

**ANNEX I: THE LEGAL
METHODS &
JURISPRUDENCE OF
THE UNITED NATIONS
WORKING GROUP ON
ARBITRARY DETENTION
(2020)**

RELEASED OCTOBER 2021

**CENTER FOR HUMAN RIGHTS &
HUMANITARIAN LAW**

AMERICAN  UNIVERSITY
WASHINGTON
COLLEGE OF LAW

Annex I: The Legal Methods & Jurisprudence of the United Nations Working Group on Arbitrary Detention (2020)

Year 2019 Snapshot: Opinions and Cases

The United Nations Working Group on Arbitrary Detention (Working Group) released 85 opinions that were adopted during its 84th, 85th, and 86th sessions related to 171 individuals in detention in 42 countries.¹ Under its urgent action procedure, it transmitted 61 urgent appeals to 31 Governments and, in one case, to other actors.² It also transmitted 80 letters of allegations and other letters to 43 Governments concerning at least 377 individuals.³ The Working Group found that the detentions of the individuals at issue were arbitrary in all of the 83 opinions it issued under its regular procedure (i.e., 100% of the time).⁴ Three communications did not result in an opinion: one that had pertained to a request for review and two communications that had been “filed,” meaning the Working Group did not reach a determination in these three instances.⁵ In the first filed case, the Working Group was unable to reach a conclusion based on the information received by the source and government concerned.⁶ In the second filed case, the Working Group found that the factual circumstances and information provided for Minors A, B, and C were sufficient to determine that their detention was arbitrary under Category I.⁷ However, the Working Group considered it possible that the arrest of Minor D could have been legitimate under the exception of arrest in flagrante delicto.⁸ Further, it found the government’s reply credible with respect to its assertion that Minor D had a guardian present at the time of interrogation, whereas the assertions for Minors A, B, and C did not.⁹ Based on these differences, the Working Group filed the case with respect to Minor D, making no determination as to whether the detention was arbitrary.¹⁰

¹ Report of the Working Group on Arbitrary Detention, A/HRC/45/16 (24 July 2020), available at: <https://undocs.org/en/A/HRC/45/16>.

² *Id.* at p. 1 summary.

³ *Id.*

⁴ The Working Group refers to the situations of fact submitted to it for consideration as “cases” whereas its written determinations of whether a deprivation of liberty is arbitrary are referred to as “opinions.” Accordingly, this annex utilizes both terms when referring to the Working Group’s jurisprudence.

⁵ See Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 60/2019 (Belarus) (filed for one minor of the four named in the petition), Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2019 (France) (insufficient information to reach a determination), and Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 27/2019 (Cameroon) (requesting that the Working Group revise opinion No. 40/2017).

⁶ See Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2019 (France), ¶ 49.

⁷ Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 60/2019 (Belarus), ¶ 133.

⁸ *Id.* at ¶ 119.

⁹ *Id.* at ¶¶ 110-118.

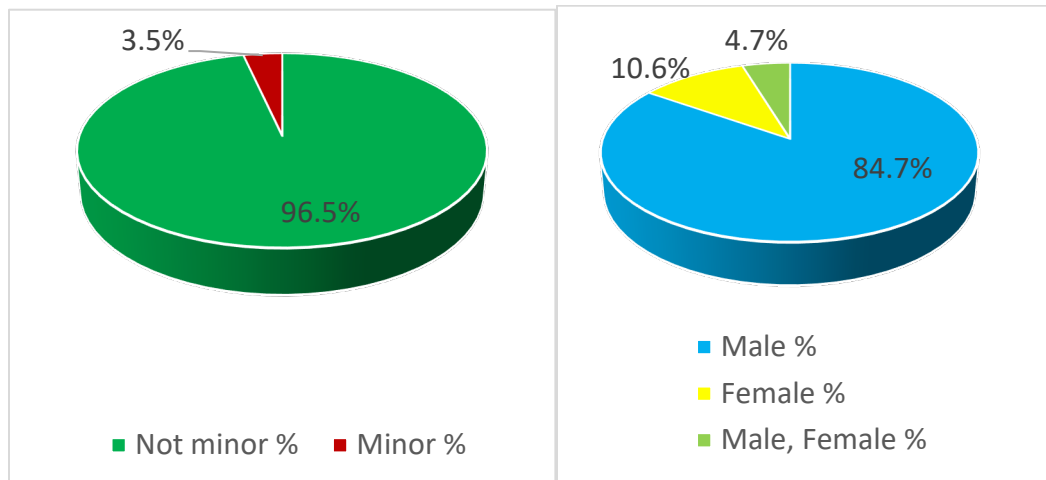
¹⁰ *Id.* at ¶ 133.

The Working Group referred 74 of 83 cases under its regular procedure to other Special Procedure mandate holders or Working Groups (i.e., 89.15% of the time).¹¹ The Government replied to the Working Group’s request for information in 47 opinions (55.3%). It did not reply in 37 opinions (43.5%), and in an opinion pertaining to two States, one State replied, and one did not.¹²

Opinions in which the State at issue replied to the Working Group’s request for information

GOVERNMENT REPLY	Yes	No	No and yes
2019 GOVERNMENT REPLY	47	37	1
2019 GOVERNMENT REPLY (%)	55.3%	43.5%	1.2%
CASE NUMBERS	1, 2, 6, 7, 8, 10, 12, 13, 14, 20, 22, 23, 24, 26, 27, 28, 33, 35, 39, 40, 44, 45, 46, 47, 49, 50, 52, 53, 54, 56, 57, 58, 59, 60, 63, 64, 69, 71, 72, 73, 74, 75, 79, 80, 81, 82, 83	3, 4, 5, 9, 11, 15, 16, 17, 18, 19, 21, 25, 29, 30, 31, 32, 34, 36, 37, 38, 41, 42, 43, 48, 51, 55, 61, 62, 65, 66, 67, 68, 70, 76, 78, 84, 85	77

Gender breakdown and age of subjects within the Working Group’s 2019 opinions



¹¹ The following opinions were not referred by the Working Group: 13/2019, 27/2019, 38/2019, 48/2019, 49/2019, 50/2019, 58/2019, 75/2019, and 79/2019.

¹² See, chart on page 3 for reference to case numbers.

The charts below reflect what categories were identified by the Working Group in the 2019 cases it considered, i.e., in what manner the arbitrary deprivation of liberty occurred. In most cases, the Working Group determined there were violations of more than one category. As in other years, very few cases pertained to Category IV, which relates to the prolonged administrative detention of asylum seekers, refugees, and immigrants without judicial review or remedy.¹³ This may be an indication that this category is not well understood or is underutilized by individuals in these communities given the preponderance of mandatory, long-term administrative immigration detention throughout the world.¹⁴ Overall, the data from 2019 is largely analogous to the data collected in 2018, showing a similar percentage of cases in each category relative to the number of opinions issued. Charts showing comparisons between the data collected from 2015, 2016, 2017, 2018, and 2019 are on pages 14-17 of this annex.

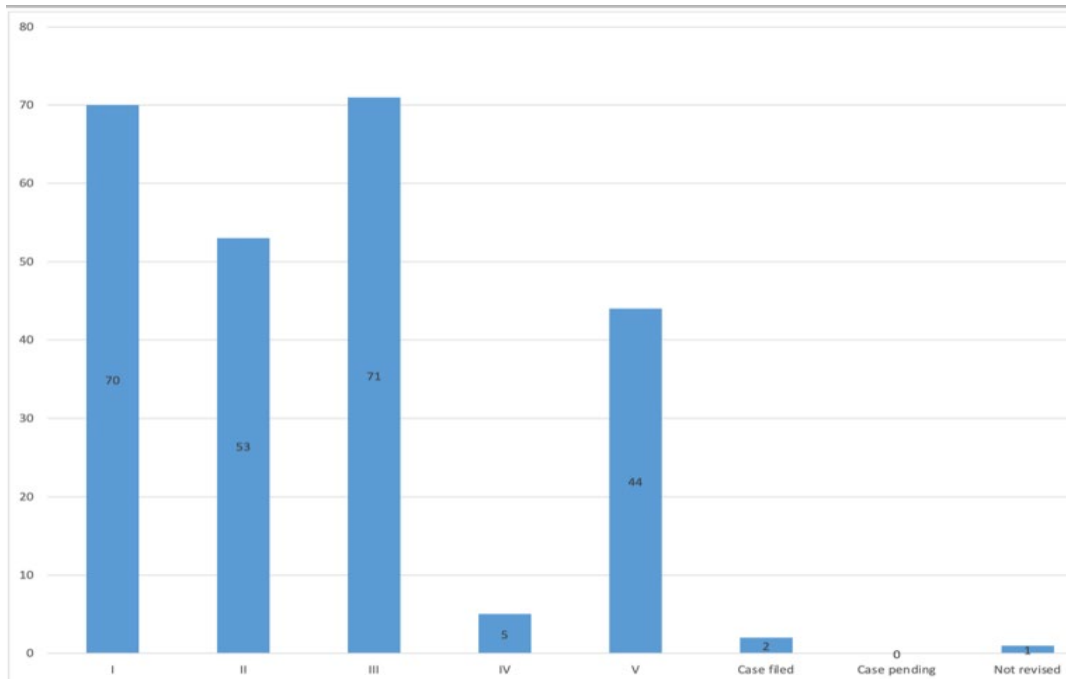
Categories identified in each opinion represented by incidence and percentage

CATEGORIES	I	II	III	IV	V	Case filed	Case pending	Not revised	
2019 CATEGORIES	70	53	71	5	44	2	0	1	
2019 CATEGORIES (%)	28.5%	21.5%	28.9%	2.0%	17.9%	0.8%	0.0%	0.4%	
CASE NUMBERS	3, 4, 5, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78, 80, 81, 82, 83, 84, 85	1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 15, 16, 17, 19, 20, 21, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84	3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 53, 55, 56, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85	1, 2, 7, 54, 74		1, 2, 5, 6, 9, 10, 11, 12, 14, 15, 17, 20, 23, 26, 29, 32, 34, 35, 40, 41, 42, 43, 44, 45, 48, 51, 53, 56, 59, 64, 65, 66, 67, 68, 70, 71, 73, 74, 75, 76, 79, 80, 83, 84	50, 60	-	27

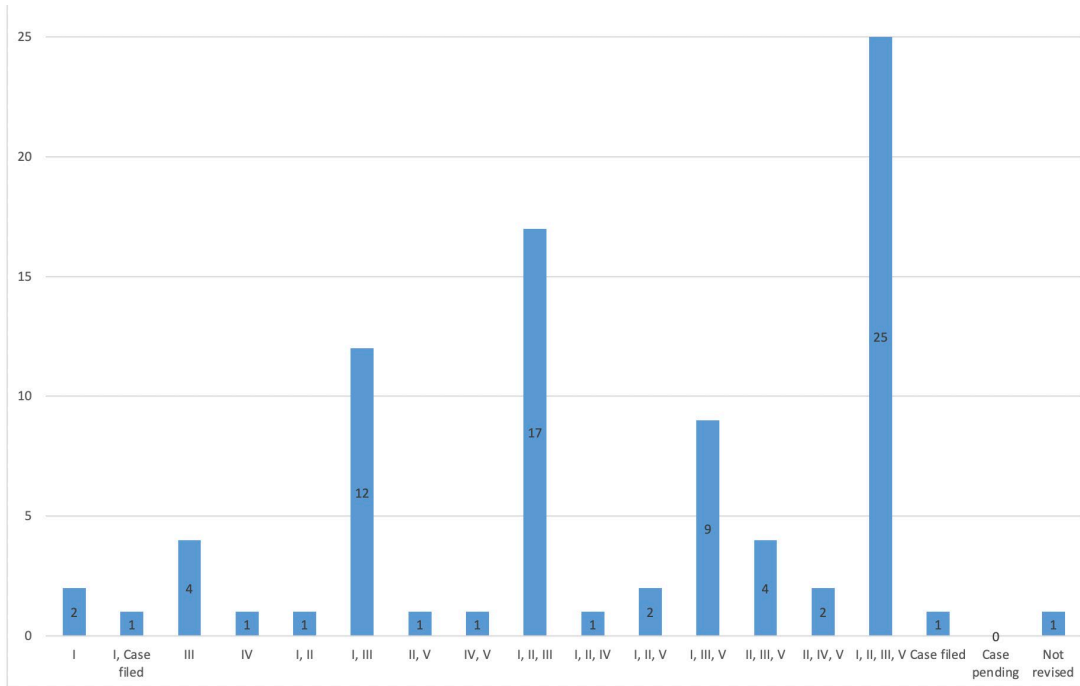
¹³ See, Working Group on Arbitrary Detention, Revised Fact Sheet No. 26 (8 February 2019), available at: <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf> (defining Category IV as “when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy”).

¹⁴ See opinions 1/2019, 2/2019, 7/2019, 54/2019, and 74/2019.

Instance of each category identified in the 2019 opinions



Instances of multiple categories identified in the 2019 opinions



The Working Group's 2019 opinions involve cases of arbitrary detention in: Australia¹⁵ (3); Azerbaijan¹⁶ (1); Bahrain¹⁷ (3); Belarus¹⁸ (1); Bolivarian Republic of Venezuela¹⁹ (6); Burundi²⁰(1); Cambodia²¹ (1); Cameroon²² (2); Canada²³ (1); China²⁴ (6); Colombia²⁵ (1); Cuba²⁶ (1); Democratic People's Republic of Korea²⁷ (3); Egypt²⁸ (6); El Salvador²⁹ (1); France³⁰ (1); Gabon³¹ (2); Islamic Republic of Iran³² (3); Israel³³ (1); Indonesia³⁴ (1); Kuwait³⁵ (1); Libya³⁶ (2), Mauritania³⁷ (1); Mexico³⁸ (3); Kingdom of Morocco³⁹ (3); Mozambique⁴⁰ (1); Nicaragua⁴¹ (3); Panama⁴² (2); Plurinational State of Bolivia⁴³ (1); Qatar⁴⁴ (1); Russian Federation⁴⁵ (2); Rwanda⁴⁶ (1); Saudi

¹⁵ See opinions 1/2019, 2/2019, and 74/2019.

¹⁶ See opinion 10/2019.

¹⁷ See opinions 31/2019, 59/2019, and 73/2019.

¹⁸ See opinion 60/2019.

¹⁹ See opinions 13/2019, 39/2019, 40/2019, 75/2019, 80/2019, and 81/2019.

²⁰ See opinion 37/2019.

²¹ See opinion 3/2019.

²² See opinions 27/2019, and 46/2019.

²³ See opinion 7/2019.

²⁴ See opinions 15/2019, 20/2019, 35/2019, 36/2019, 72/2019, and 76/2019.

²⁵ See opinion 38/2019.

²⁶ See opinion 63/2019.

²⁷ See opinions 52/2019, 57/2019, and 69/2019.

²⁸ See opinions 21/2019, 29/2019, 41/2019, 42/2019, 65/2019, and 77/2019.

²⁹ See opinion 68/2019.

³⁰ See opinion 50/2019.

³¹ See opinions 5/2019, and 62/2019.

³² See opinions 32/2019, 33/2019, and 51/2019.

³³ See opinion 84/2019.

³⁴ See opinion 49/2019.

³⁵ See opinion 82/2019.

³⁶ See opinions 18/2019, and 85/2019.

³⁷ See opinion 48/2019.

³⁸ See opinions 14/2019, 54/2019, and 64/2019.

³⁹ See opinions 23/2019, 67/2019, and 78/2019.

⁴⁰ See opinion 30/2019.

⁴¹ See opinions 16/2019, 19/2019, and 43/2019.

⁴² See opinions 25/2019, and 47/2019.

⁴³ See opinion 61/2019.

⁴⁴ See opinion 58/2019.

⁴⁵ See opinions 11/2019, and 34/2019.

⁴⁶ See opinion 24/2019.

Arabia⁴⁷ (4); Senegal⁴⁸ (1); Spain⁴⁹ (2); Sudan⁵⁰ (1); Tajikistan⁵¹ (2); Thailand⁵² (1); Togo⁵³ (1); Turkey⁵⁴ (3); United Arab Emirates⁵⁵ (2); United States of America⁵⁶ (2); and Viet Nam⁵⁷ (2).

Observations and Developments

The Working Group issued two new deliberations to assist States and other stakeholders in preventing and addressing cases of arbitrary deprivation of liberty. The first—Deliberation No. 10, adopted in the 86th session—articulates the Working Group’s views on the reparations owed to victims of arbitrary deprivation of liberty.⁵⁸ In the deliberation, the Working Group notes that in cases where it recommends that a State issue reparations to a victim of arbitrary detention, the Working Group will inquire into the status of the implementation of its recommendation in its follow up procedure established in 2016.⁵⁹ The deliberation also sets forth how the Working Group defines the scope of reparation owed to individuals by States, including restitution, rehabilitation, satisfaction, compensation, and guarantees of non-repetition.⁶⁰

Considering the pervasive nature of the COVID-19 pandemic, the Working Group issued Deliberation No. 11, adopted in the 87th session, on the prevention of arbitrary deprivation of liberty in the context of public health emergencies in 2019.⁶¹ The deliberation sets forth guidelines for States on how to prevent arbitrary deprivation of liberty within the context of implementing public health emergency measures, such as those developed during the COVID-19 pandemic.⁶² For instance, the Working Group cautions States that any restriction on individuals’ liberty, such as restrictions in the context of quarantine measures, can constitute an arbitrary deprivation of liberty if the measure is not necessary and proportional and otherwise in accordance with international law.⁶³ Further, quarantine measures must be “clearly specified by

⁴⁷ See opinions 22/2019, 26/2019, 56/2019, and 71/2019.

⁴⁸ See opinion 85/2019.

⁴⁹ See opinions 6/2019, and 12/2019.

⁵⁰ See opinion 77/2019.

⁵¹ See opinions 17/2019, and 66/2019.

⁵² See opinion 4/2019.

⁵³ See opinion 83/2019.

⁵⁴ See opinions 10/2019, 53/2019, and 79/2019.

⁵⁵ See opinions 28/2019, and 55/2019.

⁵⁶ See opinions 70/2019, and 85/2019.

⁵⁷ See opinions 8/2019, and 9/2019.

⁵⁸ Report of the Working Group on Arbitrary Detention, Human Rights Council, Forty-fifth session (24 July 2020), A/HRC/45/16, Annex I, Deliberation No. 10 on reparations for arbitrary deprivation of liberty, available at: <https://undocs.org/A/HRC/45/16> [Hereinafter “Deliberation No. 10”].

⁵⁹ Deliberation No. 10 ¶ 3.

⁶⁰ Deliberation No. 10 ¶¶ 9-16.

⁶¹ Report of the Working Group on Arbitrary Detention, Human Rights Council, Forty-fifth session (24 July 2020), A/HRC/45/16, Annex II, Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies, available at: <https://undocs.org/A/HRC/45/16> [Hereinafter “Deliberation No. 11”].

⁶² *Id.* at ¶ 10.

⁶³ Deliberation No. 11, ¶ 8.

law and strictly adhered to in practice.”⁶⁴ Likewise, the Working Group reminds States that while national emergencies and public health crises may allow derogations from liberty, arbitrary deprivation of liberty can “never be justified,” regardless of the rationale.⁶⁵ The deliberation also highlights important preventative measures for States, such as taking special precautions to protect vulnerable individuals deprived of liberty (e.g., individuals who are nursing or pregnant, individuals with underlying health conditions, etc.⁶⁶) and taking appropriate measures to reduce their prison populations in order to reduce risks of spreading the contagion from overcrowding and poor hygiene.⁶⁷

During its 85th session in 2019, the Working Group also began incorporating language into its opinions referencing the impact of the COVID-19 pandemic. For example, in opinion No. 60/2019, the Working Group notes: “[i]n the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Minors A, B, and C.”⁶⁸ Similar language was used in other opinions.⁶⁹ It is anticipated that the Working Group will continue this practice in opinions issued in 2020 that further emphasize how the pandemic uniquely persons deprived of liberty.

In February 2020, the Working Group contributed to a joint amicus curiae addressing the arrest and detention of 71 women suspected of being sex workers who were allegedly physically and sexually assaulted while in custody.⁷⁰ The amicus was drafted in collaboration with the Working Group on discrimination against women and girls.⁷¹ The submission argues that the State at issue had a duty to protect the rights of sex workers to equality, non-discrimination, liberty and security, fair trial, private and family life, health, and to be free from inhuman and degrading treatment.⁷² It also elaborates on the human rights standards applicable to detention based on vague laws and the requirement of informing people deprived of liberty of the basis for their arrest, access to judicial review, and duty to provide remedy to human rights violations.⁷³ The amicus is the first legal intervention submitted by the Working Group to a court and may be an

⁶⁴ *Id.*

⁶⁵ Deliberation No. 11, ¶ 15.

⁶⁶ Deliberation No. 11, ¶ 15.

⁶⁷ Deliberation No. 11, ¶ 16.

⁶⁸ Opinion No. 60/2019 ¶ 135.

⁶⁹ See opinions No. 1/2020, No. 2/2020, No. 3/2020, No. 4/2020, No. 5/2020, No. 6/2020, No. 9/2020, No. 10/2020, No. 11/2020, No. 12/2020, No. 13/2020, No. 15/2020, No. 16/2020, No. 18/2020, No. 20/2020, No. 24/2020, No. 26/2020, No. 28/2020, No. 29/2020, No. 30/2020, No. 31/2020, No. 33/2020, 34/2020, No. 35/2020, No. 37/2020, No. 38/2020, No. 39/2020, No. 41/2020, No. 42/2020, No. 45/2020, No. 47/2020, No. 48/2020, No. 49/2020, No. 51/2020, No. 54/2020, No. 55/2020, No. 56/2020, No. 57/2020, and No. 58/2020.

⁷⁰ Joint Amicus Curiae Submission by the United Nations Human Rights Council’s Working Group on Discrimination against Women and Girls and the Working Group on Arbitrary Detention on the case of Joy Moses & 5 ORS vs. THE MINISTER, FCT & 13 ORS (3 February 2020), Federal High Court of Nigeria in the Abuja Judicial Division, available at: https://www.ohchr.org/Documents/Issues/Women/WG/Amicus_Brief_1_Nigeria.pdf.

⁷¹ *Id.*

⁷² Report of the Working Group on Arbitrary Detention, A/HRC/45/16 (24 July 2020), ¶ 12.

⁷³ *Id.*

indication that it intends to take a more direct role in promulgating international standards and interpretations of law in domestic courts.

Key Developments

The 2019 opinions covered many topics within the Working Group's mandate, including the treatment of minors in detention, the right to a fair trial, the rights to freedom of expression and opinion, the right to be free from torture, and other rights articulated under the ICCPR and UDHR. Where States failed to guarantee individual rights or did not properly limit or derogate them in accordance with law, the Working Group found that there was no lawful basis for the detention.

Opinion No. 27/2019 is notable in that it concerned a "request for review," a procedural request available under paragraph 21 of the Working Group's Methods of Work.⁷⁴ The Working Group will only revise an opinion if all the conditions listed in paragraph 21 are met, which has rarely occurred since the Working Group was established in 1991.⁷⁵ The source's request for review must be based on entirely new facts, which would cause the Working Group to alter its decision if it had been aware of them.⁷⁶ Further, if the facts had been known or had been accessible to the source, the request for review will not be considered admissible.⁷⁷ While the Working Group did not grant the request for review, its assessment of whether the request met the procedural requirements offers helpful insights for individuals considering whether such a request is possible and what the process entails. For instance, the Working Group notes that [it] "cannot determine whether the conditions set out in paragraph 21 of its methods of work have been met without first hearing from the other party, especially to find out whether the alleged new facts would have led it to a different outcome. Only when the Working Group has considered all the arguments put forward by the parties will it be in a position to conclude, firstly, whether the admissibility conditions set out in paragraph 21 have been met and, secondly, whether the review request is justified."⁷⁸ The opinion then proceeds to analyze the information received by both parties to assess whether the new information would have led the Working Group to alter its initial opinion.⁷⁹ In denying the request for review, the Working Group concluded that while one new fact was presented by the source, it would not have led to a different outcome to that reached in the Working Group's 2017 opinion in which it found the detention was not arbitrary.⁸⁰

⁷⁴ See, Methods of Work of the Working Group on Arbitrary Detention, Human Rights Council Thirty-sixth session, A/HRC/36/38, (13 July 2017), available at: <https://undocs.org/A/HRC/36/38>.

⁷⁵ See, inter alia, revised decision No. 3/1996 (Bhutan), stating that the source's request was admissible and granting a partial review; revised decision No. 2/1996 (Republic of Korea), stating that the Government's request was admissible but refusing the review; and revised decision No 1/1996 (Colombia), stating that the Government's request was admissible but refusing the review. In these three cases, the Working Group did not apply the provisions on review in its methods of work because the requests for review were submitted before the adoption of the revision criteria. The Working Group decided that, based on the principle of non-retroactivity, the review criteria would only be applied to requests submitted after their adoption.

⁷⁶ Opinion 27/2019 at ¶ 75.

⁷⁷ *Id.* at ¶ 75.

⁷⁸ *Id.* at ¶ 76.

⁷⁹ *Id.* at ¶¶ 77-95.

⁸⁰ *Id.* at ¶ 96.

Emerging Trends

The Working Group's opinions in 2019 contain several cases which examine the linkages between detainees' mental and physical health and the due process rights that protect against arbitrary deprivation of liberty. The Working Group has explored the relevance of health to detainees' ability to raise an adequate defense in other years;⁸¹ however, there was a marked increase in the number of cases dealing with this issue in 2019. Its jurisprudence from 2019, therefore, offers important elaboration on how the deprivation of medical treatment and the denial of proper conditions necessary for mental and physical health can hinder an individual's ability to enjoy the due process rights defined under article 9 of the ICCPR.⁸² Specifically, a person's ability to understand the basis of their arrest and subsequent charges, and to meaningfully challenge the lawfulness and necessity of detention are not fully enjoyed if States fail to take an individual's needs and circumstances into consideration and make necessary accommodations. Accordingly, where the Working Group finds evidence of a State's total or partial non-observation of the international norms relating to the right to a fair trial, such as those established by the ICCPR, UDHR, and other relevant instruments, as to give the deprivation of liberty an arbitrary character, it will note a violation of Category III.⁸³

With respect to the impact of reduced physical health on arbitrariness, in opinion No. 20/2019, the Working Group found that where a State forced a trial to proceed despite the defendant's visible fatigue, it not only threatened his right to health, but also compromised his ability to properly defend himself in court.⁸⁴ Similarly, in communications which raised allegations of torture, the Working Group assessed whether the impact of the torture had degraded the physical and mental health of the victim to the extent that it hindered the victim's due process rights. In a case pertaining to a minor detained in Saudi Arabia, the Working Group noted that States' use of torture, "seriously undermines . . . the ability of detainees to defend themselves from accusations."⁸⁵ Additionally, in opinion No. 70/2019, the Working Group considered the impact of indefinite solitary confinement rising to the level of torture on the mental and physical

⁸¹ Similar findings were reached in 2016 (see, e.g., opinion No. 29/2016 ¶¶ 21, 25; and opinion No. 25/2016 ¶ 32).

⁸² Article 9 of the ICCPR delineates due process rights into five parts: (1) the right not to be subjected to arbitrary arrest; (2) to be informed at the time of arrest of the reasons for arrest and promptly informed of any charges; (3) where charged with a crime to be brought promptly before a judge or other judicial officer and entitled to trial with judicial guarantees of due process within a reasonable time; (4) the right to challenge the lawfulness of detention; and (5) to have an enforceable right to compensation if these rights are violated.

⁸³ See, Category III: "when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights 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. In order to evaluate the arbitrary character or otherwise of cases of deprivation of liberty under category III, the Working Group considers, in addition to the general principles set out in the Universal Declaration of Human Rights, several fair trial and due process criteria drawn from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and, for the States parties to the International Covenant on Civil and Political Rights, the criteria laid down particularly in articles 9 and 14 thereof. If the Working Group arrives at a finding that there have been violations of such due process rights, it then considers whether these violations, taken together, are of such gravity as to give the deprivation of liberty an arbitrary character, thus falling under category III."

⁸⁴ See opinion No. 20/2019 ¶ 86.

⁸⁵ See opinion No. 22/2019 ¶ 78.

wellbeing of a detainee in Guantanamo Bay. The Working Group observed that given the severity of the alleged torture and its impact on the detainee's pre-existing mental illness, it was extremely unlikely that he would be able to effectively participate in any of his Combatant Status Review Tribunals, Administrative Review Board, or Periodic Review Board, all related to challenging his ongoing 18-year detention.⁸⁶ Accordingly, the Working Group noted that this gave weight to its conclusion that his right to a fair trial had been violated.⁸⁷

The Working Group also examined the impact of mental health conditions, both preexisting and developed within the context of detention, on an individual's ability to exercise their due process rights.⁸⁸ In opinion No. 1/2019, the source communicated that his prior capture and torture by the Sri Lankan Army caused him to "develop psychotic symptoms" and he was later diagnosed with schizophrenia, which made it difficult for him to understand the "pathways" available to him regarding his ongoing detention and the necessity of his adverse security designation.⁸⁹ Further, while the Government found him unfit to plea, the Working Group noted that no accommodations had been made to empower him to challenge the legality of his detention in keeping with his rights under article 9 of the ICCPR.⁹⁰ Accordingly, the Working Group rejected the Government's argument that the detainee's detention was not arbitrary because it failed to explain how a detainee who is unfit to plea could have effectively challenged the necessity of his own detention.⁹¹

The Working Group's 2019 jurisprudence on mental health also explored the effects of extended prison sentences on minors.⁹² In opinion No. 22/2019, it considered the case of a minor held in pre-trial detention for eleven years who attempted suicide on at least one occasion.⁹³ The source reported to the Working Group that the minor's mental health had deteriorated so significantly over the course of his detention that he could no longer communicate through comprehensible speech, which had seriously undermined the minor's ability to challenge the basis of his detention.⁹⁴ In its findings, the Working Group reminded the States at issue that the Convention to the Declaration of the Rights of the Child notes that children, by reason of their physical and mental immaturity, need special safeguards and care, especially in cases involving deprivation of life or liberty of the child.⁹⁵

The Working Group also considered differential access to health treatment between genders. In opinion No. 68/2019, the Working Group found that laws that restrict women's rights to personal liberty and full enjoyment of health by criminalizing abortion are *prima facie* discriminatory.⁹⁶

⁸⁶ See opinion No. 22/2019 ¶ 74.

⁸⁷ See opinion No. 22/2019 ¶ 74.

⁸⁸ See opinions 1/2019, 2/2019, 70/2019, 73/2019, and 74/2019.

⁸⁹ See opinion No. 1/2019 ¶ ¶ 4, 52-56.

⁹⁰ See *Id.* ¶¶ 76-80.

⁹¹ See *Id.* ¶ 81.

⁹² See opinions 22/2019, 60/2019.

⁹³ See opinion No. 22/2019 ¶ 12.

⁹⁴ *Id.* at ¶ 19.

⁹⁵ *Id.* at ¶25; see also opinion 60/2019 at ¶131.

⁹⁶ See opinion No. 68/2019 at ¶ 115.

Further, it noted that any legislative framework that restricts the rights of only one gender is discriminatory on the basis of sex or gender and is in breach of articles 2 and 26 of the ICCPR and articles 2 and 7 of the UDHR.⁹⁷ Narrowly read, the case indicates that any woman detained solely on the basis of exercising her right to terminate a pregnancy would be considered arbitrarily deprived of liberty under Category V, as it is discriminatory. Read more broadly and in keeping with the Working Group's other jurisprudence on Category V, any discriminatory law which forms the basis of arrest is considered an arbitrary deprivation of liberty.

Another emerging trend identified was the influx of cases related to the detention of actual or assumed members of the Fethullah Gülenist movement in Turkey on the basis of their ownership or use of the ByLock encryption application.⁹⁸ While the arbitrary detention of Gülenists is a continuing trend, detentions predicated on mere possession of the ByLock application were noted by the Working Group as a concerning pattern.⁹⁹ In opinion No. 53/2019 and No. 79/2019, the Working Group addressed communications relating to the detention of individuals who, by their use of the application, were deemed part of the Gülen Group, a political opposition party designated a terrorist organization by the Turkish government in 2015.¹⁰⁰ In its findings, the Working Group took special note of a report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression based on his visit to Turkey in 2016, during which he recorded numerous cases of arrest based purely on the possession of ByLock software on the accused's computer.¹⁰¹ It also referenced the Human Rights Committee's decision in *Özçelik et al v. Turkey*, in which the Committee held that mere use of the ByLock application is an insufficient basis for the arrest and detention of an individual.¹⁰² Likewise, the Working Group determined that when detention of an individual is based on use of the ByLock application alone, it is arbitrary, as it is, at best, circumstantial and also fails to meet the test of reasonableness and necessity required by restrictions to freedom of political association and expression.¹⁰³

Continuing Trends

The 2019 opinions also advance the Working Group's jurisprudence on several country-specific trends identified in past years that have not been addressed by the States concerned. These are highlighted below and may be relevant to advocates preparing communications to the Working Group on behalf of individuals detained in similar circumstances.

i. United States of America: Guantanamo Detention Facility

⁹⁷ *Id.* ¶ 116.

⁹⁸ See opinions No. 53/2019 and No. 79/2019.

⁹⁹ See opinion No. 79/2018 at ¶ 72 referring to prior opinions No. 42/2018 and No. 44/2018; see also opinion No. 53/2019.

¹⁰⁰ See opinion No. 79/2018 at ¶ 66.

¹⁰¹ See opinion No. 79/2018 at ¶ 69.

¹⁰² *Id.*

¹⁰³ See opinion No. 79/2018 at ¶¶ 70-74.

In opinion No. 70/2019, the Working Group held, as it has in other communications on similarly situated individuals, that the United States had arbitrarily detained a Guantanamo detainee by denying him the fair trial guarantees that would ordinarily apply within the judicial system of the United States based on his status as a foreign national and his religion.¹⁰⁴ The Working Group noted that the Government's argument that articles 2 and 26 of the ICCPR permit distinctions based on factors such as race or religion when such distinctions are rationally related to a legitimate government objective.¹⁰⁵ However, in the view of the Working Group, the Government failed to explain how military commissions, which have in practice only prosecuted Muslim men who are not United States nationals, are an appropriate means of achieving a legitimate objective.¹⁰⁶

ii. Australia: Mandatory Immigration Detention

In opinion No. 74/2019, the Working Group again considered Australia's mandatory immigration regime, which it has consistently found to be discriminatory on the basis of citizenship following the High Court's decision in *Al-Kateb v Godwin*, which held that all non-citizens may be automatically deprived of liberty.¹⁰⁷ The Working Group considers that the effect of this judgment is such that there is no effective remedy for non-citizens to challenge the legality of their continued administrative detention.¹⁰⁸ Further, it views the impact on non-citizens as prohibitively discriminatory, in violation of article 26 of the ICCPR, and as arbitrary under Category V of its methods of work.¹⁰⁹

iii. Egypt: Detention of Muslim Brotherhood Members

In opinion No. 2/2019 and No. 65/2019, the Working Group noted its concern regarding the ongoing pattern of discriminatory treatment and arbitrary detention of Muslim Brotherhood members and "collective punishment meted out by the Government and courts over the past six years to the real or perceived members of the outlawed Muslim Brotherhood."¹¹⁰ Further, it observed that the continued and routine detention of individuals associated with the Muslim Brotherhood appears to fit a pattern of "widespread and systematic persecution."¹¹¹

iv. Turkey: Detention of Actual and Suspected Gülenists

In opinion No. 53/2019 and No. 79/2019, the Working Group considered communications pertaining to the detention of suspected Gülenists, a political group designated as a terrorist organization by the Turkish government in 2015. In opinion No. 53/2019, the Working Group

¹⁰⁴ See opinion No. 70/2019 ¶ 84.

¹⁰⁵ See opinion No. 70/2019 ¶ 78.

¹⁰⁶ See opinion No. 70/2019 ¶ 85.

¹⁰⁷ See opinion No. 74/2019 ¶ 73.

¹⁰⁸ *Id.* at ¶ 74.

¹⁰⁹ *Id.*

¹¹⁰ See opinion No. 65/2019 ¶ 82.

¹¹¹ *Id.*

noted that the case was the tenth case to come before the Working Group where individuals linked to the group, or suspected to be linked, had been deprived of liberty on the basis of their association and perceived political opinion.¹¹² In all of these cases, the Working Group found that the detention of the concerned individuals constituted an arbitrary deprivation of liberty.¹¹³ It noted that this appeared to be an emerging pattern of arbitrary detention on a discriminatory basis, therefore falling under Category V.¹¹⁴ The practice of arresting and prosecuting individuals for their use of the ByLock application has emerged as another manifestation of this pattern.

v. Venezuela: Detention of Opposition Members

In opinion No. 80/2019, the Working Group considered the detention of an opposition party member, noting that the Working Group viewed the present case as “one of a series of arbitrary detentions carried out by the authorities of the Bolivarian Republic of Venezuela against members of political opposition parties, human rights defenders and people who are critical of the authorities’ actions.”¹¹⁵ In its decision, the Working Group held that because the detainee’s political opinion formed the basis of his detention, it was in violation of international law as a form of discrimination in contravention of articles 2 and 26 of the ICCPR and articles 2 and 7 of the UDHR.¹¹⁶

vi. Russian Federation: Detention of Jehovah’s Witnesses

In 2019, the Working Group again addressed the detention of a Jehovah’s Witness in the Russian Federation deprived of liberty based on the State’s designation of the religious organization as an extremist group.¹¹⁷ In opinion No. 34/2019, the Working Group found that the detainee’s pretrial detention was unjustified because of the lack of evidence against the detainee and the government’s failure to provide reasons for his detention other than his association with the Jehovah’s Witness religion.¹¹⁸ The decision also observed a pattern of “the now ever-growing number of Jehovah’s Witnesses in the Russian Federation who have been arrested, detained and charged with criminal activity on the basis of the mere exercise of freedom of religion, a right protected by article 18 of the Covenant.”¹¹⁹ Notably, it also highlighted similar practices in other States and emphasized that the findings in the current opinion would be applicable to others in similar situations, namely individuals deprived of liberty based on the practice of peaceful religious activities.¹²⁰

¹¹² See opinion No. 53/2019 ¶ 91.

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 81.

¹¹⁵ See opinion No. 80/2019 ¶ 113.

¹¹⁶ *Id.* at ¶ 113.

¹¹⁷ See opinions 11/2019 and 34/2019.

¹¹⁸ See opinion 34/2019 at ¶ 63 (noting that the deprivation of liberty without a legal basis falls under Category I).

¹¹⁹ See opinion 34/2019 at ¶ 67; see also reference to give joint urgent actions by special procedure mandates holders since 2015 on this issue referenced at ¶ 65.

¹²⁰ *Id.* ¶ 68.

vii. Iran: Discrimination against Dual-Nationals

In opinion No. 32/2019, the Working Group noted that it has repeatedly found “a practice in the Islamic Republic of Iran of targeting foreign nationals, dual nationals and Iranian nationals with permanent residence in another country for prosecution.”¹²¹ Accordingly, the Working Group considers that dual nationals deprived of liberty in Iran are part of a pattern wherein the State is arbitrarily depriving such people of liberty on the basis of residence status in violation of articles 2 and 7 of the UDHR and articles 2(1) and 26 of the ICCPR. Further, detention based on any discriminatory basis, such as residency status, are arbitrary under Category V.

viii. Nicaragua: Detention of Protestors

In opinion No. 43/2019, the Working Group considered the arrest and detention of protestors in Nicaragua. The Working Group noted that it observed a “pattern of serious human rights violations committed in Nicaragua in the context of the peaceful protests that began on 18 April 2018.”¹²² It further noted that the case was “not the first to be carried out by the authorities of Nicaragua against persons who criticize the authorities’ actions or who have participated in social demonstrations.”¹²³

ix. Tajikistan: Torture and Arbitrary Detention of Opposition Members

In opinion No. 66/2019, the Working Group noted the “strikingly similar” facts to other cases it had previously considered in opinions 2/2018 and 17/2019 alleging patterns of abuse against opposition members.¹²⁴ Further, it observed that the Committee against Torture had noted similar patterns in its third periodic report of Tajikistan, as had the Human Rights Committee in its third periodic report, which noted: [the] “politically motivated harassment of opposition members that undermines genuine political pluralism.”¹²⁵ Accordingly, it found that the information received was indicative of a pattern of discriminatory behavior by authorities against opposition members on the basis of political or other opinion, a prohibited ground of discrimination under articles 2(1) and 26 of the Covenant, falling under Category V.¹²⁶

Conclusion

The trends identified in the 2019 annex provide insight into the emerging and ongoing patterns of State practices of arbitrary detention. This annex builds on the Center for Human Rights & Humanitarian Law’s handbook on *The Legal Methods and Jurisprudence of the United Nations*

¹²¹ See opinion No. 32/2019 ¶ 49.

¹²² See opinion No. 43/2019 ¶ 86.

¹²³ *Id.* ¶ 89.

¹²⁴ See opinion No. 66/2019 ¶ 99.

¹²⁵ *Id.* ¶ 100.

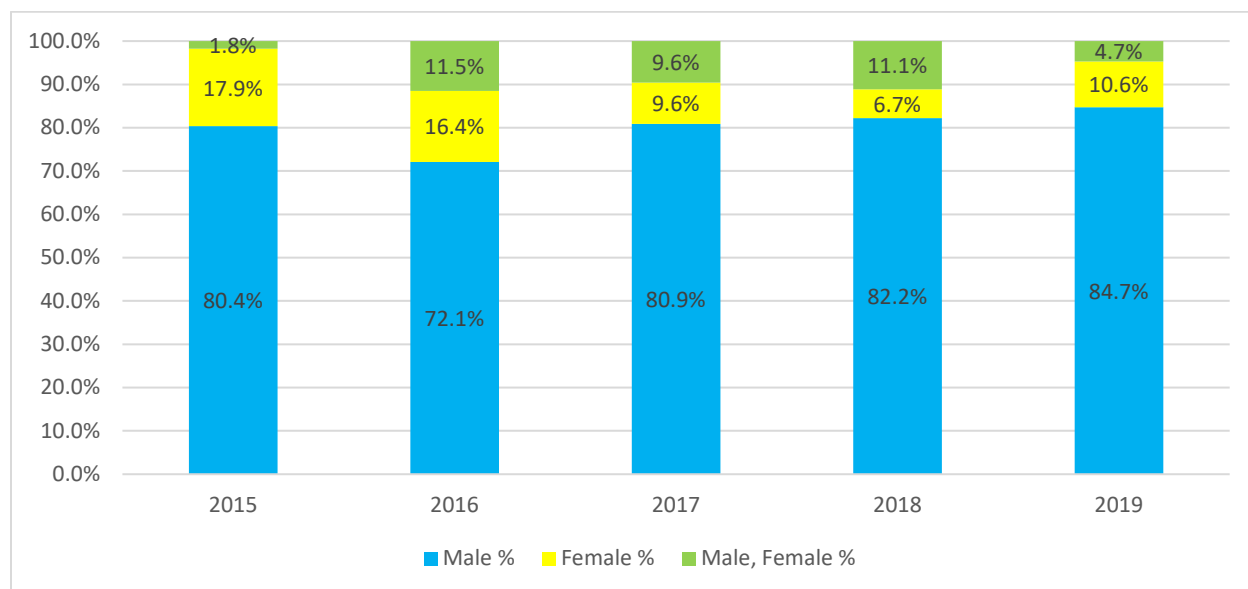
¹²⁶ *Id.* ¶ 101.

Working Group on Arbitrary Detention (2015-2018).¹²⁷ The trends identified within, and information contained in the included charts and graphs, can assist advocates in successfully engaging with the Working Group's communication procedures by highlighting the facts, patterns, and interpretations of law relevant to its assessment of arbitrariness. The Working Group's publication of two new Deliberations and co-authorship of an amicus curiae submission in 2019 also demonstrate its responsiveness to evolving global conditions, including but not limited to, the impact of the COVID-19 pandemic on detained individuals and the importance of mental and physical health in preventing arbitrary deprivations of liberty. The Working Group's willingness to engage with emerging issues is vital to its continued success and the relevance of its opinions for human rights attorneys and advocates.

¹²⁷ See, THE LEGAL METHODS AND JURISPRUDENCE OF THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION (2015-2018): An Introduction for Practitioners, American University Washington College of Law Center for Human Rights & Humanitarian Law (2021), available at: <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/the-legal-methods-and-jurisprudence-of-unwgad/>.

Comparisons between data gathered from years 2015-2019

Percentage of cases pertaining to male, female and multiple people of both genders

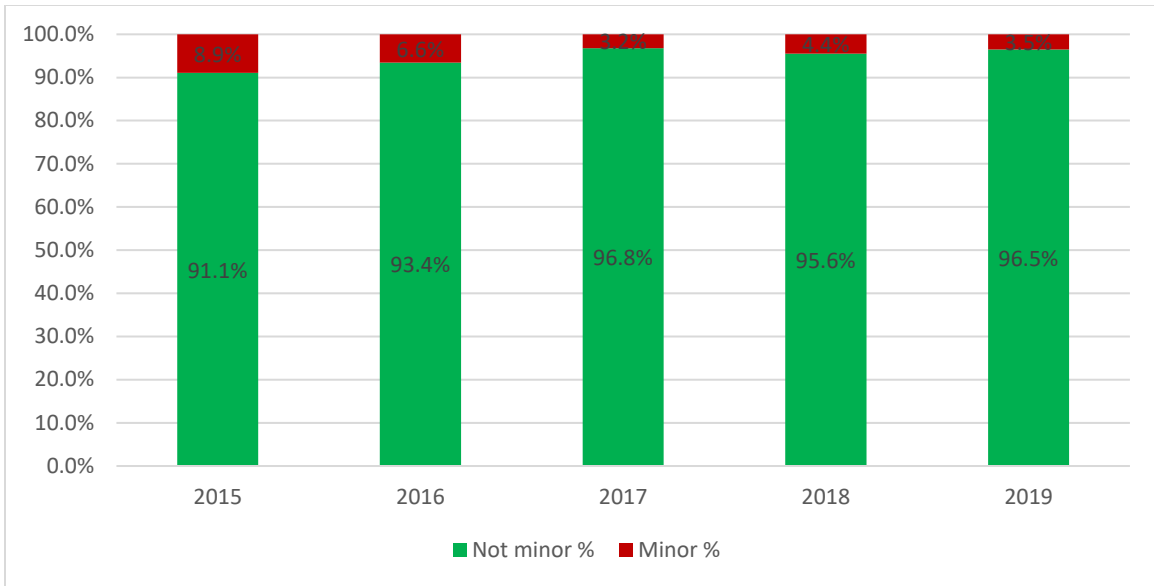


Gender	Male	Female	Male, Female	Total	Gender %	Gender %	Male %	Female %	Male, Female %
2015	45	10	1	56	2015 Gender %	2015	80.4%	17.9%	1.8%
2016	44	10	7	61	2016 Gender %	2016	72.1%	16.4%	11.5%
2017	76	9	9	94	2017 Gender %	2017	80.9%	9.6%	9.6%
2018	74	6	10	90	2018 Gender %	2018	82.2%	6.7%	11.1%
2019	72	9	4	85	2019 Gender %	2019	84.7%	10.6%	4.7%

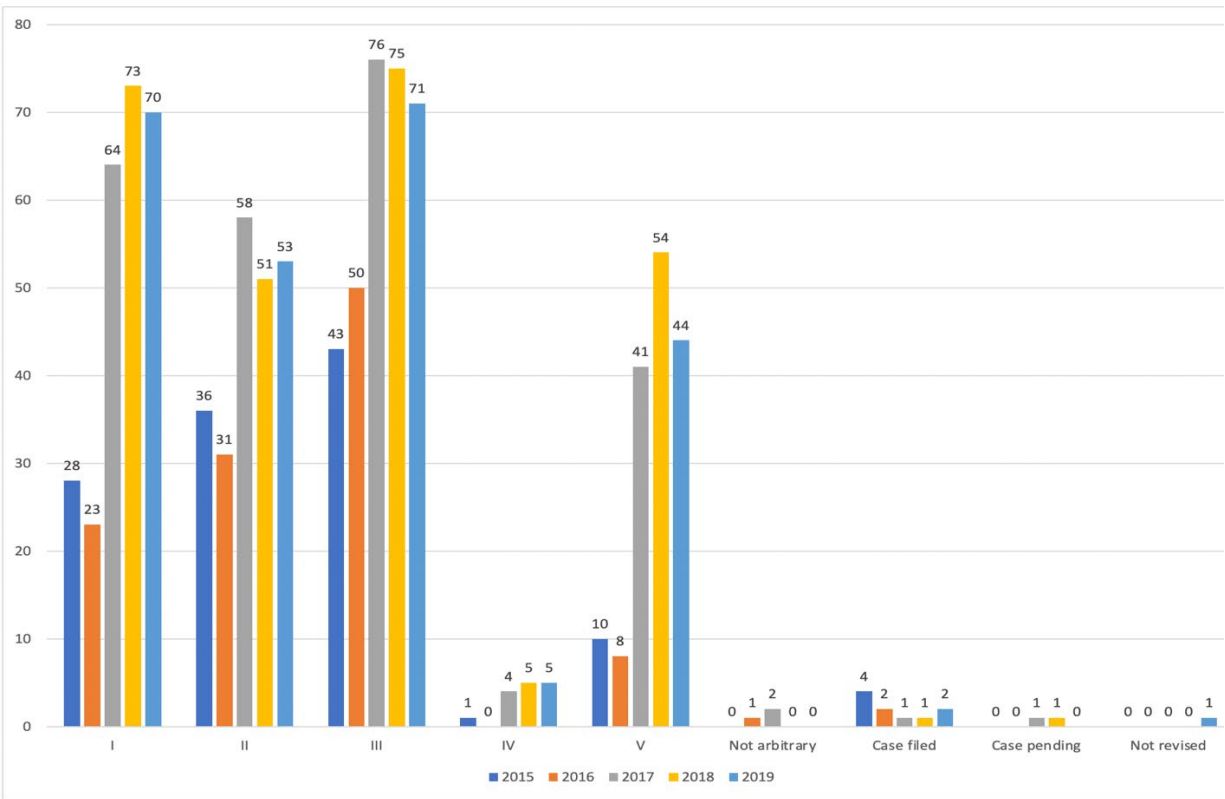
Percentage of cases pertaining to minors and adults

Majority	Not minor	Minor	Total	Majority %	Majority %	Not minor %	Minor %
2015	51	5	56	2015 Majority %	2015	91.1%	8.9%
2016	57	4	61	2016 Majority %	2016	93.4%	6.6%
2017	91	3	94	2017 Majority %	2017	96.8%	3.2%
2018	86	4	90	2018 Majority %	2018	95.6%	4.4%
2019	82	3	85	2019 Majority %	2019	96.5%	3.5%

Annex I: The Legal Methods & Jurisprudence of the United Nations Working Group on Arbitrary Detention (2020)



Comparison between categories identified in opinions issued from 2015-2019



Annex I: The Legal Methods & Jurisprudence of the United Nations Working Group on Arbitrary Detention (2020)

CATEGORIES	I	II	III	IV	V	Not arbitrary	Case filed	Case pending	Not revised	TOTAL
2015	28	36	43	1	10	0	4	0	0	122
2016	23	31	50	0	8	1	2	0	0	115
2017	64	58	76	4	41	2	1	1	0	247
2018	73	51	75	5	54	0	1	1	0	260
2019	70	53	71	5	44	0	2	0	1	246

Comparison between cases in which multiple categories were identified between 2017-2019

