Submission to the Senate Foreign Affairs, Defence and Trade References Committee to the Inquiry into the Wrongful Detention of Australian Citizens Overseas

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EXECUTIVE SUMMARY:
Wrongfully detaining civilians has long been a key tool in the arsenal of nonstate actors. But in recent years, this practice has become almost normalized as a form of 'diplomacy' employed by authoritarian regimes like Russia, China, and Iran, as well as by terrorist groups like Al Qaeda and Hamas. Australians continue to be seized abroad in this manner. They continue to be abused, tortured, and murdered by their captors. The persistence of this phenomenon combined with limited domestic action taken so far by many rights-respecting states, demonstrates that Australia must take further action to prevent and combat wrongful detentions by foreign state and nonstate actors. In February 2021, Australia joined the Canada-led Declaration Against Arbitrary Detention in State-to-State Relations. That was a commendable first step, and now this commitment should be translated into substantive reforms. Australia should follow Canada's lead. In September 2023, Canadian MP Melissa Lantsman introduced Bill C-353, the *Foreign Hostage Takers Accountability Act*, which recently passed second reading in Canada's House of Commons. Bill C-353 would provide a legislative toolkit for policy-makers to protect Canadians abroad, by establishing a dedicated sanctions mechanism, mandating consistent and reliable support for family members, and enabling greater international cooperation in recovery efforts. The provisions contained in Bill C-353 can and should be adapted to the Australian context to address current gaps.

1. Relevant International and Domestic Laws; Definitions

The practice of taking innocent civilians as hostages is primeval. However, with the advent of international human rights law and the recognition that everyone has the right to life, liberty, and security of person, the international community collectively decided to prohibit and punish hostage-taking. The *International Convention Against the Taking of Hostages* (the "*Hostages Convention*") was adopted in 1979, and Australia ratified the *Hostages Convention* in 1990. It is now universally recognized that hostage-taking is an offence of grave concern to the international community. To ensure compliance with the *Hostages Convention*, Australia passed the *Crimes (Hostages) Act* in 1989, which established hostage-taking as a domestic criminal violation, with hostage-takers liable to prosecution and imprisonment upon conviction. It appears that nothing further was done to combat hostage-taking specifically but in 2021, Australia joined the Canada-led *Declaration Against Arbitrary Detention in State-to-State Relations*. While an important step, the *Declaration Against*

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Arbitrary Detention in State-to-State Relations is declarative and does not encompass any substantive legal or policy reform.

There are at present several terms that in common parlance are often used interchangeably: hostage-taking, hostage diplomacy, arbitrary detention, arbitrary detention in state-to-state relations, illegal detention, and wrongful detention, to name a few. Some of these terms have clear definitions that are contained in various instruments.

For instance, "hostage-taking" is defined in article 1 (1) of the *Hostages Convention* as:

> "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage".[2]

Article 1 (2) of the *Hostages Convention* further provides that:

> "Any person who:
> (a) attempts to commit an act of hostage-taking, or
> (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking
> likewise commits an offence for the purposes of this Convention".

Australia's *Crimes (Hostages) Act* mirrors this definition. Section 7 states that "a person commits an act of hostage-taking if the person:

> (a) seizes or detains another person (in this section called *the hostage*); and
> (b) threatens to kill, to injure, or to continue to detain, the hostage;
> with the intention of compelling:
> (c) a legislative, executive or judicial institution in Australia or in a foreign country;
> (d) an international intergovernmental organisation; or
> (e) any other person (whether an individual or a body corporate) or group of persons;
> to do, or abstain from doing, any act as an explicit or implicit condition for the release of the hostage."[3]

The term "arbitrary detention" is contained in the *International Covenant on Civil and Political Rights* ("*ICCPR*"). Article 9 of the *ICCPR* defines the right to liberty and security of person, and outlines conditions that render a detention arbitrary, such as when the grounds for arrest were not legal, the detainee's procedural rights were not respected, the detainee was not given reasons for their arrest, and/or the detainee was not brought before a judge in a reasonable time frame.[4]

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[2] *International Convention Against the Taking of Hostages*, https://treaties.un.org/doc/Treaties/1979/12/19791218%2003-20%20PM/Ch_XVIII_5p.pdf.

[3] *Crimes (Hostages) Act 1989,* https://sherloc.unodc.org/cld/uploads/res/document/aus/crimes-hostages-act-1989_html/Crimes_Hostages_Act_1989.pdf. Attempts to commit acts of hostage-taking and conspiracies to commit acts of hostage-taking are prohibited as well, pursuant to section 3 (1) of the *Crimes (Hostages) Act* which refers to sections 11.1 and 11.5 of the *Criminal Code*, dealing with attempts and conspiracies, respectively. See: https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-24-extensions-criminal-liability/division-11.

[4] *International Covenant on Civil and Political Rights,* https://www.ohchr.org/sites/default/files/ccpr.pdf.

The U.N. Working Group on Arbitrary Detention (WGAD) has adopted criteria to assist in determining whether a detention is arbitrary. Specifically, a detention is arbitrary if it fits one of five categories:

> "**Category I:** When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of their sentence or despite an amnesty law applicable to them);
> **Category II:** When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights [*UDHR*] and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of [*ICCPR*];
> **Category III:** When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the *UDHR* and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.
> **Category IV:** When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; and
> **Category V:** When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights."[5]

"Arbitrary detention in state-to-state relations" is defined in the *Declaration Against Arbitrary Detention in State-to-State Relations* as occurring when a person arbitrarily arrests or detains the individual "to compel action from, or exercise leverage over, a foreign government".[6]

The remaining terms do not appear to have clear definitions, and in fact, many of these phrases and terms appear to be used interchangeably. The term "hostage diplomacy" appears to be almost always used synonymously with "arbitrary detention in state-to-state relations".[7] "Wrongful detention" and/or "unlawful detention" are sometimes used alongside "hostage-taking". Although the United States' *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act* – which like Canada's Bill C-353 enables the imposition of sanctions on perpetrators and consistent and reliable communication with family members of those detained – emphasizes "hostage-taking" right in its title, it uses the terms "unlawful detention" and "wrongful detention" throughout the text of the instrument.[8] The wide variety of terminology, much of which is not clearly or at least consistently defined, muddies the waters of this issue. Nevertheless, there are useful criteria and definitions to pull from all the above instruments, including the criteria employed to determine whether a detention is unlawful or wrongful under the U.S. *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act*. Under that instrument, officials can look a variety of criteria to determine if a detention is unlawful or wrongful, and these criteria "may include whether–

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[5] "About arbitrary detention," *United Nations Office of the High Commissioner for Human Rights,* https://www.ohchr.org/en/about-arbitrary-detention.
[6] *Declaration Against Arbitrary Detention in State-to-State Relations,* https://www.international.gc.ca/news-nouvelles/arbitrary_detention-detention_arbitraire-declaration.aspx?lang=eng.
[7] See for example: https://www.wilsoncenter.org/event/hostage-diplomacy-international-security-threat-strengthening-our-collective-action.
[8] *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act,* https://www.congress.gov/bill/116th-congress/senate-bill/712/text.

(1) United States officials receive or possess credible information indicating innocence of the detained individual;
(2) the individual is being detained solely or substantially because he or she is a United States national;
(3) the individual is being detained solely or substantially to influence United States Government policy or to secure economic or political concessions from the United States Government;
(4) the detention appears to be because the individual sought to obtain, exercise, defend, or promote freedom of the press, freedom of religion, or the right to peacefully assemble;
(5) the individual is being detained in violation of the laws of the detaining country;
(6) independent nongovernmental organizations or journalists have raised legitimate questions about the innocence of the detained individual;
(7) the United States mission in the country where the individual is being detained has received credible reports that the detention is a pretext for an illegitimate purpose;
(8) the individual is detained in a country where the Department of State has determined in its annual human rights reports that the judicial system is not independent or impartial, is susceptible to corruption, or is incapable of rendering just verdicts;
(9) the individual is being detained in inhumane conditions;
(10) due process of law has been sufficiently impaired so as to render the detention arbitrary;…
(11) United States diplomatic engagement is likely necessary to secure the release of the detained individual."[9]

2. Problems in Governmental Response and Bill C-353

Across many of the world's democracies, governmental response to cases of wrongful detention is often muted. Negotiations may happen, but the public is not privy to it; families are not receiving consistent support[10]; and existing pressure levers like targeted sanctions are seldom utilized. For instance, as part of a review of existing targeted sanctions regimes across the U.S., Canada, the U.K., and the E.U., and their use to combat wrongful detentions of journalists, U.K. Barrister Amal Clooney noted that there is an "apparent reticence among some policy-makers to use sanctions in response to cases of arbitrary detention or against judicial officers for such detention or unfair trials".[11]

In response to these gaps, Canadian MP Melissa Lantsman introduced Bill C-353 in September 2023; it passed second reading in June 2024 and is expected to be studied by the House of Commons Standing Committee on Foreign Affairs and International Development when Parliament resumes.[12] Bill C-353 – the *Foreign Hostage Takers Accountability Act* – has three parts, the provisions of which would all likewise be valuable for Australia.

The first part would implement a dedicated sanctions mechanism to respond to hostage-taking and arbitrary detention in state-to-state relations. Specifically, this part provides that sanctions may be implemented against foreign nationals, foreign states, or foreign entities responsible for, or

[9] *Ibid* at s. 2.
[10] For instance, a Toronto Star investigation from 2016 exposed the inconsistent and inadequate nature of the Canadian government's communications with the families of hostages. This appears to be a common problem across multiple jurisdictions.
[11] Amal Clooney, "Report on the Use of Targeted Sanctions to Protect Journalists," *International Bar Association Human Rights Institute*, 13 February 2020, https://mediafreedomcoalition.org/wp-content/uploads/2023/04/Report-on-the-Use-of-Targeted-Sanctions-to-Protect-Journalists.pdf, para 134.
[12] See: https://www.ourcommons.ca/committees/en/FAAE/StudyActivity?studyActivityId=12817874.

complicit in, the hostage taking or the arbitrary detention in state-to-state relations of a Canadian national or eligible protected person outside Canada.[13] Sanctions may also be implemented against foreign nationals, foreign states, or foreign entities that have materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, the hostage taking or the arbitrary detention in state-to-state relations of a Canadian national or eligible protected person outside Canada. By removing ambiguity and clearly directing that sanctions may be implemented on perpetrators of hostage-taking and arbitrary detention in state-to-state relations, this gives government clear power and direction to immediately deploy sanctions in response to the commission of these crimes.

The second part would ensure that the families of Canadian hostages and those arbitrarily detained in state-to-state relations are consistently and reliably supported by mandating that the Minister of Foreign Affairs "provide [them with] timely information and assistance" including advice, guidance, and appropriate supports and services including psychological support services.

Lastly, the third part would provide the government of Canada with more tools to help secure the release of hostages and those arbitrarily detained in state-to-state relations by enabling the provision of monetary rewards and/or refugee protection to foreign nationals who provide information leading to the release and repatriation of a Canadian held hostage or arbitrarily detained in state-to-state relations abroad. Specifically, pursuant to section 21 (2), if an individual provides critical information leading to the release and repatriation of a hostage or detained individual, the government may pay a monetary reward to the individual who provides that information, in an amount and manner determined by the Minister, and/or recommend that the individual and their family members be granted permanent resident status. These discretionary tools may serve not only to incentivize cooperation, but also to protect those that help in a recovery effort by bringing them to safety in Canada.

3. Recommendations

Article 4 of the *Hostages Convention* requires states parties to take "administrative and other measures as appropriate to prevent the commission of those offences". This is in keeping with "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)".[14]

Other international instruments make clear that more needs to be done as well. The *International Convention for the Suppression of the Financing of Terrorism* requires states parties, including Australia, to "cooperate in the prevention of [hostage-taking offences] by taking all practicable

[13] "Hostage-taking" in Bill C-353 is defined with reference to section 279.1 (1) of the Canadian *Criminal Code,* which in turn uses the definition found in the *Hostages Convention*. "Arbitrary detention in state-to-state relations" is defined with reference to the *Declaration Against Arbitrary Detention in State-to-State Relations*. "Eligible protected persons" are defined in Bill C-353 as individuals within the meaning of subsection 95 (2) of Canada's *Immigration and Refugee Protection Act (IRPA)* – meaning, persons on whom refugee protection is conferred – and who have not been determined to be inadmissible under *IRPA* on security grounds, on grounds of violating human or international rights or on grounds of serious criminality, criminality or organized criminality. For further details, see: https://www.parl.ca/DocumentViewer/en/44-1/bill/C-353/first-reading.

[14] Irwin Cotler, "A Pressing Concern: Protecting and Promoting Press Freedom by Strengthening Consular Support to Journalists at Risk," *International Bar Association*,16 November 2020, page 65.

measures".[15] U.N. General Assembly resolution 68/276, which passed by consensus, called on states to "secure the safe release of hostages" by means other than ransom payments or political concessions.[16] U.N. Security Council Resolution 2133 likewise expressed "its determination to prevent … hostage-taking … and to secure the safe release of hostages without ransom payments or political concessions".[17] This Resolution also recognized "the need to further strengthen efforts to support victims", and "call[ed] upon all Member States to cooperate closely" during incidents of hostage-taking.[18]

These international instruments, alongside the most recent *Declaration Against Arbitrary Detention in State-to-State Relations,* exhibit what appears to be a general consensus that states need to take further action on this issue.

Australia's responses to cases of wrongful detention appear marred by many of the same issues faced in Canada: existing tools such as targeted sanctions are seldom imposed; families are too often left without sufficient support or services; and there are limited options for governmental action.

To address some of these issues, and with reference to lessons learned from other jurisdictions:

i) Australia should specify that targeted sanctions will be implemented on those responsible for, or complicit in, the wrongful detention of Australian nationals or eligible protected persons abroad (using the same definition of "eligible protected persons" as in Canada's Bill C-353);

ii) Australia should ensure that the families of Australians wrongfully detained abroad receive consistent and reliable communication, support, and services including psychological support services;

iii) Australia should enable at the relevant Minister's discretion the provision of monetary rewards and/or refugee protection to foreign nationals who provide information leading to the release and repatriation of an Australian wrongfully detained abroad;

iv) in all of the above, Australia should consider which term(s) should be used as between "hostage-taking", "arbitrary detention in state-to-state relations", "arbitrary detention", "wrongful detention", "unlawful detention", and/or "hostage diplomacy", and define whichever terms are used clearly and in a manner that is consistent with existing international instruments; and

v) with reference to determining whether an Australian is detained wrongfully or illegally abroad, Australia should consider utilizing some or all of the criteria outlined in the U.S. *Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act*.

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[15] *International Convention for the Suppression of the Financing of Terrorism*, https://www.un.org/law/cod/finterr.htm, article 18.
[16] *United Nations General Assembly resolution 68/276*, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_276.pdf, para 28.
[17] *United Nations Security Council Resolution 2133*, https://press.un.org/en/2014/sc11262.doc.htm.
[18] *Ibid*.