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Wrongful detention of Australian citizens overseas

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Arbitrary Detention: Ideas for Action

Policy Recommendations

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1. Prioritize Resolving Ongoing Cases of Arbitrary Detention

- The immediate liberation of the detainee(s) should be the top priority. The available data on arbitrary detention cases does not support the common assumption that resolving cases encourages more arbitrary detention. Prevention is best achieved through swift resolutions of cases balanced with normative suasion and robust deterrence by denial and punishment.
- Call for detainees' release and propose negotiation at every opportunity, including in meetings of leaders and ministers, and in meetings on human rights, economic, trade and security issues.
- In all areas of the detaining state's relationship with Australia, condition any progress on things it wants on the freeing of any arbitrarily detained foreign nationals.
- Comprehensively assist detainees and their families, loved ones and dependents. Provide families with clear contact points in the Australian government. Treat families like part of a team with a common goal.
- Formally assert and insist on detainees' rights as Australian citizens to consular access and protection. In cases of dual nationals, insist that under international law it is not up to the detaining state to legally circumscribe that nationality.
- Combat victim-blaming. Refute false allegations against detainees and delegitimize attempts by detaining states to obfuscate hostage situations behind trumped-up charges and politicized legal procedures. Proactively engage Australian strategic communication and media relations specialists with coordinated messaging to define the public narrative about the case.
- Until release is achieved through negotiation, apply persistent pressure and diplomacy to improve detainee conditions. Ensure detainees receive sufficient legal advice, mental health assessments and psychological guidance, relevant reading material, means of communicating with the outside world (such as writing and receiving letters), and funds to buy necessities.
- Assist detainees and their advocates with submissions to the UN Working Group on Arbitrary Detention if they wish.
- Subsequent to the detainee's release, support should include compensation for costs incurred, suffering endured, time and income lost, physical and mental health care, a detailed briefing on what happened and the government's response, recognition and remembrance of the ordeal, protection and privacy from the media, assistance in connecting with supportive civil society organizations, and guidance and support in seeking legal assistance, justice and accountability. Formally invalidate any criminal charges or forced confessions imposed on the detainee.

2. Build Institutional Capacity to Designate and Resolve Cases

- Formally recognize the use of arbitrary detention in state-to-state relations as a hybrid security threat, a form of political coercion and a violation of national sovereignty and norms of international relations.
- Build the institutional capacity to respond strategically, comprehensively and firmly to cases of arbitrary detention. Prepare to protect. Establish an Australian office with expertise and coordination capacity similar to the US State Department's Special Presidential Envoy for Hostage Affairs. The lead official and supporting office should have communication channels with government offices specialized in national security, law enforcement, hostage negotiation and recovery, consular affairs, and human rights.
- Consider legislation similar to the US *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* that would formally establish Australian government roles and responsibilities on arbitrary detention.
- Define formal, standard Australian criteria for Australia to determine if a case constitutes arbitrary or wrongful detention or state hostage-taking, and establish common Australian standards and best practices for managing and resolving cases, including providing consular support to detainees both during and after detention, and assisting and working strategically with their families.
- Develop an Australian database and repository of knowledge on cases of arbitrary detention and lessons learned, and an Australian playbook on resolving cases.
- Develop concise Australian briefing material on arbitrary detention for politicians and public figures such as ministers, MPs, and senior government officials. This would emphasize the important role such decision-makers can play in resolving cases through policymaking, persuasion, pressure, and negotiation.
- Codify consular access and protection as a legal right of all Australian citizens.
- Coordinate closely and share information and expertise with likeminded states such as the EU member states, Canada, Japan and the United States. Organize firm common responses to incidents. This will require commitment mechanisms that move in the direction of NATO's Article 5 (an attack on one is treated as an attack on all) to surmount collective action dilemmas.
- Support civil society organizations such as Hostage International, Hostage Aid Worldwide, Redress, the Foley Foundation, Safeguard Defenders, and the Australian Arbitrary and Wrongful Detention Alliance (AWADA) that work to free detainees and assist families. Consult civil society experts when formulating policies. Support relevant specialized training for psychologists and maintain a database of qualified practitioners.

3. Strengthen Instruments of Legal and Normative Suasion

Develop and strengthen legal and normative instruments of suasion to manage collective action dilemmas, influence state behaviour and make it clear that taking hostages isn't worth the reputational cost. This is an opportunity for Australia to enhance its role as a normative and regulatory power, a bastion of human rights and a force for good.

- Publicly call out incidents of arbitrary detention, including in periodic Australian and United Nations human rights reporting.
- *Declaration Against Arbitrary Detention*: Encourage more governments to sign. Implement the Partnership Action Plan and urge others to do the same. In communicating about the declaration, Go beyond the low ambition of raising awareness and focus on communicating to change state behaviour.
- *Vienna Convention on Consular Relations*: Invoke this and applicable bilateral consular agreements and define and employ punitive measures for violations. This could include mechanisms for calling out and formally reporting violations to Australia and UN. Australian representatives and UN officials should call out violations of relevant conventions.
- *UN Working Group on Arbitrary Detention*: Seek advice from working group experts in formulating policy. The WG has a backlog of cases; consider providing it with more resources to review and rule on cases in a timelier manner. Assist in publicizing rulings.
- *UN Convention Against Torture and Istanbul Protocol*: Assess in each case whether the severe suffering inflicted by the detaining state to exercise diplomatic leverage may constitute torture, and if so, employ applicable measures under the convention. Review and publish Australian policies on protecting citizens abroad from torture and mistreatment, consistent with their international legal obligations.
- *International Convention against the Taking of Hostages*: Persistently invoke the convention and its provisions and obligations in cases of arbitrary detention for international political purposes. Article 16 (1) asserts that in disputes between states parties over whether a case constitutes hostage-taking, they should negotiate, and if they are unable to agree, the parties can request arbitration or refer the case to the International Court of Justice. Call on states (such as China) that have formally declared themselves not bound by this article to retract their reservation. If they refuse, insist that they publicly justify their refusal.
- *International Covenant on Civil and Political Rights*: The covenant asserts "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." Report and call out violations by states parties, and call on all states to ratify the covenant.

4. Prepare and Sharpen Tools to Deny, Deter and Punish

Conduct a review across the full spectrum of instruments of Australian power, including Diplomatic, Information, Military, Economic, Financial, Intelligence, and Law enforcement (DIMEFIL). Prepare a toolkit of potential measures that could be used to deny, deter and punish arbitrary detention. Some ideas follow.

Travel Advisories

- Deny states the opportunity to arbitrarily detain citizens through travel advisories that warn against travel to states where there is a significant risk of arbitrary detention. Travel advisories also serve as a mild form of sanctioning by stigmatizing and denying tourism revenue to states that engage in arbitrary detention. Advisories should also reflect the degree of risk of torture to detainees and prisoners.
- Extensively publicize warnings through media advisories and outreach to travel agencies, airlines, political risk consultancies and related businesses. Airlines could be required to display a warning to citizens purchasing tickets to countries where detention is a risk.
- Australia could warn citizens to leave a country if there is a risk of a major dispute arising.

Travel Bans

- In exceptional cases, Australia could make it extremely inconvenient for their citizens to visit countries with severe risk of arbitrary detention. US policies on Cuba and Russia may offer a model.

Financial Restrictions and Economic Leverage

- Financial restrictions like those employed by the US Treasury could be imposed, blocking the transfer of euros and dollars to perpetrator countries and their financial institutions, restricting the use of credit cards and access to Western bank accounts through ATMs or money transfers.
- Economic leverage can be applied through WTO-compliant measures such as freezing any ongoing trade negotiations, delaying decisions on investments, and discouraging companies from doing business with the offending country.

Sanctions

- Impose Magnitsky-type sanctions on individuals and organizations that engage in arbitrary detention. Penalties could include restricting travel (visa bans) and freezing or seizing overseas assets. Sanctions are important not only to induce behaviour change but also to pursue justice for victims. Removal could be conditioned on releasing all wrongfully detained persons, signing the declaration on arbitrary detention and retracting exclusion from article 16 of the hostage convention.
- Such sanctions should target not only lower-level officers doing the detaining, but also senior decision-makers who ordered it, including those responsible for interrogations, torture and human rights abuses, illegitimate legal proceedings, and using detainees as

bargaining chips. They should target the spokespeople and propaganda workers who disseminate false information about detentions.

- Coordinated sanctions should be imposed together with like-minded governments. They would ideally be implemented multilaterally as part of the 'Partnership Action Plan' of the Declaration Against Arbitrary Detention with a long-term goal of following the model of a NATO Article 5 for hostage-taking.
- When granting visas to nationals of the offending country, include an informational leaflet about any ongoing cases that urges citizens to call on their government to release the wrongfully detained. Granting of visas could be conditioned on proof that travelers have written to their government calling on it to release political detainees and cease specific human rights abuses.
- In extreme cases, consider further stages of sanctions through extending visa bans and other restrictions to all members and staff of the offending political or governmental organization and their families, as well as celebrities, influencers and athletes from the offending country. This would have the effect of raising the cost of hostage-taking and sensitizing elites to the fact that their country is engaged in unacceptable activities.

Include Arbitrary Detention Measures in Broader Efforts to Combat Coercion

- Recognize arbitrary detention as an asymmetric form of coercion and include measures to deal with it in efforts and toolkits to combat economic coercion. Whether a state is weaponizing economic interdependence, threatening companies, or kidnapping citizens, its behaviour should be met with public moral opprobrium and concrete measures that are swift and harsh enough to change its cost-benefit calculus.

Enable Private Litigation

- Explore legal changes that would waive foreign sovereign immunity in cases of wrongful detention, enabling private citizens to sue foreign government entities for engaging in hostage-taking and human rights abuses. For example, the US Foreign Sovereign Immunities Act of 1976 (FSIA) has an exception (§ 1605A of NDAA of 2008) that enables citizens to bring suit against a foreign state for acts including hostage-taking by an official, employee, or agent of the state if acting in the scope of their office—but currently it is limited to states that have been designated as sponsors of terrorism.