2001, the Eritrean government shut down all independent newspapers and arrested 11 journalists, including Isaak.¹²⁴ He was detained in an Eritrean prison without trial or any official charges.

Since Isaak's arrest in 2001, freedom of the press in Eritrea has continued to be stifled. Several of the 11 journalists arrested in 2001 are now believed to be dead.¹²⁵ In 2020, Reporters without Borders ranked Eritrea as 178th out of 180 countries in their World Press Freedom Index.¹²⁶ In 2019, the Committee for Journalists ranked Eritrea the most censored country in the world, citing its repressive expression laws, legal monopoly of broadcast media and imprisonment of journalists without trial.¹²⁷

Of the 11 arrested journalists, Isaak was the only one to have dual citizenship, as an Eritrean and Swedish citizen. Due to his Swedish citizenship, the Swedish government has engaged in a course of diplomacy to seek his release. After significant advocacy by Isaak's lawyers and the Swedish government, Isaak was briefly released in 2005,¹²⁸ but was then arrested again two days later while on his way to hospital.¹²⁹

Ascertaining precise information on Isaak's location and health has proven difficult, as the Eritrean government refuses to provide information. He is believed to have been seriously ill during his detention, but the extent of his illness unknown. In December 2008 there were unconfirmed reports that Isaak was transferred to a maximum-security prison, where he fell seriously ill and was admitted to a hospital in Asmara shortly thereafter.¹³⁰

123 CPJ, 'Journalist freed without charge after four years in jail' (CPJ, 21 November 2005) <https://cpj.org/2005/11/journalist-freed-without-charge-after-four-years-i>.

124 Solomon Abera, 'When Eritrea shut down the independent press' (CPJ, 18 September 2011) <https://cpj.org/2011/09/when-eritrea-shut-down-the-independent-press>.

125 Reporters Without Borders, 'African panel to examine case of detained Swedish-Eritrean journalist' (RSF, 13 March 2013; last updated 20 January 2016) <https://rsf.org/en/news/african-panel-examine-case-detained-swedish-eritrean-journalist>.

126 Reporters Without Borders, '2020 World Press Freedom Index' https://rsf.org/en/ranking_table.

127 CPJ, '10 Most Censored Countries' <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist>.

128 CPJ, 'Journalist freed without charge after four years in jail' (CPJ, 21 November 2005) <https://cpj.org/2005/11/journalist-freed-without-charge-after-four-years-i>.

129 Tom Lantos Human Rights Commission, 'Defending Freedom Project: Dawit Issak' <https://humanrightscormission.house.gov/defending-freedom-project/prisoners-by-country/Eritrea/Dawit%20Isaak>.

130 European Parliament, 'Eritrea, the case of Dawit Isaak – European Parliament resolution of 8 October 2020 on Eritrea, notably the case of Dawit Isaak (2020/2813(RSP))' P9_TA-PROV(2020)0258 www.europarl.europa.eu/doceo/document/TA-9-2020-0258_EN.pdf.

While Isaak's exact whereabouts within the Eritrean prison system is unknown, the Eritrean foreign minister confirmed to journalists that Isaak was still alive in 2016.¹³¹ In 2020, Isaak's daughter, Betlehem Isaak, also confirmed that he was still alive.¹³² As of 2020, sources suggest that he is likely in the Eiraeiro prison camp,¹³³ a secret prison where three other Eritrean journalists are confirmed to have died.¹³⁴

In 2011, three European jurists filed a writ for *habeas corpus* with the High Court of Eritrea. After receiving no response from the High Court, they sought to bring Isaak's case before the African Commission on Human and People's Rights.¹³⁵ In 2016, the African Commission on Human and People's Rights heard Isaak's case, with the subsequent decision finding that he should be brought to trial or released, and provided with access to his family and legal representatives.¹³⁶

In both 2014 and 2016, Reporters without Borders asked the Swedish prosecutor-general to investigate Isaak's detention in Eritrea and open a criminal investigation against Eritrean President Afwerki and other Eritrean leaders. In both instances, the prosecutor-general found it likely that Isaak had suffered crimes against humanity committed by the Eritrean government and that there would be enough evidence for an investigation in Sweden. However, the investigation was not undertaken after the Swedish Foreign Ministry indicated that the investigation could harm the ministry's negotiations to release Isaak.¹³⁷

In July 2017, the European Parliament adopted a resolution calling for his immediate release.¹³⁸ Dawit Isaak was awarded the 2017 UNESCO/Guillermo Cano World Press Freedom Prize in recognition of his courage, resistance and commitment to freedom of expression.¹³⁹

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- 131 Tom Lantos Human Rights Commission, 'Defending Freedom Project: Dawit Issak' <https://humanrightscmission.house.gov/defending-freedom-project/prisoners-by-country/Eritrea/Dawit%20Isaak>.
- 132 European Parliament, 'European Parliament resolution of 8 October 2020 on Eritrea, notably the case of Dawit Isaak (2020/2813(RSP))' www.europarl.europa.eu/doceo/document/TA-9-2020-0258_EN.html.
- 133 Reporters Without Borders, 'RSF brings "crime against humanity" case in Sweden against Eritrea's president' (RSF, 21 October 2020) <https://rsf.org/en/news/rsf-brings-crime-against-humanity-case-sweden-against-eritreas-president>.
- 134 Reporters Without Borders, 'Three journalists held since 2001 die in Eiraeiro prison camp' (RSF, 30 August 2021; last updated 20 January 2016) <https://rsf.org/en/news/three-journalists-held-2001-die-eiraeiro-prison-camp>.
- 135 Reporters Without Borders, 'Three jurists refer imprisoned journalist's case to African human rights panel' (RSF, 29 October 2012; last updated 20 January 2016) <https://rsf.org/en/news/three-jurists-refer-imprisoned-journalists-case-african-human-rights-panel>.
- 136 African Commission on Human and Peoples Rights, 'Decision of the African Commission on Human and Peoples Rights on the Preliminary Objection Communication 428/12 – Dawit Isaak v Republic of Eritrea' www.achpr.org/public/Document/file/English/decision_on_communication_428_12_eng.pdf.
- 137 Reporters Without Borders, 'Eritrea: RSF asks Sweden to investigate journalist's detention' (RSF, 29 June 2016) <https://rsf.org/en/news/eritrea-rsf-asks-sweden-investigate-journalists-detention>.
- 138 Ezega News, 'EU Presses for Release of Eritrean-Born Journalist' (Ezega News, 15 August 2017) www.ezega.com/News/NewsDetails/4557/EU-Presses-for-Release-of-Eritrean-Born-Journalist.
- 139 See <http://en.unesco.org/news/eritrean-born-journalist-dawit-isaak-awarded-unesco-guillermo-cano-world-press-freedom-prize>.

On 8 October 2020, the European Parliament once again passed a resolution calling for Isaak's immediate release. In addition to calling for Isaak's release, the 2020 resolution also calls on the African Union to step up its activity in seeking the release of Isaak and calls on the European Commission to ensure that none of their aid benefits the Eritrean government.¹⁴⁰

On 21 October 2020, lawyers Percy Bratt and Jesús Alcalá of Reporters Without Borders filed a complaint with the Office of the Swedish Prosecutor for international crimes, accusing Eritrean President Isaias Afwerki and seven other Eritrean officials of crimes against humanity for their detention of Isaak.¹⁴¹ The complaint was signed by Esayas Isaak, Dawit Isaak's brother; international affairs expert Susanne Berger, who coordinates the Raoul Wallenberg Research Initiative; the head of Isaak's Swedish legal team, Björn Tunbäck; international lawyer Antoine Bernard, a senior advisor at Reporters Without Borders; and the author of this report.¹⁴²

While over the years Sweden has repeatedly engaged in diplomatic efforts with Eritrea for the release of Dawit Isaak, it is increasingly clear that these efforts are lacking. In 2011, Britain successfully secured the release of four British nationals from Eritrean prisons by imposing sanctions on Eritrean diplomats in the United Kingdom and ordering the Eritrean embassy to suspend collecting the two per cent tax imposed on all Eritrean expatriates.¹⁴³ Sweden's use of 'silent diplomacy' lies in stark contrast to the British method. Swedish authorities have failed to ask Eritrean officials to stop collecting the two per cent tax, to take steps to ensure that Swedish funds are linked to Dawit Isaak's case, or to allow for the initiation of a criminal investigation.

It is unclear exactly what steps have been taken by Swedish officials, as the Swedish Ministry of Foreign Affairs will not reveal their advocacy attempts. The only certainty in this form of advocacy is that it has failed to secure Dawit Isaak's release, a fair trial, transparency in his whereabouts and health, or proper proof of life.

As Björn Tunbäck, a lawyer on Isaak's legal team said in 2018, '[o]f course silent diplomacy can be useful – sometimes you definitely should keep it silent. But when Dawit's already been in prison for more than 17 years, shouldn't you try something

140 UNESCO, 'Eritrean-born journalist Dawit Isaak awarded UNESCO/Guillermo Cano World Press Freedom Prize 2017' (30 March 2017) www.europarl.europa.eu/doceo/document/TA-9-2020-0258_EN.pdf.

141 Reporters Without Borders, 'RSF brings "crime against humanity" case in Sweden against Eritrea's president' (RSF, 21 October 2020) <https://rsf.org/en/news/rsf-brings-crime-against-humanity-case-sweden-against-eritreas-president>.

142 This complaint was also backed by 11 other well-known international figures: 2003 Nobel Peace Laureate Shirin Ebadi; former UN High Commissioner for Human Rights Navi Pillay; former African Commission on Human and Peoples' Rights Chair Pansy Tlakula; former Canadian Justice Minister Irwin Cotler; Bernhard Docke, a lawyer and member of the German Federal Bar's Human Rights Committee; international human rights lawyer David Matas; Eritrean Law Society Director Daniel Mekonnen; Philippe Sands, a British and French lawyer who is President of English PEN; Institute for Human Rights and Development in Africa Executive Director Gaye Sowe; Straniak Academy for Democracy and Human Rights Director Hannes Tretter; and University of Pretoria Centre for Human Rights Director Frans Viljoen.

143 BBC News, 'Britons held as "spies" in Eritrea have been released' (BBC News, 12 June 2011) www.bbc.com/news/uk-13742725.

else? They've been negotiating "silently" for more than a decade.¹⁴⁴ There is also little transparency in what this silent advocacy process entails or has accomplished. As Isaak's daughter, Betlehem Isaak says, '[i]t's called silent diplomacy because you can't or won't be allowed to talk about what's happening on the outside'.¹⁴⁵ Where silent diplomacy has failed, increased pressure and legal action is needed.

Dawit Isaak's lengthy imprisonment and denial of a fair trial highlights the long nature of advocacy in media freedom cases. Even 19 years later, the Eritrean government's reluctance to release Isaak or give him a fair trial demonstrates the need for sustained advocacy and international mechanisms for journalist protections. The opaque nature and inadequacy of Swedish interventions on Isaak's behalf further underscores the need for transparency, flexibility and meaningful measures to advance media freedom.

Consular support as a State right

A State's right to offer consular support, should it desire to do so, is clear. Under international law, States have a right to provide consular support to their detained nationals to ensure that their basic needs are being met and that their fundamental human rights are respected.¹⁴⁶ Indeed, case law from the European Court of Human Rights has recognised that the 'activities of [...] diplomatic or consular agents abroad' are legitimate examples of the extra-territorial exercise of jurisdiction by a State, under customary international law and various treaty provisions.¹⁴⁷ Article 1 of the European Convention on Human Rights (ECHR) not only allows for such extra-territorial jurisdiction, but anticipates it.¹⁴⁸

Although diplomats and consular officials have a duty not to interfere in the internal affairs of their receiving State and are expected to maintain good relations with that State,¹⁴⁹ this principle does not prevent these officials from protecting the human rights of those abroad.¹⁵⁰ For instance, during World War II, Raoul Wallenberg saved tens of thousands of Jews in Nazi-occupied Hungary from genocide in his capacity as Sweden's special envoy in Budapest, by providing them with protective passports and sheltering

144 Cathal Sheerin, 'Dawit Isaak and the failure of silent diplomacy: In conversation with Björn Tunbäck' (ifex, 5 December 2018) <https://ifex.org/dawit-isaak-and-the-failure-of-silent-diplomacy-in-conversation-with-bjorn-tunback>.

145 Eritrea Hub, 'Dawit Isaac is alive – says his daughter' (Eritrea Hub, 7 July 2020) <https://eritreahub.org/dawit-isaac-is-alive-says-his-daughter>.

146 Redress 'Beyond Discretion' (Redress, January 2018) p 1.

147 See *Al-Skeini v UK*, Application No 55721/07, para 134.

148 Redress, 'ALI AARRASS V. BELGIUM: Application Number: 16371/18: Written comments of REDRESS', p 1 <https://redress.org/wp-content/uploads/2018/10/Aarrass-TPI-final-2018-09-24-public.pdf>.

149 See VCCR 500 unts 95, Art 41(1); and VCCR 596 unts 261, Art 55(1).

150 Amal Clooney, 'Book IV Multilateral Diplomacy, Human Rights, and International Organizations, 17 Human Rights' in Sir Ivor Roberts (ed), *Satow's Diplomatic Practice* (7th Edition) (Oxford University Press 2016), p. 328.

them in buildings designated as Swedish territory.¹⁵¹ Today, 'diplomats around the world are increasingly involved in human rights issues when their own citizens, but also others, need assistance in the countries in which they are working'.¹⁵² They routinely engage in the context of such human rights violations by providing consular assistance to those in need.

Case study: Dr Wang Bingzhang, Huseyin Celil and Sun Qian

Dr Wang Bingzhang, Huseyin Celil and Sun Qian are three political prisoners with strong links to Canada currently detained by the Chinese government.

Wang studied at McGill University and his immediate family, including his siblings, wife and children, are Canadian citizens and residents.¹⁵³ He has been held by the Chinese government for over 18 years, having been abducted in 2002.¹⁵⁴ The leader of the China Overseas Democracy Movement at the time he was arrested, Wang was travelling in Vietnam and was illegally abducted by the Chinese government on charges of terrorism and espionage.¹⁵⁵ The trial was closed-door and spanned only half a day. His 18 years of detention have been spent in solitary confinement.¹⁵⁶ Through his detention, his physical and mental health has deteriorated rapidly, and he has no access to psychological care.¹⁵⁷

His lengthy detention by the Chinese government has been met with concerted advocacy from his friends and family. International organisations such as the UNWGD, Human Rights Watch, Amnesty International and the Raoul Wallenberg Centre for Human Rights have voiced their opposition to Dr Wang's imprisonment, calling it arbitrary, and the Canadian Parliament and US Congress have passed

151 Irwin Cotler, 'Raoul Wallenberg: Disappeared Hero of the Holocaust' (HAARETZ, 16 January 2020) www.haaretz.com/opinion/.premium-raoul-wallenberg-disappeared-hero-of-the-holocaust-1.8408477.

152 CPJ, '10 Most Censored Countries' <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist>.

153 Xiao Xu, 'Canadians want Chinese dissident Wang Bingzhang nominated for Nobel Peace Prize' (*The Global and Mail*, 11 April 2019) www.theglobeandmail.com/canada/article-canadians-want-chinese-dissident-wang-bingzhang-nominated-for-nobel.

154 Nicholas Doiron and Jeremy Wiener, 'Opinion: A former Canadian student has been languishing in a Chinese prison for 18 years' (*National Post*, 16 September 2020) <https://nationalpost.com/opinion/opinion-a-former-canadian-student-has-been-languishing-in-a-chinese-prison-for-18-years>.

155 Raoul Wallenberg Centre for Human Rights, 'Defending political prisoners: Dr. Wang Bingzhang' www.raoulwallenbergcentre.org/prisoner-bio-dr-wang.

156 Nicholas Doiron and Jeremy Wiener, 'Opinion: A former Canadian student has been languishing in a Chinese prison for 18 years' (*National Post*, 16 September 2020) <https://nationalpost.com/opinion/opinion-a-former-canadian-student-has-been-languishing-in-a-chinese-prison-for-18-years>.

157 'Mandate of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment' UA CHN 8/2016 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3352>.

resolutions calling on China to release Dr Wang and allow him to return to Canada.¹⁵⁸ A bipartisan group of former Canadian cabinet ministers sent an open letter to the Chinese foreign minister, decrying that Wang has suffered three debilitating strokes, is at heightened risk of contracting Covid-19 in detention and has been denied access to family members who live in Canada, and calling for his release.¹⁵⁹

Chinese Communist Party authorities have continued to harass and intimidate Wang's Canadian family members.¹⁶⁰ After over a decade of visa requests, his daughter Ti-Anna was finally issued a visa in 2019, only to be detained upon her arrival in China and then deported back to Canada.¹⁶¹ Canadian consular officials had worked to help facilitate the visa, and also assisted with Ti-Anna's release and return to Canada.¹⁶²

A close friend of Wang's, Ms Sheng, noted that close international attention was important to his safety, as she knew of two other political prisoners who had died in Chinese custody. She noted that in both those cases 'they didn't receive consistent long-term attention from the outside world'.¹⁶³

Huseyin Celil is a Canadian citizen and Uighur activist who has been held in a Chinese prison for 14 years. He is currently serving a life sentence for his political activities. Celil was arrested in 2006 during a trip with his family to Uzbekistan. When Chinese authorities found out he was in Uzbekistan, his arrest was ordered and he was moved to China in 2007.¹⁶⁴ After his arrest, he was held in a secret location and denied access to legal counsel, his family and Canadian officials.¹⁶⁵ He was threatened and forced to sign a confession that was used to convict him. No Canadian officials were allowed to attend his trial.¹⁶⁶ Since then, Celil has spent much of his time in solitary confinement and in poor health.¹⁶⁷ Despite Celil's lengthy detention, the Canadian

158 Robert Fife, 'Six former Canadian ministers call for release of jailed Chinese dissident in open letter' (*The Globe and Mail*, 15 September 2020) www.theglobeandmail.com/politics/article-six-former-canadian-ministers-call-for-release-of-jailed-chinese.

159 Robert Fife, 'Six former Canadian ministers call for release of jailed Chinese dissident in open letter' (*The Globe and Mail*, 15 September 2020) www.theglobeandmail.com/politics/article-six-former-canadian-ministers-call-for-release-of-jailed-chinese.

160 Ti-Anna Wang, 'The silver lining: Canadians know the truth about the ruthless Chinese government' (*The Globe and Mail*, 19 February 2019) www.theglobeandmail.com/opinion/article-the-silver-lining-canadians-know-the-truth-about-the-ruthless-chinese.

161 Nathan Vanderklippe, 'China blocks entry to Canadian woman who wanted to visit her father, a jailed political dissident' (*The Globe and Mail*, 9 January 2019) www.theglobeandmail.com/world/article-china-blocks-entry-to-canadian-woman-who-wanted-to-visit-her-father-a.

162 Nathan Vanderklippe, 'China blocks entry to Canadian woman who wanted to visit her father, a jailed political dissident' (*The Globe and Mail*, 9 January 2019) www.theglobeandmail.com/world/article-china-blocks-entry-to-canadian-woman-who-wanted-to-visit-her-father-a.

163 Xiao Xu, 'Canadians want Chinese dissident Wang Bingzhang nominated for Nobel Peace Prize' (*The Global and Mail*, 11 April 2019) www.theglobeandmail.com/canada/article-canadians-want-chinese-dissident-wang-bingzhang-nominated-for-nobel.

164 Josh K Eliot, 'Wife of Canadian citizen jailed 13 years in China fears he's been 'forgotten' amid Huawei crisis' (*Global News*, 24 January 2019) <https://globalnews.ca/news/4874245/canadian-detained-china-huseyin-celil>.

165 Amnesty International, 'Huseyin Celil' www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil.

166 Amnesty International, 'Huseyin Celil' www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil.

167 Amnesty International, 'Huseyin Celil' www.amnesty.ca/our-work/individuals-at-risk/huseyin-celil.

government has seemingly not made consular support in his case a priority. In February 2020, the Canadian ambassador to China mistakenly told a parliamentary committee that Celil was not a Canadian and so Canadian officials were barred from helping him.¹⁶⁸ Mehmet Tohti, an Uighur-Canadian community leader, said the error was troubling as it seemed Celil was ‘not only forgotten, he’s not on the agenda’.¹⁶⁹

Sun Qian is a Canadian Falun Gong practitioner who was arrested in February 2017.¹⁷⁰ Sun was arrested in Beijing and imprisoned for her belief in the Falun Gong spiritual practice. In June 2020, she was sentenced to eight years in prison.¹⁷¹ At her trial, she pleaded guilty to charges that she had used her religion to ‘disrupt the implementation of law’.¹⁷² She pled guilty under duress, subjected to brutal torture documented by her lawyer.¹⁷³ Her case has been marred by pressure on her and her legal counsel. Several lawyers who have tried to represent her have resigned due to pressure.¹⁷⁴ Her most recent legal counsel, Xie Yanyi, had his licence to practise law revoked after he signed an open letter asking Canadian Prime Minister Trudeau to help Sun.¹⁷⁵

Two of the cases demonstrate the international risk that critics of the Chinese government face. Both Wang and Celil were kidnapped outside of China, and forced to face punishment in China for their criticisms of Chinese Communist Party authorities. While both were kidnapped over a decade ago, Chinese critics still maintain a justified fear of such extraterritorial retaliation when abroad, in disregard of the rights and remedies they hold as foreign nationals. Under a 2020 Chinese national security law, the Chinese government can extradite individuals from Hong Kong to China. This 2020 law is just one of many tactics the Chinese government uses to threaten extraterritorial dissidents. A September 2020 article describes Chinese dissidents living abroad being threatened by Chinese government agents.

168 Robert Fife and Steven Chase, ‘Foreign Minister corrects Canadian envoy to China on imprisoned citizen’ (*The Globe and Mail*, 6 February 2020) www.theglobeandmail.com/politics/article-foreign-minister-corrects-canadian-envoy-to-china-on-imprisoned.

169 Robert Fife and Steven Chase, ‘Foreign Minister corrects Canadian envoy to China on imprisoned citizen’ (*The Globe and Mail*, 6 February 2020) www.theglobeandmail.com/politics/article-foreign-minister-corrects-canadian-envoy-to-china-on-imprisoned.

170 Raoul Wallenberg Centre for Human Rights, ‘Defending political prisoners: Sun Qian’ www.raoulwallenbergcentre.org/prisoner-bio-sun-qian.

171 Tom Blackwell, ‘Canadian citizen sentenced to eight years by China is latest victim of Huawei feud, Beijing lawyer says’ (*National Post*, 30 June 2020) <https://nationalpost.com/news/canadian-citizen-sentenced-to-eight-years-by-china-is-latest-victim-of-huawei-feud-beijing-lawyer-says>.

172 Tom Blackwell, ‘Canadian citizen sentenced to eight years by China is latest victim of Huawei feud, Beijing lawyer says’ (*National Post*, 30 June 2020) <https://nationalpost.com/news/canadian-citizen-sentenced-to-eight-years-by-china-is-latest-victim-of-huawei-feud-beijing-lawyer-says>.

173 Nathan Vanderklippe, ‘Canadian arrested for her religion pepper sprayed, shackled in Chinese detention’ (*The Globe and Mail*, 20 June 2017) www.theglobeandmail.com/news/world/canadian-arrested-for-her-religion-pepper-sprayed-shackled-in-chinese-detention/article35391374.

174 Tom Blackwell, ‘Canadian citizen sentenced to eight years by China is latest victim of Huawei feud, Beijing lawyer says’ (*National Post*, 30 June 2020) <https://nationalpost.com/news/canadian-citizen-sentenced-to-eight-years-by-china-is-latest-victim-of-huawei-feud-beijing-lawyer-says>.

175 Tom Blackwell, ‘Canadian citizen sentenced to eight years by China is latest victim of Huawei feud, Beijing lawyer says’ (*National Post*, 30 June 2020) <https://nationalpost.com/news/canadian-citizen-sentenced-to-eight-years-by-china-is-latest-victim-of-huawei-feud-beijing-lawyer-says>.

Cheuk Kwan, the Chair of the Toronto Association for Democracy in China, noted that agents would often call activists and tell them '[w]e know where your parents live'.¹⁷⁶ These worrying tactics are widespread and well-documented.¹⁷⁷

Wang, Celil and Sun have been held in China on trumped-up charges. Wang was charged with espionage, Celil charged with terrorism and Sun charged under a Chinese law against superstitious sects. The use of broad legislation to imprison individuals at the political whims of the Chinese Communist Party authorities still continues. In 2018, Canadians Michael Spavor and Michael Kovrig were placed in a Chinese jail on various espionage charges.¹⁷⁸ While Chinese authorities will not explicitly confirm, there is consensus among experts that their detention was in retaliation for Canada's arrest of Meng Wanzhou, an executive of Chinese company Huawei.¹⁷⁹ David Mulrone, a former Canadian ambassador to China, noted China's anger over Meng's detention meant that 'two innocent Canadians, Michael Spavor and Michael Kovrig, will bear the brunt of the anger' and it was likely that their detentions would be extended 'until China has some clarity as to Ms. Meng's eventual fate'.¹⁸⁰ Similarly, Sun's lawyer has said that her harsh sentence was also likely tied to Wanzhou's arrest, stating that '[a]fter such a heavy-handed, wrongful sentence, it definitely has to do with the Meng Wanzhou case'.¹⁸¹

These three cases highlights the impunity with which China treats its critics, not just domestically, but also internationally. The unjust manner of their arrest, denial of legal recourse, and lengthy imprisonment and torture in detention are not single case studies, but demonstrate that pattern with which oppressive governments can systematically punish dissenters. These policies and practices are of particular salience to the press, as China remains the largest jailor of journalists in the world.¹⁸²

The denial of consular assistance by Chinese authorities is of particular concern, as is the general inadequacy of consular support by the home State in many of these cases

176 Evan Dyer, "'We know where your parents live': Hong Kong activists say Canadian police helpless against online threats' (CBC News, 10 September 2020) www.cbc.ca/news/politics/china-hong-kong-democracy-protests-chinese-embassy-canada-1.5717288.

177 Canadian Coalition on Human Rights in China and Amnesty International Canada, 'Harassment and Intimidation of Individuals in Canada Working on China-Related Human Rights Concerns' (March 2020) www.amnesty.ca/sites/default/files/Canadian%20Coalition%20on%20Human%20Rights%20in%20China%20-%20Harassment%20Report%20Update%20-%20Final%20Version.pdf.

178 CBC, 'Ottawa could do more to free 2 Canadians jailed in China, Michael Kovrig's wife says' (CBC News, 22 June 2020) www.cbc.ca/news/politics/kovrig-spavor-nadjibulla-interview-1.5621981.

179 Steven Chase, 'CSIS report before Meng Wanzhou's arrest called the move "highly political"' (The Globe and Mail, 12 June 2020) www.theglobeandmail.com/politics/article-csis-report-made-before-meng-wanzhou-arrest-predicted-shockwaves.

180 Mike Blanchfield, 'China will "lash out at Canada" and the two Michaels will "bear brunt of anger," experts predict' (National Post, 28 May 2020) <https://nationalpost.com/news/canada/kovrig-spavor-face-retaliation-from-china-after-meng-ruling-experts-predict>.

181 Tom Blackwell, 'Canadian citizen sentenced to eight years by China is latest victim of Huawei feud, Beijing lawyer says' (National Post, 30 June 2020) <https://nationalpost.com/news/canadian-citizen-sentenced-to-eight-years-by-china-is-latest-victim-of-huawei-feud-beijing-lawyer-says>.

182 Amy Gunia, 'At Least 250 Journalists Have Been Imprisoned in 2019 and China Is the Top Jailer, CPJ Says' (TIME, 12 December 2019) <https://time.com/5748675/committee-to-protect-journalists-2019-survey>.

and the clear inconsistency in the provision of consular assistance between each of these cases.

Traditional approach to consular support as a State obligation

Historically, consular support, and especially diplomatic protection, has been viewed as the discretionary prerogative of States and therefore not obligatory. This approach, known as the Vattelien fiction, focuses on the State as the principal actor, and largely ignores the rights of the State's national. The Permanent Court of International Justice (PCIJ) in the *Mavrommatis Palestine Concessions* case explained: 'By taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.'¹⁸³

Because the injury done to a national was viewed as an injury done to the home State of that national, diplomatic protection has historically been conceived as a vindication of rights between States.

The VCCR was enacted with this traditional framework in mind. For example, the description of 'consular functions' focuses on the 'interests of the sending State'.¹⁸⁴ Furthermore, consular officers of the sending State have the right to visit their national in detention in the receiving State¹⁸⁵ and; to converse and correspond with him and to arrange for his legal representation', subject to the individual's consent.¹⁸⁶

At the same time, certain provisions of the VCCR go beyond the traditional framework and posit direct rights for nationals seeking protection abroad. For instance, individuals who are arrested abroad have a right to require that the local consular officials of their home State be informed of their arrest, imprisonment or detention without delay.¹⁸⁷ In addition, individuals have the right to freedom of communication with consular officers;¹⁸⁸ the right of access to consular officers;¹⁸⁹ the right to have any communication to the relevant consular post forwarded without delay;¹⁹⁰ and the right to be informed of the rights under Article 36(1)(b) without delay.¹⁹¹

It would be incorrect, therefore, to suggest that the VCCR is limited to the Vattelien fiction or, even worse, that it does not provide a meaningful foundation to assist those

183 John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) *AUYrBkIntLaw* 6; (2005) 24 *Australian Year Book of International Law* 75, citing [1924] PCIJ (ser A) No 2, 112.

184 VCCR, Art 5(a).

185 VCCR, Art 36(1)(c).

186 VCCR, Art 36(1)(c).

187 VCCR, Art 36(1)(b).

188 VCCR, Art 36(1)(a).

189 VCCR, Art 36(1)(a).

190 VCCR, Art 36(1)(b).

191 Redress, 'ALI AARRASS V. BELGIUM: Application Number: 16371/18: Written comments of REDRESS', p 2 <https://redress.org/wp-content/uploads/2018/10/Aarrass-TPI-final-2018-09-24-public.pdf>.

individuals in need of consular support abroad. To the contrary, the provision of consular assistance as envisioned by the VCCR is crucial to prevent abuses in detention or put an end to it where it has already occurred. The VCCR achieves this by way of three key protections:

- (1) freedom of communication between consular officials and a detained person;
- (2) freedom of access for consular officials to the detained person; and
- (3) notification of the detention to be given by the detaining State to the consulate of the detained person.¹⁹²

The VCCR also describes other consular functions crucial to the protection of nationals abroad. These include representing or arranging for legal representation in hearings in order to obtain provisional measures for the protection of the rights and interests of detained nationals, especially where they are vulnerable. These functions can be particularly relevant in cases where torture or mistreatment have been alleged.¹⁹³

Case law also supports the notion that both States and individuals are afforded 'rights' under the VCCR.¹⁹⁴ In its rulings, the International Court of Justice (ICJ) has found that Article 36 of the VCCR created individual rights for those detained or facing charges outside their own country.¹⁹⁵ In the *LaGrand* case, brought by Germany against the US regarding two German citizens on death row who claimed not to have been informed of their rights to consular assistance, the ICJ held that the receiving State's failure to notify a foreign national of consular rights constitutes a violation of the VCCR.¹⁹⁶ The Court determined 'that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State'.¹⁹⁷

In the *Avena* decision, brought by Mexico against the US, the ICJ elaborated on the inter-relationship between the rights of the individual and the sending State.¹⁹⁸ The Court stated:

192 Redress, 'Beyond Discretion' (Redress, January 2018) p 16

193 Redress, 'Beyond Discretion' (Redress, January 2018) p 17.

194 Under the Optional Protocol to the VCCR, concerning the 'Compulsory Settlement of Disputes' (UNTS, vol 596, p 487, 24 April 1963), the ICJ has – or States may consent to giving it – jurisdiction over disputes arising from the VCCR.

195 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on 'Application of the death penalty to foreign nationals and the provision of consular assistance by the home State' UN General Assembly 74th Session A/74/318, p 7 para 23 <https://undocs.org/A/74/318>; Redress, 'ALI AARRASS V. BELGIUM: Application Number: 16371/18: Written comments of REDRESS', p 3 <https://redress.org/wp-content/uploads/2018/10/Aarrass-TPI-final-2018-09-24-public.pdf>.

196 ICJ, *LaGrand (Germany v USA)* [2001] ICJ (Judgment of 27 June) www.icj-cij.org/public/files/case-related/104/104-20010627-JUD-01-00-EN.pdf.

197 ICJ, *LaGrand (Germany v USA)* [2001] ICJ (Judgment of 27 June), para 77 www.icj-cij.org/public/files/case-related/104/104-20010627-JUD-01-00-EN.pdf.

198 ICJ, Case concerning *Avena and Other Mexican Nationals, (Mexico v United States of America)* [2004] ICJ (Judgment of 31 March) (ICJ, *Avena* case) www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf.

‘[V]iolations of the rights of the individual under article 36 [of the VCCR] may entail a violation of the rights of the sending State, and [...] violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of the interdependence of the rights of the State and individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of the individual rights conferred on Mexican nationals under article 36, paragraph 1(b).¹⁹⁹

In *Diallo*, the ICJ expounded upon the individual rights conferred upon nationals by the VCCR. In that case, the Court found that the Democratic Republic of the Congo (DRC) violated Article 36(1)(b) of the VCCR because DRC officials failed to advise Mr Diallo of his right to seek consular assistance from his home State ‘without delay’.²⁰⁰ Consistent with its findings in *Avena*, the Court interpreted Article 36(1)(b) in terms of an individual ‘right’ of the detainee.²⁰¹

However, the practical limitations of the VCCR based on the traditional paradigm are apparent when it comes to the mechanisms of enforcement that the convention references. These mechanisms target the relationship between the receiving State and the sending State. Even when the right appears to be one held by the individual, it is usually the individual’s State of nationality that must advance the claim on their behalf.²⁰²

Contemporary developments in consular support as a State obligation

MOVEMENT AWAY FROM THE VATTELIAN FICTION

As we have seen, the view represented by the Vattelien fiction is increasingly being questioned. Indeed, strict adherence to this traditional paradigm would be absurd in contemporary international law, as consular support would inexplicably remain one of the few areas of international law in which individuals have no established rights or protections. As John Dugard has argued, specifically with regard to diplomatic protection:

‘The right of a State to protect a national when it pleases and whether it pleases has no place in contemporary international law. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own

199 ICJ, Case concerning *Avena and Other Mexican Nationals*, (*Mexico v United States of America*) [2004] ICJ (Judgment of 31 March) (ICJ, *Avena* case), para 40 www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf.

200 ICJ, Case concerning *Ahmadou Sadio Diallo*, (*Republic of Guinea v Democratic Republic of the Congo*) [2010] ICJ (Judgment of 30 November) www.icj-cij.org/public/files/case-related/103/103-20101130-JUD-01-00-EN.pdf.

201 Redress, ‘Beyond Discretion’ (Redress, January 2018) p 20.

202 Redress, ‘Beyond Discretion’ (Redress, January 2018) pp 17–18.

national when his or her most basic human rights are seriously violated abroad. This applies particularly in the case of “a grave breach of a *jus cogens norm*”.²⁰³

As noted above, this view finds support in recent Statements from leading international courts, shedding new light on the VCCR and distancing it from the Vattelian fiction. In the *LaGrand* case, the ICJ confirmed that Article 36, paragraph 1, creates individual rights for a person detained outside their home State.²⁰⁴ And in an advisory opinion published in 1999, the Inter-American Court of Human Rights (IACtHR) has recognised the right to consular information as a human right, stating that ‘Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart of the host State’s correlative duties.’²⁰⁵

Dr Callamard, UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has argued that consular support is a human right that imposes obligations on both the prosecuting State and the home State. Where a *jus cogens* norm, such as the right to life, is threatened, the failure of the home State to provide adequate consular assistance amounts to a violation of its responsibility to protect the right to life.²⁰⁶ She adds:

‘International human rights law imposes on States a duty to respect, protect and ensure human rights “by law”. This includes the obligation to establish adequate institutions and procedures for preventing arbitrary deprivation of life: States parties are under a due diligence obligation to undertake reasonable positive measures that do not impose on them disproportionate burdens, in response to credible foreseeable threats to life.’²⁰⁷

This may include a duty to provide consular assistance where that is required to protect the right to life.²⁰⁸ Callamard notes that international and regional tribunals and experts have repeatedly held that consular notification and assistance is a minimum fair trial

203 John Dugard, ‘Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission’ (2005) *AUYrBkIntLaw* 6; (2005) 24 *Australian Year Book of International Law* 75, citing [1924] PCIJ (ser A) No 2, 112.

204 *LaGrand Case (Germany v United States of America)*, Judgment, ICJ Reports 2001, p 466, para 89. See also *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004, para 40.

205 IACtHR, ‘The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law’, Advisory Opinion OC-16/99, 1 October 1999, paras 84 and 137.

206 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on ‘Application of the death penalty to foreign nationals and the provision of consular assistance by the home State’ UN General Assembly 74th Session *A/74/318*, pp 5–6, para 23 <https://undocs.org/A/74/318>; *X v Federal Republic of Germany* (1965), European Commission on Human Rights; *X v United Kingdom* (1977), European Commission on Human Rights; *V v Denmark* (1993), European Commission on Human Rights; *Al-Skeini and Others v The United Kingdom* (2011), European Court of Human Rights. See also UN General Assembly 38th Session *A/38/40*, annex XIV, para 6.1.

207 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on ‘Application of the death penalty to foreign nationals and the provision of consular assistance by the home State’ UN General Assembly 74th Session *A/74/318*, p 6, para 23 <https://undocs.org/A/74/318>.

208 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on ‘Application of the death penalty to foreign nationals and the provision of consular assistance by the home State’ UN General Assembly 74th Session *A/74/318*, p 6, para 23 <https://undocs.org/A/74/318>.

guarantee in death penalty cases and that foreign detainees have a right to consular assistance, as will be more fully explained below.²⁰⁹

The right to redress for serious human rights violations is clearly established in international law. For example, where victims of torture are concerned, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) provides that ‘each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible’.²¹⁰ In order to give meaningful content to the right to redress, States are required to:

- make available adequate, effective, prompt and appropriate remedies, including reparation;²¹¹ and
- provide those who claim to be victims of a human rights violation with adequate access to justice²¹² and provide effective remedies, including reparations.²¹³

In order to fulfil its obligations to ensure access to justice for alleged victims of serious human rights violations, States can themselves prosecute the alleged offenders or espouse the claim, or the State may advocate for adequate investigation or prosecution by the foreign State in which the harm occurred.²¹⁴

The evolution away from a strictly traditional State-centred approach is effectively complete. The next area of development is going beyond accountability for the receiving State and ensuring accountability for the home State.

Consular support as a home State obligation

As we have seen, States may have a positive obligation to provide consular support to their nationals at risk abroad under international human rights law. This obligation stems from the customary international law obligation of all States to ensure the protection of the fundamental rights of their nationals to life, liberty, freedom from torture and enforced disappearance (including hostage-taking). States must also ensure that their nationals have access to effective remedies when these or other *jus cogens* norms are violated abroad; in some cases and jurisdictions, consular assistance or diplomatic protection may be the only avenue for protection against or redress for human rights

209 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on ‘Application of the death penalty to foreign nationals and the provision of consular assistance by the home State’ UN General Assembly 74th Session A/74/318, p 7, para 23 <https://undocs.org/A/74/318>.

210 UNCAT, Art 14. See also Redress, ‘Beyond Discretion’ (Redress, January 2018) p 14.

211 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (‘Basic Principles and Guidelines’), UN General Assembly resolution 60/147 of 16 December 2005, Art 1(c), www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

212 Basic Principles and Guidelines, Art 2(c).

213 Basic Principles and Guidelines, Art 2(d).

214 Redress, ‘Beyond Discretion’ (Redress, January 2018) p 14.

violations. When violations are of *jus cogens* norms, a State's failure to provide consular support should be placed under particularly close scrutiny, and a refusal to act may be impossible to reconcile with its obligations under various international treaties.²¹⁵

For example, UN independent experts representing various Special Rapporteur mandates and Working Groups within the Special Procedures of the UN Human Rights Council (UNHRC) called on Canada to secure the urgent release and repatriation of an orphaned five-year-old girl being held in unsanitary and overcrowded conditions in Syria's Al-Hol camp. The experts stated that 'Canada has an obligation to intervene in favour of its nationals abroad, particularly if there are reasonable grounds to believe that their non-derogable human rights have been violated.'²¹⁶ This is an illustrative pronouncement by Special Procedures on the positive obligation of States to provide consular support to nationals abroad.

In a 1999 Advisory Opinion, the IACtHR decided that the rights to consular notification and to consular access are fundamental human rights essential to the protection of due process, and their denial renders any subsequent execution arbitrary and illegal under international law. The application was brought in the context of several Mexican nationals who had been sentenced to death in the US without having been informed of their right to consular assistance. The Court stated that Article 36 of the VCCR creates an individual right for a detained foreign national that is the counterpart of the host State's correlative duties.²¹⁷

The Court came to the following conclusion:

[N]on-observance of a detained foreign national's right to information, recognized in Article 36 (1) (b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (eg the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations.²¹⁸

Following this opinion, then, a detained journalist has a fundamental human right to be given access to consular assistance, particularly where their rights to life and personal security are at risk, pursuant to the terms of the VCCR. The detaining State

215 UNWGAD Report, A/HRC/39/45, 2 July 2018, paras 50–58.

216 UN Human Rights Office of the High Commissioner, 'Canada urged to repatriate orphaned five-year-old girl held in Syrian camp' (20 May 2020) www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25899&LangID=E.

217 IACtHR, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law', Advisory Opinion OC-16/99, 1 October 1999, para 84.

218 IACtHR, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law', Advisory Opinion OC-16/99, 1 October 1999, para. 137.

has an obligation to provide that access, or risk liability for a human rights violation. Furthermore, as REDRESS argued in a recent comment, the journalist's home State may also be liable for a failure to provide access to consular assistance, since this right has been framed as a human right that forms part of the right to due process:

'[I]f the IACHR is able to conclude that rights to consular protection are "human rights" enforceable against a receiving State, it is hard to see why the rights would not also be enforceable against a sending State. Indeed, if consular protection rights are considered to be "human rights", it would imply an applicability to both sending and receiving States.'²¹⁹

The link between the right to consular access and the right to a fair trial has also been recognised recently by the ICJ. In 2019, the Court ruled on the merits of the *Jadhav* case involving an Indian national sentenced to death for espionage in Pakistan. India claimed that it had been denied access to Jadhav in violation of Article 36 of the VCCR. The Court determined that Pakistan had indeed violated its obligations under the VCCR, and ordered Pakistan to remedy the breach by, among other remedies, providing effective review and reconsideration of the death sentence, taking into account the denial of rights to consular assistance. In its reasons, the ICJ directly linked denials of consular access and assistance in death penalty cases to fair trial rights:

'The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.'²²⁰

As these cases and opinions demonstrate, the prerogative of States to protect their nationals is increasingly being reframed as an individual right to the consular support of one's home State. Under this modern conception, the State's obligations extend beyond its borders, and include the panoply of diplomatic and international legal recourses at its disposal to defend the human rights of its nationals. Though *Jadhav* is a case about the obligations of receiving States, the logical link between fair trial rights and consular assistance is as valid for the obligations of sending States.

Crucially, States themselves are subscribing to this view – many of them through explicit, legally binding enactments. Twenty-eight States have recognised a constitutional right to consular assistance which would be enforceable against them by their own nationals.²²¹

219 Redress, 'ALI AARRASS V. BELGIUM: Application Number: 16371/18: Written comments of REDRESS', pp 3–4 <https://redress.org/wp-content/uploads/2018/10/Aarrass-TPI-final-2018-09-24-public.pdf>.

220 ICJ, *Jadhav case (India v Pakistan)*, 17 July 2019, General List no 168 at para 145.

221 See, e.g., Constitution of Bulgaria, Art 25(5); Constitution of China, Art 50; Constitution of Estonia, Art 13; Constitution of Guyana, Art 31; Constitution of Hungary, Art 69(3); Constitution of Latvia, Art 98; Constitution of Lithuania, Art 13; Constitution of the Republic of Korea, Art 2(2); Constitution of Poland, Art 36; Constitution of Portugal, Art 14; and Constitution of Romania, Art 17.

Other States have no specific law on the subject, but a right to consular assistance could be established through legal interpretation; for example, REDRESS has argued that Articles 25(5) and 26(1) of the Bulgarian Constitution could be interpreted to find a right to protection while abroad.²²² Other States uphold a partial but still significant guarantee of consular assistance, including Germany, Ireland, Lithuania and Malta.²²³ A final group of States recognise the right to consular assistance in their policies for nationals detained abroad.²²⁴

Certain State practices also suggest that States recognise a positive obligation to provide consular or other assistance to their nationals detained abroad. For example, the practice of certain home States of stripping nationals detained abroad of their citizenship, thereby removing their obligation to protect these detainees (including through the provision of consular assistance), indicates that States understand that they are required to provide such assistance to their nationals detained abroad. The Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions expressed that stripping nationals of their citizenship in such cases 'may be a breach of the right to life where it foreseeably and directly impacts the individual's right to life, a highly likely circumstance if the defendants are charged with crimes punishable by death, such as under counter-terrorism provisions'.²²⁵

The home State's obligation to provide consular assistance or diplomatic protection is particularly strong in the case of journalists whose work has put them at risk in a foreign jurisdiction, given the multiple and overlapping obligations on States to protect freedom of expression, freedom of the press and the other human rights in which journalism plays an essential role.

Case study: the US

- Section 22 of the US Code relates to Foreign Relations and Intercourse. Chapter 23 of the Code provides for:²²⁶
 - 'Section 1731. Protection to naturalized citizens abroad: All naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.

222 Redress, 'Beyond Discretion' (Redress, January 2018) p53.

223 Redress, 'ALI AARRASS V. BELGIUM: Application Number: 16371/18: Written comments of REDRESS', pp 2–3 <https://redress.org/wp-content/uploads/2018/10/Aarrass-TPI-final-2018-09-24-public.pdf>.

224 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on 'Application of the death penalty to foreign nationals and the provision of consular assistance by the home State' UN General Assembly 74th Session A/74/318, p 11 <https://undocs.org/A/74/318>.

225 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Agnes Callamard on 'Application of the death penalty to foreign nationals and the provision of consular assistance by the home State' UN General Assembly 74th Session A/74/318, p 11, <https://undocs.org/A/74/318>.

226 Office of the Law Revision Counsel, 'United States Code: Ch 23 – Protection of Citizens Abroad' (ss 1731–1733) <https://uscode.house.gov/browse/prelim@title22/chapter23&edition=prelim>.

- ‘Section 1732. Release of citizens imprisoned by foreign governments: Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.
- ‘Section 1733. Interagency Hostage Recovery Coordinator: Not later than 60 days after November 25, 2015, the President shall designate an existing Federal official to coordinate efforts to secure the release of United States persons who are hostages held abroad. For purposes of carrying out the duties described in paragraph (2), such official shall have the title of “Interagency Hostage Recovery Coordinator.”’
- The Consular Notification Compliance Act is a bill introduced in the 112th Congress, and which at this stage has not been passed into law.²²⁷ The bill is intended ‘to facilitate compliance with Article 36 of the Vienna Convention on Consular Relations and any comparable provision of a bilateral international agreement addressing consular notification and access’. In particular, the bill seeks to enshrine in law rights for those individuals who are not US nationals and who are arrested or detained in the US.
- The Daniel Pearl Freedom of the Press Act was signed into law by President Obama in 2010. Under the Act, the US Department of State must broaden its review and scrutiny of press freedom restrictions during its annual report on human rights in foreign countries.²²⁸
- The Office of the Special Presidential Envoy for Hostage Affairs was established in 2015 for the recovery of US nationals who are held hostage abroad.²²⁹

227 S.1194 Consular Notification Compliance Act of 2011 www.congress.gov/bill/112th-congress/senate-bill/1194.

228 Public Law 111 - 166 - Daniel Pearl Freedom of the Press Act of 2009 www.congress.gov/111/plaws/publ166/PLAW-111publ166.pdf.

229 See US Department of State, Office of the Special Presidential Envoy for Hostage Affairs, www.State.gov/bureaus-offices/bureaus-and-offices-reporting-directly-to-the-secretary/special-presidential-envoy-for-hostage-affairs.

- The Smart Traveler Enrollment Program is a free service permitting US citizens and nationals travelling and living abroad to enrol their trip with the nearest US embassy or consulate.²³⁰
- The US government's 'Arrest or Detention of a U.S. Citizen Abroad' page lists the consular assistance that the US can provide to US prisoners, but also explicitly says that they 'cannot get U.S. citizens out of jail'.²³¹
- In 2015, President Obama signed an executive order regarding Hostage Recovery Activities.²³²
- To expedite assistance to victims, the Office of Overseas Citizens Services acts as an intermediary between US-based victim service providers and embassies or consulates abroad.²³³
- The State Department Bureau of Diplomatic Security's Overseas Security Advisory Council (OSAC) manages the largest security-related public-private sector partnership in the US government, with a constituency of more than 4,700 US companies and other organisations with overseas interests. OSAC's Media and Entertainment Working Group provides the media industry with resources and information to keep their employees safe overseas. Additionally, when the US government identifies credible threats directed at a specific organisation or its employees, regardless of OSAC affiliation, OSAC provides an unclassified 'duty to warn' notification to the company. Any threat that targets an identified employee of a US company will trigger this duty to warn, irrespective of the employee's nationality.
- In 2019, a group of 16 senators sent an open letter to the Department of State seeking additional information into what practices and policies are in place to assist journalists who face threats to their personal safety while reporting overseas and 'to encourage the Department of State to actively protect reporters from retaliation they may experience in the countries where they work'.²³⁴ In the letter, the senators share their concern for the growing danger to journalists worldwide, noting that 'journalists play a crucial role in informing and expanding public discourse, as well as holding governments accountable' and that in doing so, they face 'potentially life-threatening risks

230 See Smart Traveller Enrolment Program <https://step.State.gov>.

231 US Department of State, 'Arrest or Detention of a U.S. Citizen Abroad' <https://travel.State.gov/content/travel/en/international-travel/emergencies/arrest-detention.html>.

232 National Archives and Records of Administration, 'Executive Order 13698—Hostage Recovery Activities' (29 June 2015) Federal Register 80(124), p 3 www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-16122.pdf#page=3.

233 Office for Victims of Crime, 'Resource Guide for Serving U.S. Citizens Victimized Abroad' (April 2008) www.ovc.gov/publications/infores/ServingVictimsAbroad/citizensservices.html.

234 Open letter to Under Secretary Hale signed by 16 senators www.feinstein.senate.gov/public/index.cfm?a=files.serve&File_id=85158E7A-5CC7-42DC-9939-109FA2B1CCDA.

from multiple sources, including conflict, disease, kidnapping, imprisonment, injury, repression, and harassment'.²³⁵

Case study: Declan Walsh

Declan Walsh is an Irish-American journalist currently working as the Chief Africa correspondent for the *New York Times*. Prior to this role, he worked for the *New York Times* as the Cairo Bureau Chief and he covered Pakistan for both the *New York Times* and the *Guardian*.²³⁶

In 2017, Walsh was forced to leave Egypt for his own safety. The *New York Times* had received a confidential and urgent message from an American official indicating that the Egyptian authorities were seeking to arrest Walsh, the then-Cairo Bureau Chief for the newspaper. While it was not unusual for the *New York Times* to receive reports of threats to its journalists, this report was notable because the American government planned to do nothing about the credible threat to an American citizen working for an American media outlet. Further, the American official disclosed that the US government had tried to keep the warning from reaching the *New York Times* and planned to allow the arrest to be carried out.²³⁷ When Walsh phoned the American embassy in Egypt for assistance, they declined to help and referred him to the Irish embassy. When Walsh phoned the Irish embassy, an official showed up at his home almost immediately and helped him get on a flight to Ireland.²³⁸

A G Sulzberger, the publisher of the *New York Times*, has expressed his concern with President Trump's acquiescence to Egyptian authorities and its departure from past American presidents' treatment of media freedom. In September 2019, Sulzberger stated that 'what's different today is that these brutal crackdowns are being passively accepted and perhaps even tacitly encouraged by the president of the United States'.²³⁹ As Walsh states, '[w]hat has become increasingly clear, though, is that journalists can't rely on the United States government to have our back as it once did'.²⁴⁰ His Statement rests not only in the American acquiescence to his own

235 US Senator for California Dianne Feinstein, 'Feinstein, Blumenthal, Colleagues Seek Information About State Department Policies to Protect Journalists' (30 October 2019) www.feinstein.senate.gov/public/index.cfm/press-releases?id=8098260A-9C3E-4C5A-98AE-A079340A6ADE.

236 See Declan Walsh bio and repository of articles, *The New York Times* www.nytimes.com/by/declan-walsh.

237 Teo Armus, 'Egypt planned to arrest a New York Times reporter. The Trump administration reportedly wanted to let it happen' (The Washington Post, 25 September 2019) www.washingtonpost.com/nation/2019/09/24/trump-declan-walsh-ag-sulzberger-egypt/.

238 Teo Armus, 'Egypt planned to arrest a New York Times reporter. The Trump administration reportedly wanted to let it happen' (The Washington Post, 25 September 2019) www.washingtonpost.com/nation/2019/09/24/trump-declan-walsh-ag-sulzberger-egypt/.

239 Brown, 'NYTimes publisher: 'Follow the truth wherever it leads'', (AG Sulzberger presentation transcript, 23 September 2019) www.brown.edu/news/2019-09-23/sulzberger.

240 Declan Walsh, 'The Story Behind the Times Correspondent Who Faced Arrest in Cairo' (*The New York Times*, 24 September 2019) www.nytimes.com/2019/09/24/reader-center/declan-walsh-cairo.html.

arrest, but also in its response to the 2018 murder of American-based journalist Jamal Khashoggi on Turkish soil.²⁴¹

Declan Walsh's case illustrates how nations like the US, which have previously afforded relatively strong protection to journalists, are lapsing in their prior leadership. Like many journalists at risk abroad, Walsh's safety was not guaranteed, and he was protected by a whistle-blowing American official risking his career to disclose his impending arrest, followed by the swift assistance of Irish officials on behalf of their national in danger.²⁴² Accordingly, this stark contrast between US and Irish consular assistance to their national journalist at risk abroad stresses the vital nature of the effective implementation of consular commitments in averting human rights violations.

The particular situation of dual nationals

Some governments are unwilling to recognise dual nationality, and others may be unwilling to take proactive measures to protect citizens harmed by their other nation of citizenship. Refusals to recognise dual nationality must be tested against their compliance with existing international law.

Some States explicitly commit to granting equal protection to dual citizens, both within and without that State's borders. For example, Article 5 of Germany's Consular Law States that 'Germans with dual nationality are to be treated as if they only had German nationality'.²⁴³ However, in practice, this rule does not translate into consular support for all dual nationals. German consular officials have a policy of not providing assistance to Germans residing abroad where both the citizen and one of their parents also hold the citizenship of the State in which they reside; however, assistance may still be provided on a case-by-case basis.²⁴⁴

Other States have policies that expressly do not require them to provide consular assistance to dual citizens, possibly subject to exceptions. For example, neither Australia nor the UK require their consular officials to provide assistance to dual citizens when

241 BBC, 'Jamal Khashoggi: All you need to know about Saudi journalist's death' (*BBC News*, 2 July 2020) www.bbc.com/news/world-europe-45812399.

242 Declan Walsh, 'The Story Behind the Times Correspondent Who Faced Arrest in Cairo' (*The New York Times*, 24 September 2019) www.nytimes.com/2019/09/24/reader-center/declan-walsh-cairo.html.

243 See Stijn Hoorens et al, 'Consular Services to Citizens Abroad: Insights from an International Comparative Study – Annex' (RAND Corporation, 2019), p 39 <https://doi.org/10.7249/RR4288>.

244 Ein Service des Bundesministeriums der Justiz und für Verbraucherschutz sowie des Bundesamts für Justiz (1974), Abschnitt 5.

they are in their country of nationality.²⁴⁵ However, assistance may be granted on a discretionary basis.

Few formal sources of international law address the rights of States to protect dual nationals abroad. The VCCR does not expressly exclude dual nationals from Article 36.²⁴⁶ There is no special meaning to the term 'national of the sending State' that may be drawn from the International Law Commission (ILC) Draft Articles on Consular Relations, 1961 or the commentaries thereto.²⁴⁷ State practice is not conclusive either way.

The Hague Convention on Certain Questions relating to the Conflict of Nationality Law, 1930 applies to a State's right to afford diplomatic protection to one of its nationals.²⁴⁸ Article 4 of this Convention provides that 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.'

The seeming harshness of this pronouncement has been softened by interpretation in the period since the adoption of the VCCR in 1963. International tribunals, including the ICJ, have developed the principle of 'predominant nationality'. The ILC Draft Articles on Diplomatic Protection State this principle succinctly: '[A] State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.'²⁴⁹

The line of jurisprudence that developed this principle supports the view that a State is not prohibited from exercising diplomatic protection in cases where dual nationals are subjected to injury by the other State of nationality. Indeed, where an individual has meaningful ties to multiple States, that individual may seek help from all States of which they are a national, and all of those States may provide assistance.²⁵⁰

In addition to the major multilateral treaties, some States have entered into bilateral treaties on consular assistance whereby the sending State has the right to provide consular assistance if their national travels on the passport of that State. These treaties will also have their own definitions of who is a 'national', but which implicitly include dual nationals, as they have not specifically excluded them from the scope of their protection.

245 Australian Department of Foreign Affairs and Trade (DFAT) (2016a), 'Consular State of Play 2017-18' <https://www.dfat.gov.au/sites/default/files/consular-state-of-play-2017-18.pdf>; and Foreign, Commonwealth and Development Office, 'Support for British Nationals Abroad: A guide' (2016b) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822887/Support_for_British_Nationals_Abroad_Main_Guide.pdf.

246 Redress, 'Beyond Discretion' (Redress, January 2018) p 23.

247 'Draft Articles on Consular Relations, with commentaries' in Yearbook of the International Law Commission, Vol II https://legal.un.org/ilc/texts/instruments/english/commentaries/9_2_1961.pdf.

248 UN Treaty Collection, '4. Convention on Certain Questions relating to the Conflict of Nationality Laws' (The Hague, 12 April 1930) <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=518&chapter=30&lang=en>.

249 ILC Draft Articles on Diplomatic Protection (2006) Art 7, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf.

250 See UNWGAD Report, A/HRC/39/45, 2 July 2018, para 53.

However, a broad codification of dual national rights may have unintended deleterious consequences. Requiring all States to recognise dual nationality might lead to some States requiring dual citizens to renounce one citizenship, which would be unduly constraining for dual nationals. This concern is particularly apt for some journalists, for whom dual citizenship is an asset, or even at times a necessity, for carrying out their work.

Ensuring that dual nationals receive equal treatment in the provision of consular assistance and the exercising of diplomatic protection is particularly important, as dual nationals are at heightened risk of being targeted by one State of nationality in order to send a message or exact concessions from another State of nationality. The ongoing detention of Nazanin Zaghari-Ratcliffe fits this pattern.

Case study: Nazanin Zaghari-Ratcliffe

In 2016, Iranian-British dual national Nazanin Zaghari-Ratcliffe travelled with her daughter from their home in London, UK, to Tehran in order to visit family. At the end of their two-week stay, on 3 April 2016, Zaghari-Ratcliffe was arrested by the Iranian Revolutionary Guard at the airport and detained, incommunicado, for the next 55 days.²⁵¹ Iran accused Zaghari-Ratcliffe of running 'a BBC Persian online journalism course which was aimed at recruiting and training people to spread propaganda against Iran' – a baseless accusation. Zaghari-Ratcliffe was an aid worker for Thomson Reuters Foundation, the charitable arm of the news organisation, which itself is not engaged in any media work.

However, it appears that Zaghari-Ratcliffe's tangential connection to the press is a mere pretext for her arrest. Rather, she appears to be a hostage, taken to secure payment of a debt of approximately £400m owed to Iran by the UK.²⁵² In September 2020, the UK defence secretary acknowledged for the first time that this debt was owing and the UK was 'exploring every legal avenue to pay the debt'.²⁵³

In August 2016, Zaghari-Ratcliffe was tried and convicted of national security-related crimes. The trial was held in secret. Zaghari-Ratcliffe's lawyer was not allowed to meet with her until the day before the trial began, and her defense was capped at five minutes.²⁵⁴

251 Patrick Wintour, 'The Zaghari-Ratcliffes' ordeal: a story of British arrogance, secret arms deals and Whitehall infighting' (The Guardian, 23 January 2020) www.theguardian.com/news/2020/jan/23/zaghari-ratcliffes-ordeal-a-story-of-british-arrogance-secret-arms-deals-and-whitehall-infighting.

252 Patrick Wintour, 'The Zaghari-Ratcliffes' ordeal: a story of British arrogance, secret arms deals and Whitehall infighting' (The Guardian, 23 January 2020) www.theguardian.com/news/2020/jan/23/zaghari-ratcliffes-ordeal-a-story-of-british-arrogance-secret-arms-deals-and-whitehall-infighting.

253 Patrick Wintour, 'Zaghari-Ratcliffe: UK acknowledges debt owed to Iran over Shah's tank order' (The Guardian, 4 September 2020) www.theguardian.com/news/2020/sep/04/uk-defence-secretary-acknowledges-debt-owed-to-iran-over-shahs-tank-order.

254 Patrick Wintour, 'The Zaghari-Ratcliffes' ordeal: a story of British arrogance, secret arms deals and Whitehall infighting' (The Guardian, 23 January 2020) www.theguardian.com/news/2020/jan/23/zaghari-ratcliffes-ordeal-a-story-of-british-arrogance-secret-arms-deals-and-whitehall-infighting.

The UNWGAD determined that Zaghari-Ratcliffe was unlawfully detained, was specifically targeted for her status as a dual national, and called for her immediate release.²⁵⁵ A group of six UN Special Rapporteurs subsequently echoed the call for her release, and condemned abuses against her while in detention.²⁵⁶

Zaghari-Ratcliffe's legal counsel argued that:

'the evidence clearly shows that Mrs Zaghari-Ratcliffe is predominantly a British national who has been denied a fair trial and who is arbitrarily detained in Iran. In international law the question whether Iran recognises her British nationality is irrelevant. This means that all the requirements for the exercise of diplomatic protection have been met. The British government is therefore entitled to make representations at a political and diplomatic level rather than at a consular level to remedy her situation in the exercise of diplomatic protection.'²⁵⁷

In March 2019, UK Foreign Secretary Jeremy Hunt granted Zaghari-Ratcliffe diplomatic protection, stating that 'Nazanin is innocent and the UK will not stand by when one of its citizens is treated so unjustly'.²⁵⁸ However, Iran refused to permit British officials access to her while she remained imprisoned.²⁵⁹

In March 2020, Zaghari-Ratcliffe was permitted to leave Evin prison in the context of the coronavirus pandemic.²⁶⁰ She remains under house arrest at her parents' home in Tehran.²⁶¹

In September 2020, four years into her five-year sentence, Zaghari-Ratcliffe was informed by Iranian officials that she faced fresh charges.²⁶² Her husband revealed that the new charges are 'a revived charge of propaganda against the regime'.²⁶³

255 Redress, 'Nazanin Zaghari-Ratcliffe' <https://redress.org/casework/nazanin-zaghari-ratcliffe>.

256 Redress, 'Nazanin Zaghari-Ratcliffe' <https://redress.org/casework/nazanin-zaghari-ratcliffe>.

257 Redress, 'Re. Nazanin Zaghari-Ratcliffe. Legal Opinion II, Availability of Diplomatic Protection' https://redress.org/wp-content/uploads/2017/11/16.10.17-Zaghari-Ratcliffe-Opinion-Diplomatic-Protection_for-web.pdf.

258 James Landale, 'Nazanin Zaghari-Ratcliffe: What will diplomatic protection mean for her?' (BBC News, 7 March 2019) www.bbc.com/news/uk-47490695?intlink_from_url=https://www.bbc.com/news/topics/czgd5znl24t/nazanin-zaghari-ratcliffe-case&link_location=live-reporting-correspondent.

259 Patrick Wintour, 'Nazanin Zaghari-Ratcliffe to stay out of prison until Iran decides on fate' (*The Guardian*, 20 May 2020) www.theguardian.com/news/2020/may/20/nazanin-zaghari-ratcliffe-stay-out-of-prison-until-iran-makes-decision-on-fate.

260 BBC, 'Nazanin Zaghari-Ratcliffe released from Iran prison' (BBC News, 17 March 2020) www.bbc.com/news/uk-51937629?intlink_from_url=https://www.bbc.com/news/topics/czgd5znl24t/nazanin-zaghari-ratcliffe-case&link_location=live-reporting-story.

261 Patrick Wintour, 'Nazanin Zaghari-Ratcliffe to stay out of prison until Iran decides on fate' (*The Guardian*, 20 May 2020) www.theguardian.com/news/2020/may/20/nazanin-zaghari-ratcliffe-stay-out-of-prison-until-iran-makes-decision-on-fate.

262 Patrick Wintour, 'Nazanin Zaghari-Ratcliffe "held hostage" by Iran, says husband' (*The Guardian*, 9 September 2020) www.theguardian.com/news/2020/sep/09/nazanin-zaghari-ratcliffe-held-hostage-by-iran-says-husband; BBC, 'Nazanin Zaghari-Ratcliffe "to face new charge and trial in Iran"' (*BBC News*, 8 September 2020) www.bbc.com/news/uk-54076857.

263 Patrick Wintour, 'Nazanin Zaghari-Ratcliffe "held hostage" by Iran, says husband' (*The Guardian*, 9 September 2020)

IV. Underlying rights relevant to consular support for journalists

Introduction

The deprivation of journalists' rights abroad generally follows certain prevailing patterns, practices and underlying principles. It is underpinned by the desire of the host State to silence dissent and criminalise criticism. This motivation most often manifests itself in acts of intimidation, which are meant to send a message to both the actively reporting journalist and the wider community of journalists who may consider reporting on the host State in future. These acts of targeted intimidation against journalists, as described above, often involve arbitrary arrest, unlawful detention, torture and inhuman treatment, and the confiscation or destruction of reporting materials.

Consular officials must be cognizant of these patterns and practices, and they must prepare to counter them. Accordingly, it is necessary to have knowledge of the core rights that will likely come into play in such scenarios of rights abuses abroad.

- The right to freedom of expression and freedom of the press are the cornerstones of informed public participation and debate. These rights recognise the transformation of the individual expression of reporters into a broader social good. Both are inherently beneficial to democratic society, and instrumental in disseminating information and promoting transparency. Journalists are the key actors that allow the international press to function and to satisfy its important goals. Citizens also rely on journalists to keep the public informed, to ensure governments remain accountable for their actions, and to promote the search for and attainment of truth. Attacks on journalists – especially attacks targeted at journalists – are attacks on freedom of expression and freedom of the press.
- The right to be free from arbitrary arrest and unlawful detention is often at issue when journalists seek consular support. Lamentably, this right is frequently violated for journalists working abroad. Detention based solely on an individual's participation in public affairs is necessarily arbitrary, as is detention of an accused in an unknown location. The right to be free from arbitrary detention dovetails with an individual's due process rights, which ensure inter alia prompt review by a judicial authority. Consular officials must be able to differentiate between lawful and unlawful detention in order to protect the rights of journalists.
- The right to be free from torture and inhuman treatment, as well as the right to life, liberty and security of person, are among the most basic human rights protected in international law. They are peremptory jus cogens norms; they are universal and admit of no exceptions. States must ensure that their officials do not engage in any form of torture or extrajudicial executions. These rights are

of particular concern for journalists, who are often victimised by the violation of these rights in the course of their activities abroad. Accordingly, consular officials must be attuned to signs of torture in an individual case and be familiar with the universal prohibition on torture more generally.

The rights in this section both underpin and underscore the home State's obligation to provide meaningful consular support.

Freedom of expression and freedom of the press

States have positive obligations to protect journalists from undue interference.²⁶⁴ These obligations were affirmed in a joint Statement by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information.²⁶⁵ They are further refined and enshrined in a number of regional declarations and conventions, presenting a clear and compelling global consensus on the positive obligation to protect press freedom.²⁶⁶ The Global Pledge on Media Freedom – signed by a broad and diverse coalition of States – further highlights that it is a positive duty of governments to defend media freedom, not only domestically but also internationally, stating that '[t]o focus on solving problems at home is not enough [...]

264 UN Office of the High Commissioner for Human Rights, 'Report on the Safety of Journalists' A/HRC/24/23, para 13.

265 See UN Office of the High Commissioner for Human Rights, 'Joint Declaration on Media Diversity and Independence in the Digital Age' www.achpr.org/public/Document/file/English/declaration_2018_media_diversity_english.pdf.

266 See, e.g., Organization for Security and Cooperation in Europe, 'Budapest Declaration', at paras 36–37 and 'Vilnius Declaration'; The Council of Europe, 'Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors'; and African Commission, 'Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa', Art XI(2). Those declarations and instruments that do not explicitly create positive obligations to protect press freedom do so implicitly through their guarantees. E.g., Art 32(b) of the League of Arab States 'Arab Charter on Human Rights' States that 'the present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers.' This right would entail a corollary State duty to protect journalists, without whom this 'right to information' and 'right to seek, receive and impart information' could not be fully realised. As noted in the International Federation of Journalists' 'Declaration on Media Freedom in the Arab World', 'there are various mechanisms in the Arab World which have a mandate to promote respect for human rights, including media freedom, such as the Permanent Arab Commission on Human Rights of the League of Arab States, [and] the Arab Human Rights Committee, created by the Arab Charter on Human Rights'. Also, Art 23 of the Association of Southeast Asian Nations 'ASEAN Human Rights Declaration' States that '[e]very person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice'. This should be understood as including the State duty to protect journalists – to allow for the full enjoyment of the guaranteed rights – in adherence with international legal standards in that regard, which are incorporated by reference in the 'Phnom Penh Statement on The Adoption of The ASEAN Human Rights Declaration'. Furthermore, as outlined in the landmark report of the Organization of American States, 'Violence Against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection, and Prosecution of Perpetrators', the Inter-American Commission on Human Rights, the Commission's Special Rapporteur for Freedom of Expression, and the IACtHR have all determined that there is a positive legal obligation for States to protect journalists at risk. Furthermore, the Special Rapporteur has emphasised that 'States have an obligation not only to protect at-risk journalists, but also to guarantee that the protective measures adopted are effective and adequate.'

Our governments need to work to ensure that those who violate or abuse the human rights that underpin media freedom – be they governments or private entities – are held to account.²⁶⁷

These positive obligations go beyond those owed to nationals under normal circumstances, and flow from the fundamental human right to free expression, which is at the core of ‘public participation and debate, accountability, sustainable development and human development, and the exercise of all other rights’.²⁶⁸

Indeed, Article 19 of the Universal Declaration of Human Rights (UDHR) and the ICCPR enshrine the right to freedom of expression under international law, and the UN Human Rights Committee determined that the provision specifically protects media freedom and journalists.²⁶⁹ Imposing criminal or civil penalties for exercising the right to free expression and opinion will infringe upon the guarantee of these rights.²⁷⁰ As the UN Special Rapporteur on Freedom of Opinion and Expression has articulated, ‘[s]uch measures include multiple forms of censorship, such as restrictions on particular websites and social media sites, sources of political commentary, including local and international media, or even Internet services more broadly; harassment of the media; violence against and imprisonment of journalists, activists and bloggers’.²⁷¹

In a recent report on disease pandemics and freedom of opinion and expression in light of the Covid-19 outbreak, the UN Special Rapporteur reiterated that ‘journalism plays an essential role in the communication of information to the public, enabling individuals to exercise their rights to seek and receive information and to develop opinions [...] so that they can take appropriate steps to protect themselves and their communities’.²⁷² He further stated that ‘human rights law guarantees just this kind of communication regardless of frontiers’.²⁷³ The UN Human Rights Committee has added that penalisation of the media for being critical of the government or political system is never legitimate.²⁷⁴

267 Foreign and Commonwealth Office, ‘Global pledge on media freedom’ (Policy paper, 11 July 2019) www.gov.uk/government/publications/global-pledge-on-media-freedom/global-pledge-on-media-freedom.

268 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the General Assembly, UNHRC, 20th Session, UN Doc A/71/373 (2016), para 3.

269 UN Human Rights Committee, General Comment No 34, 102nd Session, CCPR/C/GC/34 (2011).

270 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Human Rights Council on the Right to Freedom of Expression in Electoral Contexts, UNHRC, 26th Session, UN Doc A/HRC/26/30 (2014), para 17.

271 Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Human Rights Council on the Right to Freedom of Expression in Electoral Contexts, UNHRC, 26th Session, UN Doc A/HRC/26/30 (2014), para 17.

272 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on Disease pandemics and the freedom of opinion and expression, UNHRC, 44th Session, UN Doc A/HRC/44/49 (2020) para 30 https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A_HRC_44_49_AdvanceEditedVersion.pdf.

273 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on Disease pandemics and the freedom of opinion and expression, UNHRC, 44th Session, UN Doc A/HRC/44/49 (2020) para 12 https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A_HRC_44_49_AdvanceEditedVersion.pdf.

274 UN Human Rights Committee, General Comment No 34, 102nd Session, CCPR/C/GC/34 (2011), para 42.

Case study: UN resolutions and declarations on media freedom

UN Security Council

- Resolution 1738 (2006): Condemnation of Attacks Against Journalists in Conflict Situations;²⁷⁵ and
- Resolution 2222 (2015): Voicing Alarm at Growing Threats to Journalists.²⁷⁶ Adopted unanimously, the proceedings prior to adoption included the participation – in the form of strong statements and submissions – of many UN Member States beyond the Security Council, representing a broad and regionally diverse group, and including the delegations of the European Union and African Union.²⁷⁷

UN General Assembly

- Resolution (A/RES 68/183) on the Safety of journalists and the issue of impunity (2013);²⁷⁸
- Resolution (A/RES 69/185) on the Safety of journalists and the issue of impunity (2014);²⁷⁹ and
- Resolution (A/RES 70/162) on the Safety of journalists and the issue of impunity (2015).²⁸⁰

UNHRC

- Resolution on the Safety of Journalists (A/HRC/39/L.7).²⁸¹

275 UN Security Council, 'Security Council Condemns Attacks against Journalists in Conflict Situations, Unanimously Adopting Resolution 1738 (2006)' (23 December 2006) www.un.org/press/en/2006/sc8929.doc.htm.

276 UN Security Council. Resolution 2222 (2015), Adopted by the Security Council at its 7450th meeting, on 27 May 2015, UN Doc S/RES/2222 (2015) [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2222\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2222(2015)).

277 UN, 'In All-Day Debate, Security Council Voices Alarm at Growing Threats to Journalists, Unanimously Adopting Resolution 2222 (2015)' (27 May 2015) www.un.org/press/en/2015/sc11908.doc.htm.

278 UN, 'In All-Day Debate, Security Council Voices Alarm at Growing Threats to Journalists, Unanimously Adopting Resolution 2222 (2015)' (27 May 2015) www.un.org/press/en/2015/sc11908.doc.htm.

279 UN General Assembly, The safety of journalists and the issue of impunity, Resolution adopted by the General Assembly on 18 December 2014, 69th Session, UN Doc A/RES/69/185 www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/185.

280 UN General Assembly, The safety of journalists and the issue of impunity, Resolution adopted by the General Assembly on 18 December 2013, 68th Session, UN Doc A/RES/68/163 www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/163.

281 UNHRC, The safety of journalists, 39th Session https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/L.7.

UNESCO

- Resolution 29 on the Condemnation of Violence against Journalists adopted during the 29th General Conference (1997);²⁸²
- Resolution 53 adopted during the 36th General Conference (2011);²⁸³
- Resolution 39 on Strengthening UNESCO leadership in the implementation of the UN Plan of Action adopted during the 39th General Conference (2017);²⁸⁴
- 196th Executive Board Decision (196 EX/31) on Safety of Journalists and the Issue of Impunity (2015);²⁸⁵
- 201st Executive Board Decision (201 EX/Decision 5.I.I) on Safety of Journalists and the Issue of Impunity (2017);²⁸⁶
- 202nd Executive Board Decision (202 EX/Decision 5 I.K) on Safety of Journalists and the Issue of Impunity (2017);²⁸⁷
- Belgrade Declaration on Media in Conflicts Areas in Countries in Transition (2004);²⁸⁸
- Medellin Declaration Securing the Safety of Journalists and Combatting Impunity (2007);²⁸⁹
- Carthage Declaration on press freedom and the Safety of Journalists (2012);²⁹⁰
- International Programme for the Development of Communication (IPDC)

282 UNESCO, 'Resolution 29 "Condemnation of violence against journalists"' General Conference 29th Session (November 1997) https://en.unesco.org/sites/default/files/ipdc_resolution_29.pdf.

283 UNESCO, 'Vol I. Resolutions' Records of the General Conference, 36th Session (25 October–10 November 2011) https://en.unesco.org/sites/default/files/unesco_general-conference-36_resolutions.pdf.

284 UNESCO, 'Vol I. Resolutions' Records of the General Conference, 39th Session (30 October–14 November 2017) <http://unesdoc.unesco.org/images/0026/002608/260889e.pdf>.

285 UNESCO, 'Decisions adopted by the Executive Board at its 196th session' (22 May 2015) <http://unesdoc.unesco.org/images/0023/002328/232890e.pdf>.

286 UNESCO, 'Decisions adopted by the Executive Board at its 201st session' (5 June 2017) <http://unesdoc.unesco.org/images/0024/002489/248900e.pdf>.

287 UNESCO, 'Decisions adopted by the Executive Board at its 202st session' (18 November 2017) <http://unesdoc.unesco.org/images/0025/002598/259824e.pdf>.

288 UNESCO, 'Declaration of Belgrade: Media in areas of Violent Conflict and Countries in Transition' (3 May 2004) https://en.unesco.org/sites/default/files/wpfd2004_belgrade_declaration_en.pdf.

289 UNESCO, 'Medellin Declaration: Securing the Safety of Journalists and Combating Impunity' (3 May 2007) https://en.unesco.org/sites/default/files/wpfd2007_medellin_declaration_en.pdf.

290 UNESCO, 'The Carthage Declaration' (3 May 2012) https://en.unesco.org/sites/default/files/carthage_declaration_2012_en.pdf.

Decision on the Safety of Journalists and the Issue of Impunity (2008);²⁹¹

- IPDC Decision on the Safety of Journalists and the Issue of Impunity (2010);²⁹²
- IPDC Decision on the Safety of Journalists and the Issue of Impunity (2012);²⁹³
- IPDC Decision on the Safety of Journalists and the Issue of Impunity (2014);²⁹⁴ and
- IPDC Decision on the Safety of Journalists and the Issue of Impunity (2016).²⁹⁵

Case study: Maria Ressa

Maria Ressa is a US-educated American-Filipina journalist. In 2021, she co-founded a news site called Rappler, which is based in the Philippines. Ressa was the Executive Editor and CEO of Rappler. As a news site, Rappler published a variety of articles on international and domestic affairs, including articles critical of the current government of President Duterte.

In February 2019, Ressa was arrested on the charge of having committed ‘cyber libel’. Businessman Wilfredo Keng filed a complaint about a Rappler article written by Reynaldo Santos Jr, alleging that it had defamed him. The impugned article was written in 2012, before the Philippines passed its cyber libel laws later that year. The libel complaint was originally dismissed in 2018, until the Philippines National Bureau of Investigation reversed the decision and recommended the Justice Ministry retroactively to apply the law to prosecute both Ressa and Santos Jr. In June 2020, both Ressa and Santos Jr were convicted of cyber libel, the first two journalists in the Philippines to be convicted of this crime.²⁹⁶ Ressa’s prosecution was widely understood as a means of silencing her critical coverage of the current administration and sending a message to other members of the media about the consequences of independent reporting.

291 UNESCO, ‘Decision on the safety of journalists and the issue of impunity adopted by the IPDC Intergovernmental Council at its 26th session’ (27 March 2008) https://en.unesco.org/sites/default/files/ipdc2008_decision_safety_of_journalists.pdf.

292 UNESCO, ‘Decision on the Safety of Journalists and the Issue of Impunity’ Adopted by the IPDC Intergovernmental Council at its 27th session (24–26 March 2010) https://en.unesco.org/sites/default/files/ipdc2010_safety_decision_final_0.pdf.

293 UNESCO, ‘IPDC Decision on the Safety of Journalists and the Issue of Impunity’ 28th IPDC Council session (22–23 March 2012) https://en.unesco.org/sites/default/files/ipdc28_safety_decision_final.pdf.

294 UNESCO, ‘Decisions Taken by the 29th IPDC Council Session (20–21 November 2014) https://en.unesco.org/sites/default/files/ipdc29en_ipdc29_full_decisions_final.pdf.

295 UNESCO, ‘Decisions Taken by the 29th IPDC Council Session (20–21 November 2014) https://en.unesco.org/sites/default/files/ipdc29en_ipdc29_full_decisions_final.pdf.

296 Ted Regencia, ‘Maria Ressa found guilty in blow to Philippines’ press freedom’ (Al Jazeera, 15 June 2020) www.aljazeera.com/news/2020/06/15/maria-ressa-found-guilty-in-blow-to-philippines-press-freedom.

As a result of her cyber libel conviction, Ressa faces up to six years of prison.²⁹⁷ Ressa is unable to travel abroad without permission of the court as she exhausts her appeals. In August 2020, a court denied her request to travel to the US to receive the 2020 International Press Freedom Award and attend panel discussions.²⁹⁸

Ressa's arrest and conviction under the cyber libel law brings with it many concerns about the chilling effect it could have on media freedom in the Philippines. Domestically, the decision to convict Ressa was criticised for its retroactive application of the cyber libel law. While the Rappler article was published in 2012, months before the cyber libel law, the judge found that a 2014 correction of a spelling error in the article constituted an act of republication and so the law could be applied. Alongside this retroactive application, the Philippine Justice Department also extended the statute for cyber libel from one year to 12 years.²⁹⁹ The National Union of Journalists of the Philippines stated that the Court's decision to convict Ressa under cyber libel laws 'basically kills freedom of speech and of the press'.³⁰⁰ The leader of the opposition in the Philippines, Leni Lombardo, critiqued the law, stating 'We must remember that this is merely the latest instance of law being utilized to muzzle our free press [...] [s]ilencing, harassing and weaponizing law against the media sends a clear message to every dissenting voice: Keep quiet or you are next.'³⁰¹

Outside of its chilling effect, Ressa's conviction is also in violation of international law. The use of imprisonment for libel is an especially egregious violation, notwithstanding that the charges themselves were highly spurious. A September 2009 UNHRC resolution called on States to decriminalise defamation and stated that imprisonment was 'never an appropriate penalty'.³⁰² As the UN Special Rapporteur on the Right to Freedom of Opinion and Expression has stated, 'the law used to convict Ms. Ressa, and the journalist who authored the article which led to their prosecution, is plainly inconsistent with the Philippines' obligations under international law'.³⁰³

In June 2020, Amnesty International stated that the verdict was a 'sham and should be quashed', and that the 'accusations against [Ressa and Santos] are political, the

297 DW, 'Philippines journalist Maria Ressa found guilty in high-profile libel case' (15 June 2020) www.dw.com/en/philippines-journalist-maria-ressa-found-guilty-in-high-profile-libel-case/a-53806382.

298 Lian Buan, 'CA rejects Maria Ressa's US travel request, says reasons aren't urgent' (Rappler, 19 August 2020) www.rappler.com/nation/court-appeals-rejects-maria-ressa-travel-motion.

299 Joel Simon, 'Maria Ressa and the public interest' (Colombia Journalism Review, 30 June 2020) www.cjr.org/opinion/maria-ressa-duterte-rappler-public-interest.php.

300 Jason Gutierrez and Alexandra Stevenson, 'Maria Ressa, Crusading Journalist, Is Convicted in Philippines Libel Case' (*The New York Times*, 14 June 2020) www.nytimes.com/2020/06/14/business/maria-ressa-verdict-philippines-rappler.html.

301 Jason Gutierrez and Alexandra Stevenson, 'Maria Ressa, Crusading Journalist, Is Convicted in Philippines Libel Case' (*The New York Times*, 14 June 2020) www.nytimes.com/2020/06/14/business/maria-ressa-verdict-philippines-rappler.html.

302 Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UNHRC, 12th Session, UN Doc A/HRC/12/L.14/Rev 1 (30 September 2009) <https://documents-dds-ny.un.org/doc/RESOLUTION/LTD/G09/161/50/PDF/G0916150.pdf?OpenElement>.

303 UN, 'Conviction of Filipino journalist "a new low", says independent UN expert' (16 June 2020) <https://news.un.org/en/story/2020/06/1066392>.

prosecution was politically-motivated, and the sentence is nothing but political'.³⁰⁴ Amnesty urged the UN to open an international investigation into the Philippine's human rights crisis, citing the June 2020 UN report detailing 'serious human rights violations in the Philippines', including the killing and detention of dissenters.³⁰⁵ This June 2020 report expressed concern with the legal charges brought against journalists and government actions to shut down media outlets.³⁰⁶ The report makes mention of the Philippine government's treatment of Maria Ressa, noting the 'pattern of intimidation' to which she has been subjected.³⁰⁷

As of October 2020, in addition to the cyber libel conviction, Ressa has eight other charges pending in the Philippine courts. Of these eight, five are charges that she violated the tax code, two are for alleged violations of the Philippines Securities Code and Anti-Dummy law, and one is another criminal complaint by businessman Wilfredo Keng for cyber libel involving a tweet about him.³⁰⁸ The possible jail time she faces for all these charges totals 100 years.³⁰⁹ Despite the obstacles put in her way, Ressa continues to fight for freedom of expression and for justice in her case. Following her conviction, Ressa urged Filipinos to continue fighting for their freedom of expression, stating, 'I appeal to Filipinos listening to protect your rights. We are meant to be a cautionary tale [...] Don't be afraid – if you don't exercise your rights, you will lose them.'³¹⁰

Ressa's counsel Amal Clooney aptly stated her conviction was:

'a sinister action to silence a journalist for exposing corruption and abuse. This conviction is an affront to the rule of law, a stark warning to the press, and a blow to democracy in the Philippines. I hope that the appeals court will set the record straight in this case. And that the United States will take action to protect their citizen and the values of their Constitution.'³¹¹

304 Amnesty International, 'Philippines: Quash conviction of Rappler journalists Maria Ressa and Rey Santos' (15 June 2020) www.amnesty.org/en/latest/news/2020/06/philippines-quash-conviction-of-rappler-ressa-santos.

305 UN Office of the High Commissioner for Human Rights, 'Philippines: UN report details widespread human rights violations and persistent impunity' (4 June 2020) www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=25924&LangID=E.

306 UN Office of the High Commissioner for Human Rights, 'Philippines: UN report details widespread human rights violations and persistent impunity' (4 June 2020) www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=25924&LangID=E.

307 Situation of human rights in the Philippines, UNHRC, 44th Session, UN Doc A/HRC/44/22 (29 June 2020) www.ohchr.org/Documents/Countries/PH/Philippines-HRC44-AEV.pdf.

308 Lian Buan, 'Maria Ressa pleads not guilty to 5th tax case' (*Rappler*, 22 July 2020) www.rappler.com/nation/maria-ressa-pleads-not-guilty-tax-case-july-2020.

309 CBC, 'Facing possible jail time totalling 100 years, journalist Maria Ressa says she won't stop fighting for justice' (*CBC*, 18 July 2020) www.cbc.ca/radio/thecurrent/the-current-for-june-18-2020-1.5616058/facing-possible-jail-time-totalling-100-years-journalist-maria-ressa-says-she-won-t-stop-fighting-for-justice-1.5617289.

310 Aurora Almendral, "'A Cautionary Tale": Journalist Maria Ressa's Conviction Seen as Blow to Philippines' Press Freedom' (PBS, 15 June 2020) www.pbs.org/wgbh/frontline/article/maria-ressa-philippines-journalist-cyber-libel-verdict.

311 Doughty Street Chambers, 'Amal Clooney and Caoilfhionn Gallagher QC condemn conviction of Maria Ressa in Manila cyberlibel judgment' (15 June 2020) www.doughtystreet.co.uk/news/amal-clooney-and-caoilfhionn-gallagher-qc-condemn-conviction-maria-ressa-manila-cyberlibel; Amal Clooney 'Amal Clooney: A test for democracy in the Philippines' (*The Washington Post*, 12 June 2020) www.washingtonpost.com/opinions/2020/06/12/amal-clooney-test-democracy-philippines.

The US government has not thus far taken any action in support of its targeted national. The US Senate adopted a bipartisan resolution highlighting human rights concerns in the Philippines, urging the government of the Philippines to respect freedom of expression and fundamental rights in general and raising the case of Maria Ressa in particular.³¹² Visa bans on Philippine officials responsible for human rights abuses were implemented by the US Senate, but the US administration continued to ignore human rights violations in its bilateral interactions, and even allegedly sought to override the measures implemented by the Senate.³¹³

Maria Ressa's case highlights the manner in which legal systems can be politically manipulated to censor journalists. Whether it is burdening Ressa with numerous trumped-up charges or applying a law retroactively, her case raises the urgency of well-tailored and crafted laws that build in protection for media freedom. Her case also demonstrates the impunity that prevails when the home State is indifferent or indulgent towards human rights abuses and the targeting of its nationals.

Arbitrary detention

As described above, journalists are at heightened risk of targeted human rights abuses. Individuals engaged in journalistic activity – especially those working in countries with poor human rights records – face regular threats of arbitrary arrest and unjust detention, including torture and inhuman treatment in detention.³¹⁴

Consider the case of Saeed Malekpour, who was arbitrarily arrested and jailed in Iran in the context of a crackdown on free expression online.

Case study: Saeed Malekpour

In October 2008, Saeed Malekpour, an Iranian web designer who had been living and working in Canada as a permanent resident, was arbitrarily arrested by members of the Iranian Revolutionary Guard Corps while visiting his ailing father in Iran.³¹⁵ Upon

312 'Condemning the Government of the Philippines for its continued detention of Senator Leila De Lima, calling for her immediate release, and for other purposes', 116th Congress, 1st Session, DAV19513 www.markey.senate.gov/download/leila-de-lima-philippines-resolution-; Ed Markey, 'Senators Markey, Rubio, Durbin, Blackburn, Coons Introduce Bipartisan Resolution Highlighting Human Rights Concerns in the Philippines' (5 April 2019) www.markey.senate.gov/news/press-releases/senators-markey-rubio-durbin-blackburn-coons-introduce-bipartisan-resolution-highlighting-human-rights-concerns-in-the-philippines.

313 JC Continga, 'U.S. Senator Durbin: Duterte's visa threat 'insult' to Fil-Ams, PH democracy' (*Rappler*, 31 December 2019) www.rappler.com/nation/dick-durbin-statement-duterte-visa-threat; Hannah Torregoza, 'US Embassy in Manila gives Sen. Dela Rosa the go signal to reapply for US visa' (*Manila Bulletin*, 8 July 2020) <https://mb.com.ph/2020/07/08/us-embassy-in-manila-gives-sen-dela-rosa-the-go-signal-to-reapply-for-us-visa>.

314 Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press 2019), p 176 www.cambridge.org/core/books/un-working-group-on-arbitrary-detention/FEE9537EB6B99FA632FE8D539F5F7DD0.

315 Raoul Wallenberg Centre for Human Rights and Human Rights Foundation, 'Individual Complaint: The case of Saeed Malekpour' (4 October 2014), p 8 www.raoulwallenbergcentre.org/s/Malekpour-UNWGAD-Petition.pdf.

arrest, he was stripped of his Canadian permanent residency documents, as well as his Iranian passport.³¹⁶

Malekpour was targeted in a crackdown on freedom of expression online for creating an open source software program designed to allow others to share photographs over the internet, and which was allegedly used by an unknown third party to upload pornography. Malekpour was convicted on spurious charges of, *inter alia*, ‘insulting the Supreme Leader’, ‘insulting the sanctity of Islam’, and ‘spreading propaganda against the [Revolutionary] System’, and was sentenced to death.³¹⁷ However, no evidence against him existed, aside from a forced – and false – confession extracted under torture.³¹⁸ In August 2013, Malekpour’s death sentence was commuted to life in prison due to mounting international pressure, primarily from the Canadian government.³¹⁹

Malekpour languished in Iran’s notorious Evin Prison for 11 years, where he was subjected to torture and prolonged periods of solitary confinement, and denied adequate medical care.³²⁰ An independent legal opinion from the UNWGAD in September 2019 found that Malekpour’s deprivation of liberty was arbitrary and in contravention of international law, and suggested that it may even constitute a crime against humanity.³²¹

The case and cause of Malekpour was advanced by Malekpour’s younger sister, Maryam, who tirelessly advocated for her brother’s release and who eventually had to flee Iran herself due to risk of imprisonment and torture. The Raoul Wallenberg Centre for Human Rights as well as Amnesty International were instrumental in launching awareness campaigns around the world to bring attention to Malekpour’s plight and pain.³²²

316 Olivia Ward, “I would rather die than go back to prison.” Inside Saeed Malekpour’s harrowing escape from Iran’ (*The Star*, 14 September 2019) www.thestar.com/news/investigations/2019/09/14/i-would-rather-die-than-go-back-to-prison-inside-saeed-malekpours-harrowing-escape-from-iran.html.

317 Raoul Wallenberg Centre for Human Rights and Human Rights Foundation, ‘Individual Complaint: The case of Saeed Malekpour’ (4 October 2014), pp 8–10 www.raoulwallenbergcentre.org/s/Malekpour-UNWGAD-Petition.pdf.

318 Raoul Wallenberg Centre for Human Rights and Human Rights Foundation, ‘Individual Complaint: The case of Saeed Malekpour’ (4 October 2014), pp 8–10 www.raoulwallenbergcentre.org/s/Malekpour-UNWGAD-Petition.pdf.

319 Raoul Wallenberg Centre for Human Rights and Human Rights Foundation, ‘Individual Complaint: The case of Saeed Malekpour’ (4 October 2014), p 10 www.raoulwallenbergcentre.org/s/Malekpour-UNWGAD-Petition.pdf.

320 Raoul Wallenberg Centre for Human Rights, ‘Political Prisoner Saeed Malekpour Escapes to Canada After Over a Decade in Iran’s Notorious Evin Prison’ <https://myemail.constantcontact.com/Political-prisoner-Saeed-Malekpour-escapes-to-Canada-after-over-a-decade-in-prison.html?soid=1126372737507&aid=pm2Fbiq1mDU>.

321 Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019, UNWGAD, UN Doc A/HRC/2019/32 WGAD/www.ohchr.org/Documents/Issues/Detention/Opinions/Session85/A_HRC_WGAD_2019_32.pdf.

322 Olivia Ward, “I would rather die than go back to prison.” Inside Saeed Malekpour’s harrowing escape from Iran’ (*The Star*, 14 September 2019) www.thestar.com/news/investigations/2019/09/14/i-would-rather-die-than-go-back-to-prison-inside-saeed-malekpours-harrowing-escape-from-iran.html.

In 2019, as a result of sustained international pressure from the UN, the Canadian government and civil society, Malekpour was released on a three-day furlough, after Maryam raised bail money to ensure that he would return to prison following his temporary release.³²³ However, once outside the prison walls, Malekpour escaped Iran through a neighbouring third country, without permission from Iranian authorities nor the knowledge of his family or attorney in Iran. Malekpour's Canadian permanent resident status was then quickly reinstated by Canadian authorities, which facilitated his safe return to Canada on 2 August 2019.³²⁴

Malekpour's case underscores the importance of effective partnerships in the pursuit of justice, and consistent consular support, all of which was instrumental in averting his death sentence and securing his release and return to Canada.

Arbitrary arrest and detention violate the guarantees of liberty and security of the person to which all individuals are entitled. The ICCPR codifies these rights in international law, stipulating: '[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.'³²⁵

These provisions are binding on States Parties to the ICCPR. States that are signatories but have not yet ratified the ICCPR must nonetheless refrain from acts that would defeat the treaty's 'object and purpose'.³²⁶

Non-signatory States are still bound to uphold the guarantee of rights to liberty and security of person, as expressed in the UDHR, which is generally agreed to be reflective of customary international law and *jus cogens* norms.³²⁷ Article 3 of the UDHR States: '[e]veryone has the right to life, liberty and security of person', while Article 9 affirms that, '[n]o one shall be subjected to arbitrary arrest, detention or exile'.³²⁸ Further, Principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment underscores that '[a]rrest, detention or imprisonment shall only be

323 Olivia Ward, "'I would rather die than go back to prison.'" Inside Saeed Malekpour's harrowing escape from Iran' (*The Star*, 14 September 2019) www.thestar.com/news/investigations/2019/09/14/i-would-rather-die-than-go-back-to-prison-inside-saeed-malekpours-harrowing-escape-from-iran.html.

324 Raoul Wallenberg Centre for Human Rights, 'Political Prisoner Saeed Malekpour Escapes to Canada After Over a Decade in Iran's Notorious Evin Prison' <https://myemail.constantcontact.com/Political-prisoner-Saeed-Malekpour-escapes-to-Canada-after-over-a-decade-in-prison.html?soid=1126372737507&aid=pm2Fbiq1mDU>.

325 ICCPR, 19 December 1966, 999 UNTS 171, Art 9.1 (entered into force 23 March 1976).

326 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, Art 18, 1155 UNTS 331 (entered into force 27 January 1980).

327 Myres S McDougall, Harold D Lasswell and Lung-chu Chen, 'Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry' (1969) *The American Law Society of International Law* https://digitalcommons.law.yale.edu/fss_papers/2575; John Peters Humphrey, 'The Universal Declaration of Human Rights: Its history, impact and juridical character' in Bertrand G Ramcharan (ed), *Human Rights: Thirty Years After the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (Martinus Nijhoff 1979) https://books.google.ca/books?id=favRCKyN-IC&pg=PA21&redir_esc=y#v=onepage&q&f=false.

328 UDHR, GA Res 217A (III), UNGAOR, 3rd Session, Supp No 13, UN Doc A/810 (1948) 71 at Arts 3 and 9.

carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose'.³²⁹

Arrest or detention can be arbitrary for a number of reasons, including the targeting of an individual for exercising the right to freedom of expression in general and for engaging in journalistic activities in particular.³³⁰ The UNWGAD affirmed this in many of its decisions relating to journalists.³³¹

Further, arrest or detention for membership in a group constitutes an unjustified deprivation of liberty, as established by the UNWGAD in the case of *Tran Thi Thuy et al v Vietnam*.³³² In this instance, the detained persons were land rights activists and opponents of the ruling Communist Party. The UNWGAD determined that the deprivation of liberty was based solely on their membership in this dissident land rights group, with which they had a right to participate under the freedoms of expression, association and political rights. Moreover, the charges for which they were convicted allowed for detention for peaceful activities, which was a clear violation of fundamental freedoms enshrined in the ICCPR. These same protections against arbitrary arrest and detention for membership in or association with a group specifically applies to journalists and their affiliations with media outlets and industry associations.³³³

The refusal to engage in speech – including to speak about, write on, or generally provide coverage relating to a topic – is also protected, and therefore arresting or detaining a journalist for these reasons is arbitrary and unlawful.³³⁴

Arrest or detention for the possession of materials has also been determined to be arbitrary.³³⁵ The imprisonment of journalists for possessing reporting materials, including photos, recordings and unpublished writing, would therefore also be considered arbitrary.

Moreover, detaining an accused person in an unknown location is presumptively arbitrary.³³⁶ The UNWGAD has determined that detention in a secret place constitutes arbitrary detention because 'no access to counsel or relatives is granted [and] no judicial control over the deprivation of liberty is exercised'.³³⁷

329 UN Office of the High Commissioner for Human Rights, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', Adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 1 www.ohchr.org/en/professionalinterest/pages/detentionorimprisonment.aspx#:~:text=Principle%201,dignity%20of%20the%20human%20person.

330 Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press 2019), www.cambridge.org/core/books/un-working-group-on-arbitrary-detention/FEE9537EB6B99FA632FE8D539F5F7DD0.

331 See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/153/19/pdf/G1315319.pdf?OpenElement> at para 37.

332 UNHRC, 61st Session, A/HRC/WGAD/2011/46 (2012).

333 *Mahmoud Hussein Goma Ali v Egypt*, WGAD Opinion No 83/2017.

334 *Aziz Al-Syed Jasim v Iraq*, WGAD Opinion No 52/1993.

335 *Sonam Gyalpo v China*, WGAD Opinion No 33/2007.

336 UNHRC, 13th Session, UN Doc A/HRC/13/30/Add.1 (2010) at 189.

337 UNHRC, 13th Session, UN Doc A/HRC/13/30/Add.1 (2010) at 189.

Similarly, the Declaration on the Protection of all Persons from Enforced Disappearance defines an enforced disappearance as occurring when individuals are:

‘arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law’.³³⁸

The UN Working Group on Enforced or Involuntary Disappearances has issued numerous decisions specifically dealing with the enforced disappearances of journalists.³³⁹

Case study: Ekpar Asat

Ekpar Asat is an Uighur entrepreneur, philanthropist and founder of a leading media platform catering to the Uighur community, known as Bagdax.³⁴⁰ Asat visited the US in 2016 to participate in the International Visitors Leadership Program focused on journalism in the US, a highly reputable exchange programme sponsored by the State Department, and from which many Chinese citizens of the majority Han ethnicity have benefited for decades.³⁴¹ Within weeks of returning from the US to the Uighur region in western China, he disappeared into the shadows of the internment camps.

Prior to his trip to the US, Ekpar was extolled by China’s State-run media as a model citizen, a positive force and bridge builder between the Uighur people and the Han majority and broader Chinese society. However, upon his return from the US, he was disappeared. In late 2019, a group of bipartisan senators sent a public letter to the Chinese Ambassador calling for his release.³⁴² In July 2020, House Democrats led by Congressman Max Rose called for Ekpar’s unconditional release.³⁴³ The New York City Bar Association also profiled Asat as a case study of the Chinese Communist Party’s concentration camp system, and over 80 Harvard-trained lawyers petitioned US and Chinese authorities for his release. Leading human rights organisations, including the

338 UN Office of the High Commissioner for Human Rights, ‘Declaration on the Protection of all Persons from Enforced Disappearance’, Adopted by General Assembly resolution 47/133 of 18 December 1992, Art 2 www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx#:~:text=Article%202-,1.,permit%20or%20tolerate%20enforced%20disappearances.&text=States%20shall%20act%20at%20the,and%20eradication%20of%20enforced%20disappearance.

339 See A/HRC/16/48, para 441; A/HRC/19/58/Rev.1, annex I, paras 159–160, 335, 444–448, 520 and 549; and A/HRC/22/45 and Corr.1, paras 140–143 and 414.

340 Edward Wong, ‘Sister Fights to Free Uighur Businessman Held in China After U.S. Trip’ (*The New York Times*, 9 May 2020) www.nytimes.com/2020/05/09/us/politics/china-uighurs-arrest.html.

341 Bureau of Educational and Cultural Affairs, International Visitor Leadership Program, <https://eca.state.gov/ivlp>.

342 Open letter to Chinese Ambassador Cui Tiankai signed by US bipartisan senators <https://int.nyt.com/data/documenthelper/6938-senators-ekpar-asat/b23f1159370b5d1ad5a8/optimized/full.pdf#page=1>.

343 Julie-Grace Brufke, ‘House Democrats call on State Department for information on Uighur prisoner Ekpar Asat’ (*The Hill*, 19 August 2020) <https://thehill.com/homenews/house/512691-blue-dogs-call-on-State-department-for-information-on-uyghur-prisoner-ekpar>.

Raoul Wallenberg Center for Human Rights, submitted a petition to the UN Working Group on Enforced and Involuntary Disappearances, and Amnesty International also issued an urgent global action to call for Ekpar's release.

No trial, court record or judgment of any kind exists about Asat, as is the case for many Uighur interned in the concentration camps.³⁴⁴ What little information his family was able to receive was shared with them by US officials as a result of their interventions with Chinese Communist Party officials, demonstrating the impact and importance of high-level governmental interventions on behalf of journalists targeted abroad.

Detaining an accused person without allowing them to be brought promptly before a judge is also presumptively arbitrary. A hearing before a judge would prevent arbitrary or unjustified detention by allowing the accused to challenge the legality of their detention, the whole in accordance with the right to liberty and security of the person. Indeed, Article 9.3 of the ICCPR States that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'. Article 9.4 of the ICCPR further stipulates that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.³⁴⁵

Torture and inhuman treatment

The prohibition against torture and inhuman treatment is fundamental to international law. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has affirmed that 'the right to be free from torture and ill-treatment is a rule of customary international law and a peremptory *jus cogens* norm of international law applying to all States'.³⁴⁶ Thus, even States that have not enacted domestic legislation or ratified international agreements outlawing the torture and ill-treatment of those in custody must adhere to these rules. The Special Rapporteur has also noted that instances of ill-treatment often occur in jurisdictions where insufficient resources are allocated to the criminal justice system,³⁴⁷ however, a lack of resources cannot justify the violation of these legal norms.

344 New York City Bar, 'Letter to Chinese State Leadership Regarding Human Rights Violations against Muslim and Turkic Peoples in the Xinjiang Uyghur Autonomous Region' (28 August 2020) www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/end-human-rights-violations-against-muslim-and-turkic-peoples-in-the-xinjiang-uyghur-autonomous-region; Jennifer Hansler, 'Harvard-educated lawyers join Uyghur alumna calling for her brother's release' (CNN, 9 June 2020) www.cnn.com/2020/06/09/politics/harvard-lawyers-letter-ekpar-asat/index.html.

345 ICCPR, 19 December 1966, 999 UNTS 171, Arts 9.3–9.4 (entered into force 23 March 1976).

346 Interim Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGAOR, 71st Session, UN Doc A/71/298 (2016) at paras 6, 12; see also UN Human Rights Committee General Comment No 21, 44th Session (1992) at para 4.

347 Interim Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGAOR, 71st Session, UN Doc A/71/298 (2016) at para X.

As discussed above, those engaged in journalistic activities crucially contribute to ensuring transparency and accountability in the conduct of public affairs and other matters of public interest, and for this reason are frequently targeted victims of human rights abuses, including torture and ill-treatment.³⁴⁸ A journalist's other intersecting identities may put them at heightened risk of violations. As the UN High Commissioner for Human Rights noted, '[f]emale journalists face additional risks, including being subjected to forms of sexual violence while covering public events or when in detention'.³⁴⁹

Torture is a violation of the right to dignity and security of the person that is not justified under any circumstances.³⁵⁰ To inflict torture is to cause unwarranted pain and suffering, physically or mentally; the prohibition on torture is absolute. This prohibition is universal, as it is inscribed in nearly every regional and international human rights document, and specifically addressed at length in the UNCAT. Article 7 of the ICCPR States that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.³⁵¹ Similar provisions are found in Article 5 of the UDHR, Article 3 of the ECHR, Article 5.2 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, Article 13(a) of the Arab Charter on Human Rights, and Article 14 of the ASEAN Declaration on Human Rights.³⁵²

Motive is the key difference between torture and ill-treatment. Though the acts may be the same – violations of dignity, security, and bodily integrity – torture is motivated by an object or goal.³⁵³ In the case of *Mahmut Kaya v Turkey*, the European Court of Human Rights affirmed that torture was characterised by 'a purposive element', distinguishing torture as 'intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidation'.³⁵⁴ Thus, torture is inhuman or degrading treatment that has an objective and creates the intended suffering.

Any individual who is in detention for any length of time has the right to be treated with dignity. The ICCPR outlaws inhuman treatment and torture in Article 7, which States that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or

348 See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/153/19/pdf/G1315319.pdf?OpenElement> at paras 2, 11 and 36.

349 See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/153/19/pdf/G1315319.pdf?OpenElement> at para 2. See also Report of the UN Special Rapporteur on Freedom of Opinion and Expression to the Human Rights Council on the Protection of Journalists and Media Freedom, UN Human Rights Council, 20th Session UN Doc A/HRC/20/17 (2012) at para 52; CPJ, 'The silencing crime: sexual violence and journalists' (7 June 2011) <http://cpj.org/reports/2011/06/silencing-crimesexual-violence-journalists.php>.

350 It is non-derogable as a *jus cogens* norm.

351 ICCPR, 19 December 1966, 999 UNTS 171, Art 7 (entered into force 23 March 1976).

352 UDHR, GA Res 217A (III), UNGAOR, 3rd Session, Supp No 13, UN Doc A/810 (1948) 71, Art 5; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Art 3 (entered into force 3 September 1953); American Convention on Human Rights, 'Pact of San Jose, Costa Rica', 22 November 1969, Art 5.2 (entered into force 18 July 1978); African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58, Art 5 (entered into force 21 October 1986); Arab Charter on Human Rights, 15 September 1994, League of Arab States, Art 13(a) (entered into force 15 March 2008); Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, Art 14 (18 November 2012).

353 UNCAT, Art 1.

354 *Mahmut Kaya v Turkey*, No 22535/93, [2000] III ECHR 149 at para 117.

punishment'.³⁵⁵ Article 5 of the UDHR similarly States that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.³⁵⁶

The ill-treatment of detainees often occurs during interrogations. As ill-treatment is prohibited at all times and in all situations, any acts on the part of authorities during questioning that infringe upon an individual's security or dignity will be contrary to international *jus cogens* norms. This ensures that no interrogation techniques are used that coerce the detainee into falsely confessing. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has emphasised that the international law prohibiting inhuman treatment must be followed by law enforcement agents, including intelligence services, the military, private contractors and all those who act under a government mandate or otherwise implement the law.³⁵⁷ The Special Rapporteur has also stated that

'questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. The risks are heightened for vulnerable persons and for persons questioned in detention. This holds particularly true during apprehension and the early stages of custody, when the authorities exerting control over the fact and conditions of detention and conducting the investigation are the same.'³⁵⁸

Where an individual alleges that they have been a victim of torture, the State in which the alleged acts may have occurred is under an obligation to investigate this claim. All claims must be investigated. Article 13 of the UNCAT States that:

'each State Party shall ensure that any individual who alleged he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.³⁵⁹

The investigation into allegations of torture must be effective and thorough. An investigation that does not meet these criteria will not fulfil the investigating State's international obligations. In the case of *Assenov and Others v Bulgaria*, the European Court of Human Rights affirmed that:

'where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3 [of the European Convention on Human Rights],

355 ICCPR, 19 December 1966, 999 UNTS 171, Art 7 (entered into force 23 March 1976).

356 UDHR, GA Res 217A (III), UNGAOR, 3rd Session, Supp No 13, UN Doc A/810 (1948) 71, Art 5.

357 Interim Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGAOR, 71st Session, UN Doc A/71/298 (2016) at para 34.

358 Interim Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGAOR, 71st Session, UN Doc A/71/298 (2016) at para 8.

359 UNCAT, 10 December 1984, 1465 UNTS 85, Art 13 (entered into force 26 June 1987).

that provision [...] requires by implication that there should be an effective official investigation [...] capable of leading to the identification and punishment of those responsible.³⁶⁰

In this case, Mr Assenov, who was 14 years old, was arrested for gambling. Mr Assenov's father asked for his release, but both father and son were arrested and the son was beaten with 'a toy pistol and with truncheons and pummeled in the stomach by officers'.³⁶¹ The investigation that followed this incident was determined to be ineffective by the European Court, as the first investigator concluded that Mr Assenov had caused all of his son's injuries despite insufficient evidence and no effort to obtain testimony from witnesses. The lack of a proper investigation of the claim of torture led the European Court to declare that there had been a violation of the prohibition on torture.

There is not only a negative obligation on States to ensure that their officials do not harm anyone – articulated in the responsibilities to prevent and punish, as described above – but arguably a positive obligation on States to assist those facing harm from others.³⁶² Indeed, the UN Committee against Torture has determined that States have obligations under the UNCAT as applying 'in any situation in which they exercise jurisdiction or effective control over persons or territory'.³⁶³ In particular, with respect to the obligation to 'prevent torture', the Committee against Torture found that States must take 'effective measures to monitor the conduct of individuals under their effective control, to stop and sanction such conduct in any case where they become aware of credible allegations of violations of the Convention, and to take other measures within their control to prevent the commission of subsequent violations by the individuals concerned'.³⁶⁴ The UN Human Rights Committee has also affirmed the extraterritorial scope of State obligations under the ICCPR, asserting that 'a State party has an obligation to respect and ensure the rights [...] of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control'.³⁶⁵ Grounded in this determination of the Human Rights Committee, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has determined

360 *Assenov and Others v Bulgaria* (1998), 8 ECHR (Ser A) at para 102.

361 *Assenov and Others v Bulgaria* (1998), 8 ECHR (Ser A) at para 9.

362 Concluding observations on the initial report of the Holy See, UN Committee against Torture, CAT/C/VAT/CO/1 (2014), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsvx%2Fbav9tzuiLzWMki9HumriG09wXrXL8ISVBIUmRGiyoQJufkQRPqfVLKDX%2FHV7mkON0g2Zs vH%2FJYEgKuR6VKntJ4dpXoROAgGASioyLNJY>. See also UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 16 in reference to extraterritoriality and the UNCAT, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalfzYTJ%2FNYOXxeLRAIVgbwcSm2ZXH%2BcD%2B%2F6IT0pc7BkgqIATQUZPVhi>.

363 Concluding observations on the initial report of the Holy See, UN Committee against Torture, CAT/C/VAT/CO/1 (2014), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsvx%2Fbav9tzuiLzWMki9HumriG09wXrXL8ISVBIUmRGiyoQJufkQRPqfVLKDX%2FHV7mkON0g2Zs vH%2FJYEgKuR6VKntJ4dpXoROAgGASioyLNJY>.

364 Concluding observations on the initial report of the Holy See, UN Committee against Torture, CAT/C/VAT/CO/1 (2014), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsvx%2Fbav9tzuiLzWMki9HumriG09wXrXL8ISVBIUmRGiyoQJufkQRPqfVLKDX%2FHV7mkON0g2Zs vH%2FJYEgKuR6VKntJ4dpXoROAgGASioyLNJY>.

365 ICCPR, General Comment No 36, 74th Session, UN Doc A/74/318, Art 6 <https://undocs.org/en/CCPR/C/GC/36>.

that the home State has an obligation towards its nationals to take 'reasonable steps [...] to provide effective assistance that do not constitute a disproportionate burden'.³⁶⁶ Such a positive obligation would be especially salient for journalists at risk abroad, who would benefit from this particular responsibility of their home State when it comes to their safety, especially as it relates to prevention and providing assistance in the case of the occurrence of torture or ill-treatment.

Case study: Maher Arar

Maher Arar is a Syrian-Canadian telecommunications engineer who was detained by US immigration officials in September 2002. Arar was detained during a stopover in New York City on his way home to Ottawa from a family vacation in Tunis.³⁶⁷

His detention by American immigration officials was based on false information contained in a 'lookout list' received from Canadian intelligence services, which led them to believe that Arar was a member of al-Qaeda.³⁶⁸ Arar was held in the US for nearly two weeks without charges in solitary confinement.³⁶⁹ He was interrogated by American officials and denied his right to receive counsel.³⁷⁰

Although Arar was travelling on his Canadian passport and he requested to be deported back to Canada, American officials deported him back to Syria.³⁷¹ Arar was detained in Syria for ten months and ten days,³⁷² during which time he endured months of brutal interrogation and torture, according to the findings of a commission of inquiry ordered by the Canadian government.³⁷³ As a result of this severe torture, he was forced to 'confess' to training in Afghanistan, a country which he had never visited.³⁷⁴

As a Canadian citizen, Arar would have been entitled to consular services and visits from Canadian consular officials. However, Syrian law allows for dual nationality, but States that a Syrian citizen with dual citizenship is first and foremost a Syrian.

366 UN General Assembly, Extrajudicial, summary or arbitrary executions, Note by the Secretary-General, 74th Session, UN Doc A/74/318 <https://undocs.org/A/74/318>.

367 *Report of the events relating to Maher Arar* (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) <https://archive.org/details/reportofeventsre0000comm>.

368 Colin Perkel, 'Maher Arar Case' in *The Canadian Encyclopaedia* (16 December 2006) www.thecanadianencyclopedia.ca/en/article/maher-arar-case.

369 Falconers, 'Maher Arar V. Her Majesty The Queen In Right Of Canada et al' (11 December 2007) <https://falconers.ca/casestudy/maher-arar>.

370 Falconers, 'Maher Arar V. Her Majesty The Queen In Right Of Canada et al' (11 December 2007) <https://falconers.ca/casestudy/maher-arar>.

371 Falconers, Ara Statement of Claim, Court File No: O4-CV-266499CM3 www.falconers.ca/wp-content/uploads/2016/09/Ara-Statement-of-Claim.pdf.

372 Julie Ireton, "'This is who I am": the reinvention of Maher Arar' (*CBC News*, 22 April 2016) www.cbc.ca/news/canada/ottawa/maher-arar-reinvention-1.3541273.

373 'Report of the Events Relating to Maher Arar' (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

374 'The Story of Maher Arar: Rendition to Torture' (Center for Constitutional Rights) <https://ccrjustice.org/files/rendition%20to%20torture%20report.pdf>.

As a result, Syria did not recognise Arar's right to Canadian consular services. Syrian authorities controlled Arar's access to Canadian consular services and ultimately granted Arar a total of nine consular visits.³⁷⁵ In addition to denying him his full consular rights, he was also denied access to legal counsel.³⁷⁶

During his detention, Arar's wife, Monia Mazigh, campaigned for his release along with other advocates, including the author of this report. In September 2003, Mazigh described her husband's ordeal in detail to a Canadian parliamentary committee, calling on the Canadian government to seek Arar's release and request that the US take responsibility for deporting him to Syria without notifying Canadian authorities.³⁷⁷ This report's author noted the importance and imperative of devoted diplomatic and consular engagement of Canadian officials, in order to secure Arar's return and prevent similar rights violations from occurring in the future.³⁷⁸ As the author noted, in cases like Arar's, the Canadian government should make clear to other States that Canadian authorities must be informed when one of its citizens is being detained, that Canada should strategically use its diplomatic and trade relationships with both the rights-violating country and other States to strategically apply pressure, and that Canadian dual nationals should still be afforded the same rights as those with exclusively Canadian citizenship.³⁷⁹

In October 2003, Arar was released from Syria without charge and allowed to return home to Canada. After his return, Arar, Mazigh and allies launched a national campaign for a public inquiry into the role of Canadian officials in his mistreatment. In February 2004, a commission of inquiry was established and the Arar inquiry report was released in September 2006. In his report, the Commissioner found that there was 'no evidence' that Maher Arar had committed any offence or was implicated in any terrorist activity.³⁸⁰ The inquiry also found that Canadian officials contributed to Maher Arar's mistreatment in a number of ways, including the provision of a 'highly inflammatory and unfounded description of Mr. Arar and his wife as Islamic

375 *Report of the events relating to Maher Arar* (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) pp 229–30 https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

376 'The Story of Maher Arar: Rendition to Torture' (Center for Constitutional Rights) <https://ccrjustice.org/files/rendition%20to%20torture%20report.pdf>.

377 Standing Committee on Foreign Affairs And International Trade, Evidence, 37th Parliament, 2nd Session (25 September 2003) www.ourcommons.ca/DocumentViewer/en/37-2/FAIT/meeting-46/evidence - Int-689913.

378 Standing Committee on Foreign Affairs And International Trade, Evidence, 37th Parliament, 2nd Session (25 September 2003) www.ourcommons.ca/DocumentViewer/en/37-2/FAIT/meeting-46/evidence - Int-689631.

379 Standing Committee on Foreign Affairs And International Trade, Evidence, 37th Parliament, 2nd Session (25 September 2003) www.ourcommons.ca/DocumentViewer/en/37-2/FAIT/meeting-46/evidence - Int-689631.

380 *Report of the events relating to Maher Arar* (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

extremists' to American authorities.³⁸¹ Following the Arar inquiry report, Canada removed Maher Arar from their lookout lists and requested the US to amend its records accordingly. The Prime Minister subsequently issued a public apology to Arar for 'any role Canadian officials may have played in the terrible ordeal'.³⁸²

Maher Arar's case demonstrates the important need for States to have a well-developed strategy to protect the rights of its citizens abroad. Arar was a man who fell through the cracks due to the mistakes of Canadian intelligence services and American officials, and the inability of Canadian authorities promptly to recognise and remedy their errors. While Canadian processes have attempted to respond to their mistake through a public inquiry and apologies, there has yet to be a similar acknowledgement by American authorities, nor any success in legislating these lessons into laws.

As this case demonstrates, a State must urgently and unreservedly advocate on behalf of its nationals abroad, and ensure that its officials are not complicit in any human rights abuses.

381 *Report of the events relating to Maher Arar* (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) https://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf.

382 Stephen Harper, 'Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process' (26 January 2007) <https://web.archive.org/web/20100322121811/http://www.pm.gc.ca/eng/media.asp?id=1509>.

V. Strengthening consular support for journalists at risk: recommendations and minimum standards

Introduction

Journalists working abroad deserve certainty on their rights and on the support that they will receive from their home States. Such certainty has been sorely lacking in the international system generally, and in many domestic systems as well.

In the sections that follow, this report examines the international and domestic systems separately, to provide recommendations for areas of improvement. For domestic systems, we specifically elaborate minimum standards that should be adhered to. Such minimum standards do not require international coordination (though this would certainly be laudable); they reflect the bare obligations that States should fulfil on behalf of their journalist nationals abroad, and they are fully capable of being implemented immediately by any and all States. There is no excuse for these minimum standards not being adhered to.

TOWARDS A CHARTER OF RIGHTS FOR DETAINED JOURNALISTS: A NEW RIGHTS-BASED PARADIGM

As the foregoing analysis reveals, there exist significant measures – and concomitant obligations – in international law to ensure the rights of journalists working abroad are protected. But current measures form a patchy, rather than an organised, framework. Different States exercise their responsibilities differently, and many do not exercise them at all. When it comes to accountability for those States that fall short of their obligations, the international community has been largely quiet.

In order to maximise their effectiveness, current protections for journalists at risk abroad should be organised and formalised in an international instrument. Such a treaty would expand upon the obligations in the VCCR based on the developments in international law over the past decades, and it would apply them to the particular case of journalists. It would provide a clear framework for the rights that journalists enjoy when detained in a foreign State and for the accountability to which all States should be held.

At the centrepiece of this framework should be a Charter of Rights for Detained Journalists:³⁸³

1. Journalists have a right to be free from arbitrary detention and benefit from the same rights and protections as other individuals in detention.

383 As many of these rights pertain to all foreign detainees, they can certainly be generalised and/or integrated into a similar 'charter' that would apply to non-journalists as well. Such a project, however, remains outside the scope of the present report.

The detention of a journalist will be considered arbitrary, inter alia, if it is based on a denial of equal access to public space, if it is based on an unreasonable interference with the journalist's right to free expression, or if it is based on an intention to intimidate or dissuade the journalist's reporting.

2. Journalists subject to detention benefit from the same rights and protections as other individuals in detention.

These rights include (without limitation) the due process rights accorded all individuals under international law, such as the right to due process, the right to security of person, the right to be free from torture, and the right to be free from arbitrary detention.

3. Upon detention of a journalist foreign national or dual national, the foreign State³⁸⁴ must immediately contact the consulate of the journalist's home State.³⁸⁵

The detention of a journalist abroad gives rise to significant responsibilities on the part of the journalist's home State. The first step in ensuring these responsibilities are fulfilled is communicating the detention status of the journalist to the home State's consular officials. The detaining State cannot seek to avoid accountability for its detention by keeping said detention secret or by delaying contact with the home State.

4. Journalists subject to detention in a foreign State have a right to meaningful consular assistance.

In order to be meaningful, the right to consular assistance must include the right to maintain consistent confidential contact with the consulate of the journalist's home State during detention, and the right to have a representative of the home State present during all proceedings affecting the journalist's rights. Equally, consular officials from the journalist's home State have the right to monitor the journalist's detention and to be promptly communicated any material changes in the conditions of the journalist's detention.

The right to meaningful consular assistance must be honoured not only by the detaining foreign State, but also by the journalist's home State.³⁸⁶

5. The consular officials of the journalist's home State have an obligation to expend their best possible efforts to ensure that the treatment of journalists subject to detention is consistent with all applicable rules, norms and principles of international law.

384 A 'foreign State', for the purposes of this Charter, should be defined as any State that is not the journalist's sole and unique State of citizenship. Put differently, a journalist detained in a State of dual nationality should still be considered as 'foreign State'.

385 Where the journalist is a dual national, his/her 'home State' should refer to the State of which (s)he is a national that is not the foreign State.

386 Further detail on the responsibilities of the home State are detailed below.

The journalist's home State should never adopt the premise that responsibility for the journalist detainee's human rights has been outsourced to the foreign State. The home State remains responsible for ensuring that the journalist's rights are respected; if it has a reasonable basis to believe otherwise, then it must (a) escalate the issue to the highest offices within the home State; and (b) advocate on behalf of the journalist with the foreign State. This principle applies especially – but not uniquely – to cases where there is a reasonable belief that torture has occurred.

6. The consular officials of the journalist's home State have an obligation to advocate on behalf of the journalist in order to ensure that his/her treatment by the detaining State is consistent with his/her rights under the domestic law of the home State.

Domestic legal requirements still apply to consular officials even when stationed on foreign territory. As such, consular officials should not limit their advocacy to minimum standards under international law. Rather, they should advocate treatment for the journalist detainee that would meet their own domestic standards.

7. If there is a substantial concern that the journalist's rights under the present Charter will not be protected by the detaining State, the journalist's home State has an obligation to advocate the journalist's return home.

The rights guaranteed by this Charter are fundamental to journalist detainees. Where the consular officials of a home State have a reasonable basis to suspect that the journalist's rights thereunder are not being protected by the foreign State, they should seek the return of the journalist to the home State.

8. If it cannot guarantee the protection of the journalist's rights under the present Charter, the detaining State must release the journalist to his/her home State under such conditions as the circumstances may merit.

The detention of a journalist in conditions contrary to the present Charter is illegal and must be terminated immediately. Even without being formally requested to do so, a foreign State must release a journalist detainee where it cannot guarantee its protection of the rights herein.

9. The consular officials of the journalist's home State have an obligation to ensure that the journalist's designated contacts, including (where applicable) the journalist's publisher, are kept abreast of material developments in the journalist's detention.

Consular officials of the home State represent the best line of communication between a detained journalist and his/her contacts. The home State's duty to monitor the conditions of the journalist extend to an obligation to report on

these conditions regularly, and keep the journalist's contacts abreast of any material developments.

10. Communications between a detained journalist and consular officials of his/her home State cannot be monitored by the foreign State.

Consular officials must ensure that they are provided an in-person, private means of communication with a journalist detainee. The failure to provide such confidentiality by the foreign State is not only a strong indicator of abuse, but also a violation of the journalist's human rights.

11. Journalists subject to detention have the right to publicise their detention.

The detention – especially the arbitrary detention – of international journalists is newsworthy. A journalist detained abroad should not fear reprisal in the event their detention is publicised, whether directly or indirectly through the journalist themselves.

12. Upon detention of a journalist, the detaining State must preserve any reporting materials created or kept by the detained journalist. An inventory of these materials must be provided to the journalist and to the consular office of his/her home State.

Detention cannot be used as a mechanism to silence a journalist. In order to give meaning to this policy, a foreign State cannot destroy a journalist's reporting materials, which include his/her notes, drafts and digital media. It must also complete an inventory of these materials, which the journalist should personally verify with the home State's consular team. Any omissions in the inventory should be noted by the consular team and indicated to the foreign State.

13. If requested by the home State, the detaining foreign State must provide a copy of the detained journalist's reporting materials to the consulate of the home State or must justify its refusal under its national laws.

The detention of a journalist is notionally separate from the confiscation of his/her reporting materials. If the foreign State seeks to confiscate these materials, it must do so transparently, with explicit reference to national laws. It must also provide the journalist and/or the home State the opportunity to challenge said confiscation.

14. The journalist's reporting materials must be returned to him/her upon the end of his/her detention, subject to applicable national laws.

Once a journalist is released, he/she should regain possession of any reporting materials that were confiscated. Such return is integral to ensuring that press freedom is preserved. Any exception to this principle by the foreign State must be justified and subject to contestation by the journalist.

In order to ensure there is real accountability attached to the obligations in the Charter, a three-level mechanism of oversight should be established:

- the journalist, his/her designated contacts and his/her publisher can invoke these Charter rights directly against the detaining State or the home State, as the case may be;
- the home State can invoke these Charter rights against the detaining State; and
- these Charter rights should be protected by an independent international commissioner with the power to investigate claims of abuse.

The role of an international commissioner is discussed in detail in the following section.

GLOBAL ACCOUNTABILITY THROUGH AN INTERNATIONAL COMMISSIONER

Detained journalists often languish in obscurity, with information on their charges and conditions difficult to ascertain. In order to promote international transparency, an international commissioner³⁸⁷ should be appointed, with all States required to report any arrest and/or detention of a foreign journalist to the commissioner. Failure to report would itself be considered a violation of international law.

By creating a system whereby the arrest and/or detention of journalists itself becomes a newsworthy event, the existence of an international commissioner could undercut the nefarious motives of States that try to silence journalists through detention. A publicity requirement surrounding such detention effectively turns the detaining State's existing calculus on its head: rather than preventing the journalist's reporting from becoming newsworthy, detention would increase the likelihood of this happening.

Moreover, an international commissioner would be independent and, as such, would remove the issue of geopolitical expediency from the determination of when investigation or advocacy becomes necessary. As such, the international commissioner's powers should go well beyond a simple function of collating reports of arrest and detention. The commissioner should maintain an additional line of contact with the detained journalist, beyond that of the home State, to ensure the detainee's due process rights are respected. The international commissioner should have investigative powers that supplement those of the home State and that expand in scope when the home State is delinquent in exercising them. In monitoring the situation, the commissioner would also refer concerns – such as those over arbitrary detention or torture – to the relevant international bodies for further investigation.

387 The term 'international commissioner' is used herein to demonstrate the author's neutrality on the particular form this function should take. It could be seen as a standalone office, created through a new international instrument (such as the Charter discussed above). It could be created as an office associated with an existing international body – for instance, as a Special Rapporteur to the Office of the High Commissioner for Human Rights or another UN entity. While various options exist for the office's formation, this section focuses on the substantive protections that such an office could offer.

The international commissioner would not replace or alleviate the home State's obligations towards its detained journalist, but the position would add an additional layer of oversight. The commissioner's primary role would be to act as a check on the home State's consular officials and, as necessary, spur them actively to defend the detained journalist's rights. But to the extent the home State refuses to adhere to its obligations, the international commissioner would publicise and seek accountability in connection with both the foreign State's detention and the home State's inaction.

Such independent review is especially important where there exist legitimate concerns that the home State may not be willing effectively to defend the human rights of the detained journalist. The international commissioner would represent an independent point of contact for family, friends and colleagues of the detained journalist to express their concerns – not only about the detaining State, but about the home State as well.

PROTECTING JOURNALISTS' RIGHTS ABROAD: ENSHRINING A CODE OF CONDUCT FOR THE PROVISION OF CONSULAR ASSISTANCE BY THE HOME STATE

When detained abroad, journalists depend on the consular officials of their home State to ensure their rights against the detaining State are protected. From the home State's perspective, however, the protection of these rights are often calculated as part of a cost-benefit analysis in which the counterbalancing factor is the home State's diplomatic relationship with the detaining State. This is a false equation that encourages inaction on the part of the home State, thereby systematically undervaluing the human rights of the journalists at issue.

States have an international legal obligation to provide meaningful consular support to journalist nationals detained abroad. The satisfaction of this obligation is not subject to considerations of political expediency. Any compromise in the level of protection offered by the consular officials of a home State represents a failure of that State to fulfil its consular obligations.

There are five areas in which the obligation to provide meaningful consular support is manifested: consular preparation, consular training, the consular obligation to investigate, the provision of consular assistance and ensuring accountability.

The core obligations of the home State in each area should be enshrined in legislation, with the best practices being reflected in a written set of policies and practices that are regularly reviewed. These best practices will often vary according to a State's particular circumstances, including its history and domestic protections. The principles that appear here represent *minimum standards that all States should adopt and expand upon*. They are based in large part on a Canadian bill that was first presented by the author of this report to Parliament in 2011.³⁸⁸

388 Bill C-359: An Act to Protect Canadian Citizens Abroad (41st Parliament, 2nd Session).

Consular preparation

Consular officials must consistently analyse and monitor the situation of journalists in the foreign State in which they are stationed in order to be prepared to deal with the possibility of a journalist national being detained.³⁸⁹ In particular, consular missions are expected to keep up-to-date information on the following issues:

- Which are the major news agencies, and what is the status of independent journalists, freelancers and bloggers?
- What is the general attitude of the major State actors to journalists and the media?
- Do the local authorities effectively investigate threats and attacks against journalists?
- Are there any journalists' rights organisations active in the area?³⁹⁰

Having this information to hand will enable the consular mission to act more quickly in response to threats or emergencies, and to activate local support networks if and when necessary. Indeed, consular officials should maintain direct contact with local journalists and media organisations; these contacts may have the additional benefit of keeping the consulate well-informed about a range of local issues.³⁹¹

Consular officials must be aware of the laws that are likely to be invoked against foreign journalists and the procedures and sentences attached to them. If called upon, they must be prepared to offer proactive guidance to journalist nationals who have questions about reporting in the foreign State and seek to minimise their risks.

Because a foreign State's approach to a free press will often dovetail with its other human rights practices, consular officials must also be well-versed in the human rights record more generally of the State in which they are stationed. Where the foreign State has a questionable human rights record, the home State's consular team must be prepared to scrutinise the foreign State's representations concerning the detained journalist and should particularly avoid sharing information with the foreign State that could be manipulated for use against the journalist.

A foreign State's human rights record is also relevant to the home State's determination as to whether a detained journalist is at risk of torture. While the individual circumstances of the journalist's case will inform this analysis, a State's consular officials must already be prepared for this possibility in advance.

389 Community of Democracies, 'Toolkit on the Safety of Journalists for the Personnel of the Diplomatic Mission', para 2.2.

390 Community of Democracies, 'Toolkit on the Safety of Journalists for the Personnel of the Diplomatic Mission', para 2.2.

391 Community of Democracies, 'Toolkit on the Safety of Journalists for the Personnel of the Diplomatic Mission', para 2.2.4.

Finally, consular officials must have a plan in place for emergency situations involving journalists. This may involve establishing a dedicated emergency team and a protocol for referring emergency cases to that team:

'At the critical moment when a journalist is at risk and in need of support or rescue, time is of the essence. Often, when a diplomatic mission seeks approval from capital to provide assistance to a journalist in distress, instead of being directed to a special, dedicated emergency team, the case goes back and forth between various departments in the ministry or other overseeing body. Because of the lack of advance guidance or a clear decision-making process, the short window of time when help can be provided can close without help being provided to the journalist in crisis.

'Establishing procedures for emergency situations involving journalists can avoid delay and increase the chances that a journalist will receive timely assistance. Such procedures should be regularized and training provided to mission personnel; in the event of personnel turnover, the proper steps can still be followed and onboarding of new staff should include the training.'³⁹²

We note that the Global Consular Forum is an existing mechanism that has the potential to aid the development and harmonisation of consular best practices. The Forum, established through Canadian leadership to share information on State practice and develop and promote standards of conduct, aims to be a hub for development of best practices in consular services.

Consular training

Proper navigation of a foreign legal system, monitoring the conditions of detention and advocating on behalf of a journalist detainee requires specialised training that will differ based on the foreign State at issue.

Particular attention should be paid to training that would qualify consular officials to detect signs of torture or mistreatment. Such signs are often difficult to recognise and will be consciously hidden by the foreign State. For instance, where a foreign State tortures a journalist detainee, it is unlikely that this foreign State will provide a confidential line of communication between the journalist and representatives of the home State. Consular officials must be attuned to these issues and should be kept abreast of best practices in discerning signs of physical or psychological torture in detainees.

Consular obligation to investigate

When they learn about the possibility of a journalist national's detention abroad, home State consular officials have an obligation to investigate the situation.

392 Community of Democracies, 'Toolkit on the Safety of Journalists for the Personnel of the Diplomatic Mission', para 2.1.2.

A proper consular investigation involves:

1. Confirming whether the detention of the journalist is officially recognised by the foreign State (an 'Official Detention'). In the case of an Official Detention, the home State must at a minimum establish:
 - a. the provisions of law pursuant to which the journalist is being detained;
 - b. what activities the journalist was carrying out that led to his/her detention;
 - c. the circumstances of the journalist's arrest;
 - d. the site and circumstances of the journalist's detention; and
 - e. the procedural framework applicable to the journalist's detention.
2. In the case of a possible detention that is not an Official Detention, the home State must at minimum establish:
 - a. what grounds exist to believe that a detention has taken place;
 - b. how the foreign State responds to the grounds that suggest a detention has taken place; and
 - c. whether it is reasonable to believe the response provided by the foreign State.

So long as it is not reasonable to believe the response provided by the foreign State, the home State must keep its file open and continue to investigate the possible detention.

At the investigatory stage, the home State should already be in contact with the journalist's designated contacts and publisher. While uncertainty can be relayed to these individuals, it is not a reason to delay the communication of information where there exists a reasonable belief that detention has occurred.

Provision of consular support

The home State has an obligation to ensure that a journalist detained abroad receives meaningful consular support. While the manner in which the home State satisfies this obligation will vary based on the circumstances – including the level of cooperation received from the foreign State – the existence of this obligation does not. Regardless of the position of the foreign State, the home State always has an obligation to provide meaningful consular support.

The key elements of meaningful consular support are:

- *Monitoring.* A home State must monitor the circumstances and conditions of the journalist's detention. It must also monitor the legal proceedings to which a journalist national is subject. All such monitoring must be active, timely and

consistent. It should also be open, such that the foreign State understands that the home State is closely following the journalist's detention.

- *Communication and visitation.* The consular officials of the home State must be in continuous contact with the detained journalist. Such contact should involve live, in-person visitation wherein the consular officials have an opportunity personally to witness the detainee's physical and psychological condition. The home State must also take measures to ensure that its contact with the detained journalist is confidential, such that the journalist can fully and frankly elaborate his/her circumstances of detention. If confidentiality cannot be guaranteed, the home State must formally request it from the foreign State. So long as there are no confidential communications with the journalist, the home State must proceed on the premise that the conditions of the journalist's detention are significantly worse than they appear.
- *Legal representation.* During each communication, consular officials must raise the possibility of legal representation for the journalist detainee and, if so requested, place the journalist in contact with a lawyer.
- *Medical assistance.* During each communication, consular officials must verify with the journalist detainee whether she/he requires medical assistance. If the detainee signals that such assistance is lacking, the consular officials must follow up with the foreign State and ensure that it is provided.
- *Legal proceedings.* If an international journalist is brought to trial, the trial must be actively monitored through attendance of consular officials at court hearings – thus ensuring the judge and the foreign State are aware of close international scrutiny – and securing a record of proceedings. Such records should be translated and made available to the public by consular officials, thereby supporting advocacy and accountability.
- *Notification, reporting and responsiveness to contacts.* Consular officials must immediately notify the journalist's designated contacts, including where applicable the journalist's publisher, of the journalist's detention. Consular officials must further relate material developments to these individuals, must report on each communication received from the detained journalist, and must respond to all reasonable requests for information.
- *Escalation.* Where the circumstances merit, consular officials must escalate the situation of the detained journalist to the relevant government minister. Where there exist reasonable grounds to believe the detained journalist may have been, or has been, subjected to torture or inhuman treatment, the matter must be escalated to the highest offices of the home State (i.e., the head of State). The home State will have particularly exacting obligations in such a situation and the consular officials themselves cannot be solely responsible for ensuring they are met.

- *Advocacy.* Consular officials of the home State must work to ensure that the rights of the journalist are being respected while in detention. The home State must be an active advocate for the detained journalist's rights and human freedoms. For instance, consular officials should not just monitor a detained journalist's conditions of detention, but actively advocate for better ones. They should pursue clemency appeals in death penalty cases. And where due process rights are being violated, the home State should publish the names of prosecutors and judges who violate the journalist's rights. International journalists are often detained where the foreign State seeks to avoid transparency and accountability; the active advocacy of the home State can help ensure the cost-benefit analysis of detention is reversed.
- *Repatriation request.* As a particular instantiation of the home State's advocacy obligations, the home State must seek the repatriation of the detained journalist where there are reasonable grounds to believe that his/her rights under international law will not be protected. In particular, this obligation is triggered where there are reasonable grounds to believe that the journalist was, or will be, subject to arbitrary detention, torture or inhuman treatment.
- *Reporting to international bodies.* Where the home State reasonably suspects that a journalist's rights under international law are being violated, it must report such suspected violations to the relevant international agency. The home State's request for repatriation should also be reported. In circumstances where the foreign State refuses repatriation, the home State should work actively with the relevant agency to escalate the matter and advocate on behalf of the detained journalist.

Ensuring accountability for the home State

The home State should be held accountable for its performance in protecting the rights of its journalist nationals abroad. While accountability is often (rightly) directed towards the foreign State and its treatment of the international journalist, the home State must be held accountable for its conduct as well.

At a minimum, States should have an independent mechanism of oversight to review the performance of consular officials. This independent review should be triggered upon the request of the detainee, his/her designated contacts or his/her publisher, even if the matter is still open. Moreover, independent review should take place automatically any time a journalist national returns from detention abroad.

Domestic independent review should take a broad approach in analysing the performance of consular officials, such that the review is not just individual, but systemic. For instance, the independent review should query whether the provision of consular services is being offered in a consistent and principled manner to all nationals. The independent monitor should watch carefully for any discrimination in the provision of consular assistance.

Reports completed further to a State's independent review of consular services should be made publicly available and should provide 'best practices' to highlight where such services could be improved in the future.

ENDING IMPUNITY FOR THOSE WHO THREATEN A FREE PRESS

States committed to the institution of a free press must unite against those who try to silence it. Beyond the ad-hoc measures that States must take immediately while a journalist is detained abroad, there are further mechanisms of accountability that can be employed even after the detention has ended.

The notion of an international commissioner has been discussed above. The activities of this commissioner, and any reports ultimately produced by that office, will add much-needed transparency to the detention of foreign journalists across the globe.

But there is further activity that should be undertaken on the domestic front.

- Magnitsky Acts such as those enacted by the US and Canada empower States to impose domestic sanctions on individual abusers. The key insight behind such acts is that States act through individuals; when these individuals commit human rights abuses, they should not benefit from the cover of the State. Human rights abuses committed against journalist nationals detained abroad should give rise to Magnitsky Act sanctions.
- States also need to examine the domestic legal frameworks that could prevent journalists from gaining meaningful legal redress against the foreign States that violated their rights. The greatest obstacle in this regard is often a 'State immunity act' which prevents private citizens from instituting civil proceedings against a foreign State. Such immunity acts are vestiges of an international system that traditionally gave status only to State actors. As this traditional paradigm has been eroded over the past decades – especially in the area of international human rights – State immunity acts now stand as an unprincipled basis to deny accountability to the individuals whose human rights are in fact recognised by international law.³⁹³

In terms of non-legislative measures, States should maintain lists of the news agencies around the world whose content is determined or dictated by States that suppress free reporting. The goal of these State-run news agencies is often to drown out the voices of a free press through propaganda. States that support the rights of journalists should expose these State-run news agencies and deny them the cover of legitimacy. The lists of State-run news agencies should be broadly shared, such that the general public can appreciate the difference between reporting from an independent source and reporting from State agencies.

³⁹³ Exemptions to State immunity for grave crimes should be considered. See, e.g., Bill-C632, An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture) www.parl.ca/Content/Bills/412/Private/C-632/C-632_1/C632_1.pdf.

REFUSING TO ALLOW REPORTING TO BE SILENCED

States can also guard against impunity by ensuring that the reporting of detained journalists is never silenced.

This ethos can be found in the Charter of Rights for Detained Journalists outlined above, which includes the right of a journalist to publicise his/her detention, and the obligation of the foreign State to preserve, and ultimately return, reporting materials. The policy of all States that believe in a free press should be clear: the detention of journalists cannot be used as an efficient way to silence them.

At a broad financial level, States may provide economic resources to support a free press throughout the world. Grants may be awarded to support specific projects, workshops or rights literacy organisations.³⁹⁴

Accountability can be gained in particular cases where these grants are tied to violations of the free press abroad. For instance, a home State may offer a grant to investigative reporters to continue the work of another reporter unjustly detained by a foreign State. By attaching such consequences to foreign detention, the home State ensures that detention cannot be used as a strategy to avoid negative reporting.

States can be supported in this effort by non-governmental organisations. NGOs such as Forbidden Stories, the International Consortium of Investigative Journalists, and the Organized Crime and Corruption Reporting Project provide international support and resonance for the completion of their work, and thus disincentivise the suppression of investigative reporting through arbitrary arrest or detention.

Case study: Daphne Caruana Galizia

In October 2017, journalist Daphne Caruana Galizia was assassinated, killed by a car bomb near her home in Malta.³⁹⁵ Caruana Galizia was a prominent investigative reporter, whose blog was widely read at home and abroad. A mere 15 days before her death, Caruana Galizia had reported death threats to the police.³⁹⁶

Caruana Galizia had been investigating the 'Panama Papers' scandal that exposed a network of corruption in Malta.³⁹⁷ Other journalists, including her son, Matthew Caruana Galizia, believed that this story was the motive for her assassination. Refusing to allow her voice to be silenced – and her murderers to avoid accountability to the public – a group of journalists committed to continue her work in her honour.

394 See Community of Democracies, 'Toolkit on the Safety of Journalists for the Personnel of the Diplomatic Mission', para 2.2.4.2.

395 Juliette Garside, 'Malta car bomb kills Panama Papers journalist' (*The Guardian*, 15 October 2017) www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist.

396 Juliette Garside, 'Malta car bomb kills Panama Papers journalist' (*The Guardian*, 15 October 2017) www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist.

397 Juliette Garside, 'Malta car bomb kills Panama Papers journalist' (*The Guardian*, 15 October 2017) www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist.

The Daphne Project, a coordinated effort by 45 journalists across 15 countries and led by Forbidden Stories, picked up the investigative work that had resulted in Caruana Galizia's assassination.³⁹⁸

The example of Daphne Caruana Galizia is a fine, though tragic, example of how well the model of accountability-through-journalism can work. The continuation of her investigative work by the Daphne Project established by her family not only honours her memory and her important work, but also shows that journalists will not be silenced in death.

398 Juliette Garside interviewed by Sophie Zeldin-O'Neill, 'Exposing Malta's dark side: "Daphne's story is far from over"' (*The Guardian*, 8 February 2020) www.theguardian.com/membership/2020/feb/08/malta-daphne-caruana-galizia-murder-journalist-investigation.

VI. Conclusion

Journalists are crucial to the health of democracy and the advancement of human rights. Powers that are hostile to free speech, democracy and human rights try to advance their agenda by threatening or arresting journalists. Accordingly, States that value democracy and human rights must take what measures they can to protect journalists wherever they may be in danger.

The existing international framework for providing consular assistance to journalists abroad provides significant opportunities for States to protect journalists abroad whose human rights are in jeopardy. However, these rights and obligations must be better used and enforced in order to act as an effective bulwark against attacks on the free press. Consular staff must be better trained, prepared and equipped. The existing international framework would also benefit from a Charter of Journalists' Rights to clarify and reinforce States' obligations to safeguard journalists' human rights.

While silence breeds impunity, transparency breeds accountability. If the international community is to favour accountability over impunity for human rights violators, and to favour transparency over the cover of silence, then it must do more to protect – and openly signal its support for – the journalists on the front lines and online. Now more than ever, we need a sincere global commitment to protect journalists so that they can carry out their important work without the threat of harassment, intimidation, false imprisonment, torture or death.

Report on the Use of Targeted Sanctions to Protect Journalists

13 FEBRUARY 2020

Authored by Amal Clooney, barrister and Deputy Chair the High Level Panel of Legal Experts on Media Freedom, the report has been endorsed by the High Level Panel, the **International Bar Association's Human Rights Institute**, the Committee to Protect Journalists, Human Rights First, PEN America, Reporters without Borders and the UN Special Rapporteur on Freedom of Expression, David Kaye. The report examines current challenges faced by journalists around the world and recommends the consistent use of targeted sanctions as a tool to enforce compliance with international human rights law, including the right to a free press. The report contains an in-depth analysis of the existing systems for targeted sanctions in the United States, the United Kingdom, Canada and the European Union and concludes with 11 recommendations for designing and implementing global human rights sanctions regimes to better protect journalists around the world.

A copy of the report is available at:

www.ibanet.org/Media-Freedom-Sanctions-report-launch-2020.aspx

Report on Providing Safe Refuge to Journalists at Risk

23 NOVEMBER 2020

Authored by Professor Can Yeğinsu, barrister and member of the High Level Panel of Legal Experts on Media Freedom, the report has been endorsed by the High Level Panel, the **International Bar Association's Human Rights Institute**, ARTICLE 19, Reporters without Borders and a host of other international organisations. By reference to real life case studies, the report examines in detail the circumstances which make relocation necessary for journalists at risk today, finding that the pathways to safety open to them are too few in number and those that do exist are too slow, burdensome and difficult to navigate to be capable of providing practical and effective recourse.

The report recommends to members of the Media Freedom Coalition and partner States committed to the protection and promotion of media freedom: (i) the introduction of a new emergency visa for journalists at risk; and (ii) the implementation of a number of essential adjustments to the existing framework for safe relocation.

A copy of the report is available at:

www.ibanet.org/HRI-Secretariat/Reports.aspx#enforcement

Advice on Promoting More Effective Investigations into Abuses against Journalists

25 NOVEMBER 2020

Authored by Nadim Houry, Executive Director of the Arab Reform Initiative, human rights lawyer and member of the High Level Panel of Legal Experts on Media Freedom, the report has been endorsed by the High Level Panel, the **International Bar Association's Human Rights Institute**, Reporters without Borders and the UN Special Rapporteur on Freedom of Expression, David Kaye (2014-2020). The report examines the increasing and varied nature of attacks against journalists and the persistent, rampant impunity. The report reviews the existing efforts to promote effective investigations and assesses the constraints of the present system. The report concludes with three major recommendations to the signatories to the **Global Pledge on Media Freedom** and other key governments to strengthen investigations into attacks on journalists, address the issue of impunity and progress towards accountability.

A copy of the report is available at:

www.ibanet.org/HRI-Secretariat/Reports.aspx#enforcement



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