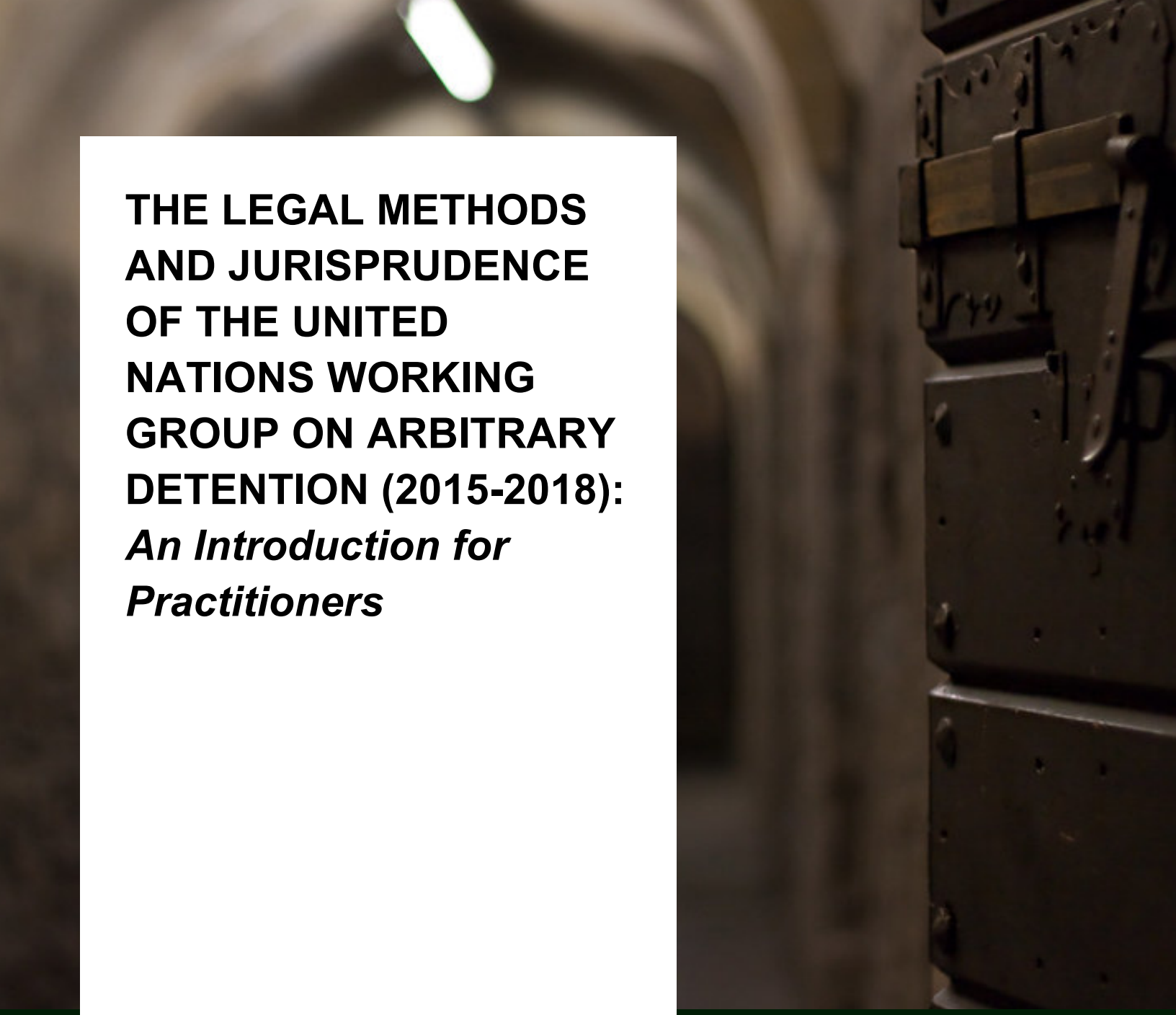

THE LEGAL METHODS AND JURISPRUDENCE OF THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION (2015-2018): *An Introduction for Practitioners*

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CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW

The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015-2018): An Introduction for Practitioners

About the Report

This is a publication of the Center for Human Rights & Humanitarian Law (Center) at American University Washington College of Law. The report is the result of a five-year collaborative research initiative of the Center's Impact Litigation Project. Students, staff, and faculty affiliated with the Impact Litigation Project researched and analyzed claims and opinions related to arbitrary deprivation of liberty issued by the United Nations Working Group on Arbitrary Detention in order to identify and map trends in arbitrary detention. Seeing the utility of these findings for other practitioners, advocates, and individuals wishing to engage with the Working Group, the Center decided in 2019 to collect and comprehensively review the data collected from the Working Group's jurisprudence since 2015. The Center plans to update this report periodically to reflect the latest findings and trends related to the work of the United Nations Working Group on Arbitrary Detention.

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Abstract

Tasked with investigating cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and other relevant international legal instruments accepted by the States concerned, the United Nations Working Group on Arbitrary Detention ("Working Group") plays an essential role in defining the prohibition on arbitrary detention.[1] The Working Group does not define the term "arbitrary" explicitly; rather, it considers arbitrary deprivations of liberty those that are contrary to current understanding of the fundamental rights established by these instruments.[2] In this regard, its jurisprudence is highly instructive to advocates and States alike on the interrelationship between the relevant rights defined in these instruments and the notion of arbitrariness.

This report will analyze individual communications submitted to the Working Group from 2015 to 2018, looking particularly at the factual circumstances and corresponding determinations by the Working Group as to whether there was an arbitrary deprivation of liberty. In doing so, it aims to identify facts that are indicative of arbitrary detention and to distill rules giving shape to acceptable and unacceptable State practices when depriving individuals of liberty. More broadly, it aims to strengthen advocacy efforts in a data-driven manner by summarizing the evidentiary standards, presumptions, and rules the Working Group uses to assess arbitrariness according to each Category defined in its Method of Work, allowing similarly situated individuals to utilize these findings for their own communications. At a more granular level, this report hopes to raise awareness about the kinds of rights that are most commonly ignored or suppressed, the groups that appear to be most at risk, and other emerging trends in the period under review.

The assertions and rules of practice are distilled from the Working Group's opinions, Annual Reports, and governing documents. The purpose of this report is to advance understanding of the Working Group and its quasi-judicial process and serve as a guide for practitioners, researchers, and human rights advocates seeking a favorable opinion from the Working Group.

[1] *See* Methods of Work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38, ¶ 7 (13 July 2017) [hereinafter, "Methods of Work"], available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/190/80/PDF/G1719080.pdf?OpenElement.

[2] *See* Revised Fact Sheet No. 26 at p 5 (citing Resolution 1991/42, as clarified by resolution 1997/50) [hereinafter, "Fact Sheet"], available at: https://www.ohchr.org/Documents/Issues/Detention/FactSheet26.pdf.

1. Introduction

This Report aims to provide guidance to advocates submitting communications to the United Nations Working Group on Arbitrary Detention (the Working Group). Based on a thorough review of the Working Group's opinions from 2015-2018, the authors of this Report have identified trends and strategies to help advocates draft persuasive and credible communications. Section One provides an overview of the report and its organization. Section Two explains the Working Group's mandate and Methods of Work, including its schedule, priorities, and complementarity with other United Nations organs. Section Three discusses the written outputs and supervisory mechanisms the Working Group uses to guide States on the prohibition on arbitrary detention, including its opinions, urgent actions, deliberations, country visits, and annual reports.

Section Four provides a procedural overview of the communication process, and relevant considerations for sources to consider when submitting information to the Working Group. Section Five reviews the sources of law and fact the Working Group uses in making its determinations. Section Six reviews the Working Group's legal approach and working definitions. Section Seven analyzes the Working Group's jurisprudence between 2015-2018 and identifies rules and norms it applies to its determinations of arbitrariness under each of its five categories. Finally, Section Eight reports data and trends from each of the years under review – 2015, 2016, 2017, and 2018 and highlights specific trends and patterns that emerge from each year's jurisprudence.

While the rules identified in this publication will be applicable to many cases, the Report does not provide an exhaustive summary of the Working Group's jurisprudence. Advocates working on a particular issue, such as the detention of journalists, or looking into the practices of a particular country, are encouraged to review the Working Group's opinions, annual reports, country and thematic reports, and deliberations for further support to help strengthen the persuasiveness of their communications. Additionally, the terms "detention" and "deprivation of liberty" are used interchangeably in this Report to refer to situations where individuals are being held or detained without liberty.

2. Mandate and Methods of Work

The Working Group is the only human rights body with a specific mandate to receive and examine cases of arbitrary deprivation of liberty.[1] It was established by the Commission on Human Rights via resolution 1991/42, and its mandate was subsequently assumed by the Human Rights Council in decision 1/102.[2] The Working Group's mandate is considered for renewal by the Human Rights Council every three years.[3] Its mandate is periodically updated, which enables the Working Group to be responsive, both substantively and procedurally, to emerging trends, as reflected in the changes to its methods over time. For instance, in addition to adding new

[1] *See* Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/22/44 ¶ 37 (24 Dec. 2012), available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf

[2] *See* Methods of Work *supra* note 1 ¶ 2.

[3] *Id*.

categories in 1997 (Category IV) and 2010 (Category V), in 2016, the Working Group added a follow-up procedure for monitoring compliance with its opinions.[4]

2.1 The Working Group's Schedule

The Working Group meets three times a year, for five to ten working days, typically in Geneva, Switzerland.[5] Its five independent experts work with the support of the Secretariat from the Office of the United Nations High Commissioner for Human Rights, which assists with the individual complaint aspect of its mandate.[6] The investigative process related to individual communications continues throughout the year, even when the Working Group is not in session.[7] However, the opinions it issues in response to individual complaints are only published online at the conclusion of each session. Therefore, advocates should bear in mind that opinions concerning communications received after the conclusion of a session will not become public until after the close of the next session, at the earliest.

Since 2016, the Working Group also monitors States' compliance with its opinions through a follow-up procedure. The procedure requests that both the State and the source of the communication provide information to the Working Group regarding the State's compliance with the recommendations made in the opinion within six months of the date of its transmission.[8] The Working Group reports the State's progress to the Human Rights Council, including, when applicable, its progress towards issuing reparations.[9]

2.2 The Working Group's Priorities and Complementarity with Other UN Organs

Per its Methods of Work and the rules of coordination established by the Human Rights Committee to prevent duplicate consideration of cases, the Working Group adheres to the principle of *non bis in idem*, under which two bodies may not simultaneously consider a single case involving the same persons, subject-matter, and cause of action.[10] Therefore, if the

[4] *See* Fact Sheet *supra* note 2 at p 8.

[5] *See* Fact Sheet *supra* note 2 at p 4; *see also* Methods of Work *supra* note 1 ¶ 4.

[6] *See* Fact Sheet *supra* note 2 at p 4.

[7] *Id*. (noting that the Working Group is assisted by the Secretariat throughout the year).

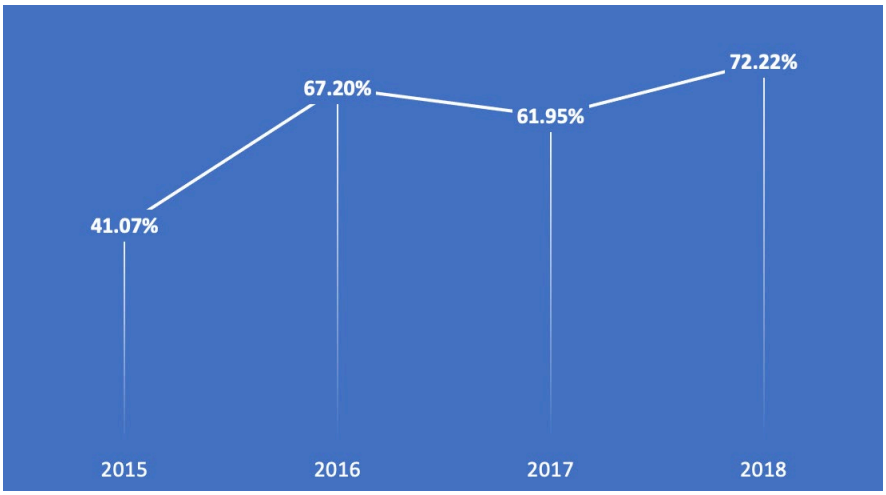
[8] Methods of Work *supra* note 1 at ¶ 20. The Working Group used the follow-up procedure for the first time in the Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 33-35, Communication No. 23/2016 (Democratic Republic of Congo), U.N. Doc. A/HRC/WGAD/2016/23 (29 December 2016) (establishing the practice of asking the following questions regarding the status of the States' implementation of its recommendations: "the Working Group requests the source and the Government to provide it with information on follow-up action taken on the recommendations made in this opinion, including on: a) Whether the above-mentioned persons have been released and, if so, on what date; (b) Whether compensation or other reparations have been made to them; (c) Whether an investigation has been conducted into the violation of these individuals' rights and, if so, the outcome of the investigation; (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Democratic Republic of the Congo with its international obligations in line with the present opinion; (e) Whether any other action has been taken to implement the present opinion").

[9] *Id.* at ¶ 35; *see also* Deliberation No. 10 on reparations for arbitrary deprivation of liberty (4 May 2020), available at: https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo10_AdvanceEditedVersion.pdf (articulating the scope of reparation that States may owe victims).

[10] *See* Methods of Work *supra* note 1 at ¶ 33.

principle violation alleged in a communication falls under the mandate of another working group or special rapporteur, it will be referred accordingly. For instance, claims solely alleging violations of the prohibition against torture, extrajudicial killings, or enforced disappearances are considered outside the purview of the Working Group. However, where the alleged violation also impacts the lawfulness of an individual's detention, the Working Group will review the case.[11] For instance, in communications raising allegations of torture, the Working Group referred these cases to the Special Rapporteur on torture but also considered whether the State's use of torture undermined fair trail rights.

Percentage of Cases Referred to Other Special Mandate Holders



3. The Work Products of the Working Group

Individuals or entities submitting allegations of arbitrary detention to the Working Group are referred to as "sources."[12] Sources can engage with the Working Group in two ways: through regular individual complaints and urgent appeals. States can request the Working Group to conduct a country visit. Additionally, the Working Group publishes an annual report each year and also periodically publishes deliberations and thematic reports on specific topics with the aim of helping States better understand their obligation to protect individuals from arbitrary deprivation of liberty. Sources are not revealed to the government concerned, and all identifying details are kept confidential, both in dialogue with the State and in its published opinions.

[11] *Id.* (noting that if the Working Group receives allegations of violations of human rights that fall within its competence as well as within the competence of another thematic mechanism, it may consider taking appropriate action jointly with the working group or special rapporteur concerned).

[12] *See* Fact Sheet *supra* note 2 at p 7 (providing that "[a]ll those making such written submissions to the Working Group are referred to as "sources."

3.1 Individual Communications

3.1.1 Regular Communication Procedure

The Working Group will assess information received via its regular communication procedure to determine whether the individual or individuals that are the subject of the communication are being arbitrarily deprived of liberty. The Working Group is the only non-treaty-based mechanism with a mandate expressly directing it to consider individual complaints, which means that its opinions and other actions are based on the right of petition of all individuals.[13] Each year, its opinions are published in an addendum to the Working Group's Annual Report presented to the Human Rights Council at the Group's scheduled reporting session.[14]

A source may bring an allegation to the Working Group by communicating with its Geneva Office, ideally by using the Model Questionnaire available on the Working Group's website.[15] The Working Group developed the Model Questionnaire to elicit the information it needs to assess the claims it receives, but it is not required. Communications should not exceed 20 pages, and any additional material, including annexes, exceeding that limit may not be taken into account.[16]

After receipt of a credible communication, the Working Group contacts the State concerned, which has 60 days to respond.[17] The State may refute or clarify the information provided by the source, and it may request an extension of up to one month if necessary. If the government does not respond, or responds after 60 days, the Working Group will proceed with issuing an opinion based on the information provided by the source or its own methods.[18] If the government does respond, the source is allowed an opportunity to comment on the government's reply.[19]

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[13] *See* Individual Complaints and Urgent Appeals, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, available at https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx.

[14] *See* Methods of Work *supra* note 1 at ¶ 19.

[15] The Model Questionnaire is accessible via the Working Group's website in English, French, Russian, and Spanish here: https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx.

[16] *See* Methods of Work *supra* note 1, ¶¶ 11 and 15; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 69, Communication No. 91/2017 (Maldives), U.N. Doc. A/HRC/WGAD/2017/91 (22 January 2018).

[17] Methods of Work *supra* note 1 at ¶ 15. The Working Group's assessment of "credibility" is discussed in greater detail in Section 5. However, generally, communications which transmit the information requested in the Model Questionnaire are eligible for consideration and action by the Working Group.

[18] *Id*. at ¶ 16.

[19] The Working Group's Working Methods do not proscribe the length of time sources have to respond to the government. A review of several opinions shows variation in how long sources have had to reply, ranging from months to days. *Compare*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 86, 87, Communication No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018) wherein a response from the government was transmitted to the source on August 15, 2017 and the source replied November 13, 2017 *with* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 32, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) in which the government's response was sent to the source on November 8, 2017 and the Working Group requested a response from the source by November 13, 2017 to facilitate consideration of the case during its eightieth session on November 20-24, 2017. No reply from the source was received.

The Working Group's opinions usually consist of several paragraphs outlining why it considers that the detention is arbitrary under one or multiple categories, citing specific treaty provisions, as well as its own prior opinions and country visit reports and the findings of other bodies both within and outside the UN system. The opinions of the Working Group are the result of consensus when possible, and majority view when consensus is not achieved.[20] At the end of each session, the opinions are published in the Working Group's report to the Human Rights Council.[21]

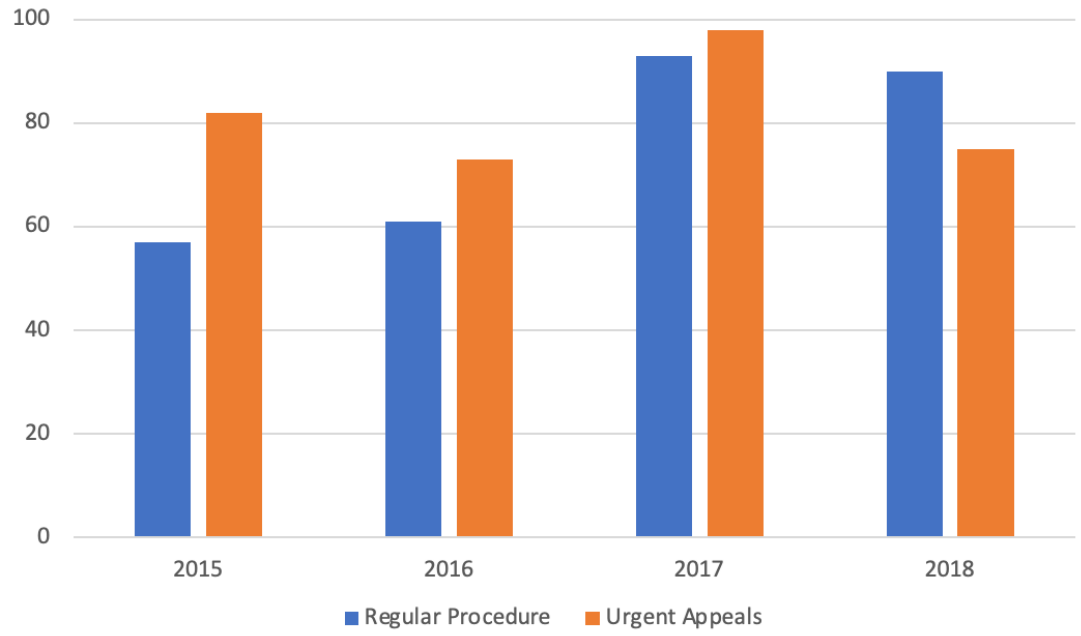
3.1.2 Urgent Action Procedure

Sources may also seek assistance from the Working Group through its urgent action procedure in cases where the detainee is being arbitrarily deprived of life or liberty in a manner that constitutes a serious danger to that person's health or life or under circumstances that warrant urgent action.[22] When the Working Group receives an urgent action request, it issues an appeal or allegation letter to the Minister of Foreign Affairs of the State concerned, requesting that the State take "appropriate measures to ensure that the detained person's right to life and to physical and mental integrity are respected."[23] The communication is initially confidential, but after 60 days, urgent appeal letters become public and are also included in the Working Group's annual report to the Human Rights Council.[24]

Communications made through the urgent action procedure are considered humanitarian appeals, which constitute a separate procedure from the communications procedure and do not result in an opinion from the Working Group.[25] Sources may request, however, that a matter be considered under both the urgent action procedure and the regular communications procedure, if an opinion is desired. If a matter is considered under both the urgent action and regular procedures, the Working Group may reference information gathered through the urgent action in its opinion.[26]

[20] Methods of Works *supra* note 1 at ¶ 6.
[21] *Id*. at ¶ 19.
[22] *See* Methods of Work *supra* note 1 at ¶ 22 (providing that even when no such threat is alleged to exist, there are particular circumstances that warrant an urgent action).
[23] *See* Fact Sheet *supra* note 2 at p. 9.
[24] *Id.*
[25] *See* Methods of Work *supra* note 1 at ¶ 23.
[26] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 16, Communication No. 21/2016 (Angola), U.N. Doc. A/HRC/WGAD/2016/21 (30 June 2016) (noting that the State replied to the urgent appeal but failed to respond to the communication through its regular procedure. The Working Group therefore considered the State's response to the urgent appeal when assessing the communication noting that it would "therefore duly consider the response made to the urgent appeal, as it is relevant to the present case").

Use of Regular and Urgent Procedures by Year



3.2 Country Visits

Upon invitation of the State concerned, the Working Group also conducts country visits to better understand the situation prevailing in the country. The Working Group meets with Governments and civil society while in-country and produces a report on its findings that is also included in its annual report. These reports can also be helpful to sources putting together communications for the Working Group.

3.3 Deliberations and Annual and Thematic Reports

In addition to issuing opinions and country visit reports, the Working Group also formulates "deliberations" on matters of a general nature clarifying its interpretation of law, its mandate, or acceptable State practice with regard to arbitrary detention.[27] It also uses its annual and thematic reports to better clarify what is expected of States under international law and to identify emerging trends and best practices.

To date, the Working Group has issued eleven deliberations on topics such as the situation of immigrants and asylum seekers, deprivation of liberty resulting from the use of the internet, psychiatric detention, and, most recently, the prevention of arbitrary deprivation of liberty in the context of public health emergencies.[28] The Working Group's deliberations offer greater insight into the legal reasoning, standards, and guidance

[27] *See* Fact Sheet *supra* note 2 at p 9.

[28] *See* Working Group on Arbitrary Detention, Compilation of Deliberations [hereinafter, Deliberations] available at: https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf.

that the Working Group commonly turns to in its opinions, and can guide States as well as advocates on how to safeguard individuals from arbitrary detention.

4. Communication Process

While securing release from detention for the subject or subjects of a communication is the primary reason for engaging with the Working Group, advocates can also use favorable opinions from the Working Group as part of a larger campaign to pressure a State to take particular action, to publicize and document a concerning practice within a State, or to bring individual attention to a detainee's circumstances. Advocates may consider using a favorable opinion from the Working Group (despite the fact they are non-binding) as part of a larger litigation strategy in a domestic or regional court that has binding jurisdictional authority over the State at issue. Therefore, whether a favorable opinion could supplement future litigation may be relevant to deciding when and if to file a communication. If the State is not a Party to any regional court and domestic litigation is exhausted or ineffective, a favorable decision can also be used to amplify a person's case via its publication in news articles, on social media, and in online campaigns. In some cases, therefore, submitting a communication to and receiving an opinion from the Working Group may come towards the beginning of the advocacy process rather than the end.

While it can be difficult to precisely measure State compliance with the Working Group's opinions, as the Working Group's annual reports reflect, States release individuals in the same year, and often two, three, four, or more years after, a recommendation is issued by the Working Group. As mentioned above, advocates also use favorable opinions from the Working Group as part of a larger campaign, which may include international press coverage and statements by special rapporteurs and international figures reiterating the Working Group's recommendations. This kind of external pressure can ultimately influence States to release individuals. Advocates are encouraged to review a particular State's engagement with the Working Group in advance of submitting a communication to assess the likelihood of the State responding to and implementing the Working Group's recommendations and to determine how an opinion from the Working Group can be best utilized.

4.1 Case Selection

Advocates should be aware that submitting a communication does not mean that the Working Group will issue an opinion on the information received. Unfortunately, because it does not publish any official data on the number of communications it receives annually, it is unclear what percentage of communications do lead to opinions. One Working Group member has published in her personal capacity that the Working Group is only able to issue a small number of opinions in relation to the number of complaints it receives, noting that in its April 2017 session it was only able to take up twenty-one cases of the sixty communications received under its regular procedure.[29] In its 2020 Annual Report to the

[29] Relying on internal data maintained by the Secretariat, Working Group member Leigh Toomey reports that from April 1 to July 31, 2017, the Working Group received sixty submissions under its regular communications procedure (i.e., requesting an opinion) and 223 requests for urgent action. "Of

Human Rights Council, the Working Group stated that it had set as a priority the adoption of opinions, which resulted in the adoption of a total of 85 opinions.[30] Similarly, in the Working Group prioritized the adoption of opinions in 2019 and issued 90.[31] This may be an indication that approximately 85-90 opinions per year is the upper end of what the Working Group can issue, even with publication of opinions flagged as its priority. Its 2019 Annual Report also acknowledged that it faced an "ongoing backlog of cases" and raised its concern that it continued to have "insufficient resources to exercise its mandate effectively, particularly in relation to human resources to support the growing demands on the mandate."[32] Given that the Working Group is comprised of only five members who work in a part-time pro bono capacity, its ability to issue more opinions per year seems unlikely to change unless additional resources and staffing through its Secretariat is expanded.

Similarly, the criteria the Working Group uses to guide its case selection is not clear. General guidance on the communications procedure of United Nations Special Procedures offers little clarification, noting only that "the decision to intervene is at the discretion of mandate-holders and will depend on the various criteria established under their respective mandates, as well as the criteria laid out in the Code of Conduct."[33] In general, it notes, this criteria will relate to "the reliability of the source and the credibility of information received; the details provided; and the scope of the mandate."[34] It may be assumed, evidenced by practice, that the Working Group adheres to the general selection criteria noted, such as reliability, applicability to its mandate, and credibility, as it does not take up communications that are not credible or applicable to its mandate. Further, while it could be assumed the Working Group adheres to the Code of Conduct, the Code does not relate specifically to case selection criteria and thus does not provide needed insight into how the Working Group selects cases. At the time of publication, no specific guidance on case selection was noted on the Working Group's website or Methods of Work.

Notably, one member of the Working Group has published that the Working Group prioritizes "urgent and emblematic cases that (i) involve threats to life or health or vulnerable groups, (ii) demonstrate ongoing

those, the Working Group could only take up twenty-one regular communications and twenty-nine appeals" noting that this number may also include cases that did not fall within the Working Group's mandate. *See* Leigh Toomey, *Detention On Discrimination Grounds: An Analysis of the Jurisprudence of the United Nations Working Group On Arbitrary Detention*, 50 Colum. Hum. Rts. L. Rev. 185, 202 (2018-2019), available at http://hrlr.law.columbia.edu/files/2019/01/HRLR-50.1-Toomey-Detention-on-Discriminatory-Grounds.pdf.

[30] *See* Working Group on Arbitrary Detention, 2020 Annual Report, A/HRC/45/16 ¶ 61, available at https://undocs.org/A/HRC/45/16.

[31] *See* Working Group on Arbitrary Detention, 2019 Annual Report, A/HRC/42/39 ¶ 78, available at https://www.ohchr.org/Documents/Issues/Detention/A_HRC_42_39.pdf.

[32] *Id*. ¶ 81.

[33] *See* Communications, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx [https://perma.cc/AJ4B-E5M6] (describing the criteria evaluated by mandate holders when deciding to intervene).

[34] *Id.*

patterns of violations or clarify important legal issues, (iii) affect a large number of victims, (iv) reflect an equitable geographic balance, and (v) may have an overall impact on arbitrary detention."[35] This criteria is not reiterated anywhere officially, but it may be of some value to for sources when drafting communications to the Working Group given that cases which may have a wide impact of concern a large number of persons may intuitively increase the likelihood of being selected for an opinion. Additionally, some external sources providing guidance the communications procedure note that the chance of engaging with the Working Group is maximized by submitting cases of a similar nature or submitting a communication which may concern a large number of individuals in order to maximize the impact of an opinion.[36]

4.2 Admissibility Considerations

The Working Group has wide discretion in reviewing cases of alleged arbitrary deprivation of liberty. Its jurisprudence indicates it is not limited by restrictions on exhaustion of local remedies, to reviewing the conduct of States Parties to the ICCPR or examining detention that is officially sanctioned by the government, or even to cases where the detainee is still presently detained. The Working Group also reviews cases of detention arising in states of emergency.

The Working Group allows broad standing with regard to who may act as a source (i.e. complainant or applicant), including, *inter alia*, family members of the individual detained, NGOs, governments, inter-governmental organizations, and advocates acting on behalf of the individual concerned.[37] Furthermore, engaging with the Working Group does not require legal experience. However, sources must be able to receive requests for information from the Working Group and its Secretariat and update the Working Group on relevant changes in the status or conditions of the detention in question, in relation to the Working Group's follow-up procedure.

While the Working Group can review the legality of most cases of deprivation of liberty, it is nonetheless advantageous to consider how the State at issue is likely to respond to the allegations and whether a public decision from an international body could negatively impact a detainee's circumstances. In some instances, a State's relationship with the United Nations may be such that it is unlikely to implement a recommendation from the Working Group or to engage with the communication process in any capacity. This may not in itself be a deterrent if the objective of the communication is to provide visibility for the case or increase local support for the case. However, in rare cases, the politics of a particular State and its relationship to the international community may be so strained that receiving a recommendation from the Working Group could be harmful to the detainee. In all cases, the individual at issue should be advised on possible outcomes before submitting a communication and clearly authorize proceeding with the case. Advocates should be mindful that individuals

[35] *See* Toomey, *supra* note 29 at p 202.

[36] *See* Engaging with the Working Group on Arbitrary Detention, p 4, available at: https://www.refworld.org/pdfid/5be2c90a4.pdf.

[37] *See* Fact Sheet *supra* note 2 at p 7.

detained within States that do have a history of hostile relations with the international community or international organizations may nonetheless decide to seek an opinion to amplify their case and document their circumstances.

4.2.1 Exhaustion of Local Remedies is not a Requirement for Admissibility

A remarkable feature of the Working Group's complaints procedure is that it does not require exhaustion of local remedies or require petitioners to establish that exhaustion would be unduly prolonged or burdensome prior to submitting a case for review.[38] Although at least one State has argued that the failure to exhaust local remedies should make a complaint inadmissible, there is no such requirement in resolution 1991/42, which lays out the Working Group's mandate.[39] Therefore, the Working Group does not consider exhaustion a requirement for admissibility.[40]

4.2.2 Cases Involving Non-States Parties to the ICCPR

The Working Group accepts complaints concerning deprivations of liberty by any State. In deliberation No. 9, the Working Group explores the customary status of the prohibition of arbitrary deprivation of liberty and finds that the prohibition applies to all States, regardless of whether the State is a Party to the ICCPR.[41] By definition, it reasons, arbitrary detention can never be a necessary or proportionate measure, making the practice inconsistent in all cases with States' obligations under both customary and treaty-based international law. On these bases, the Working Group finds that the prohibition on arbitrary detention constitutes a *jus cogens* norm that is binding on all States, irrespective of treaty obligations.[42] Accordingly, anyone may

[38] *See* Fact Sheet *supra* note 2 at p 7; s*ee also* United Nations Working Group on Arbitrary Detention, ¶ 67, Communication No. 38/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/38 (16 June 2017) (noting that no other international instrument that the parties might consider applicable to the rules of admissibility are relevant to the Working Group outside of its Methods of Work: "in its methods of work there is no rule applicable that impedes consideration of communications due to the lack of exhaustion of domestic remedies in the country concerned. Sources have no obligation therefore to exhaust domestic remedies before sending a communication to the Working Group").

[39] Methods of Work *supra* note 1 ¶¶ 5-8; *See e.g.*, the Working Group's Deliberation No. 2 in response to the letter from the Cuban Government dated 24 December 1991 requesting it to "publicly communicate to Member States for their comments" its views on the juridical standards which it established for the admissibility of the communications it receives, particularly its practice of accepting and taking action on communications that have not exhausted all available means at the national level.

[40] Methods of Work *supra* note 1 ¶ 8.

[41] *See* Deliberations, *supra* note 28, ¶ 43 (finding that the "widespread ratification of international treaty law on arbitrary deprivation of liberty, as well as the widespread translation of the prohibition into national laws, constitute a near universal State practice evidencing the customary nature of the arbitrary deprivation of liberty prohibition. Moreover, many United Nations resolutions confirm the opinio juris supporting the customary nature of these rules: first, resolutions speaking of the arbitrary detention prohibition with regard to a specific State that at the time was not bound by any treaty prohibition of arbitrary detention; second, resolutions of a very general nature on the rules relating to arbitrary detention for all States, without distinction according to treaty obligations. Such resolutions demonstrate the consensus that the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law").

[42] *See id*. at ¶ 75; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 51, Communication No. 63/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/63 (13

submit a claim of arbitrary deprivation of liberty via the communication mechanism, so long as the claim pertains to a State, its agents, or instrumentalities.

4.2.3 Cases of *de facto* State Detention

Advocates should also bear in mind that the Working Group will also consider communications arising from arbitrary deprivation of liberty via *de facto* control of the State, or in other words where the State has effective control over a non-State entity. For instance, the Working Group considered that the articles on State responsibility for internationally wrongful acts gave it authority to consider a case where an individual was detained by a non-State armed group on the basis that the group was clearly mandated by the Government to detain individuals on the Government's behalf.[43] Article 5 clarifies that the conduct of a person or entity that is not an organ of the State but that is empowered by the law of that State to exercise elements of governmental authority is considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[44] The Working Group determined that because the non-State armed group was paid salaries and provided uniforms and equipment by the State, responsibility of the group's actions could be attributed to the State and therefore fell within its mandate.[45]

4.2.4 Cases Where the Detainee Has Already Been Released

The Working Group is also not restricted to reviewing cases where the subject of the communication is presently being deprived of his or her liberty. Under paragraph 17(a) of its Methods of Work, the Working Group can issue an opinion on whether the detention was arbitrary, "notwithstanding the release of the person concerned."[46] For example, in a case concerning the detention of nine bloggers in Ethiopia, the Working Group issued an opinion despite all nine bloggers eventually being released from detention after filing the complaint.[47] Therefore, advocates need not refrain from submitting a complaint to the Working Group if the individual concerned has been released, so long as the initial detention falls within at least one of the five categories of

October 2017) (holding that "the prohibition of arbitrary detention is part and parcel of customary law that bears an absolute character and is in fact a peremptory norm (jus cogens) of international law and therefore binding upon all States, irrespective of their treaty obligations").

[43] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 26-32, 39, Communication No. 39/2018 (Libya) U.N. Doc. A/HRC/WGAD/2018/39 (22 June 2016) (referencing findings by the United Nations Office of the High Commissioner for Human Rights on the Special Deterrence Force and its relation to the State despite its formal independence from the recognized Government).

[44] *Id*. at ¶ 31 (noting that the articles on State responsibility represents customary international law).

[45] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 30-32, Communication No. 39/2018 (Libya) U.N. Doc. A/HRC/WGAD/2018/39 (22 June 2016) (recalling concluding "that, in this case, the Government is responsible for the actions of the Force").

[46] Methods of Work *supra* note 1 ¶ 17 (a).

[47] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 39-42, Communication No. 10/2016 (Ethiopia), U.N. Doc. A/HRC/WGAD/2016/10 (14 June 2016) (finding that "[t]he release of the nine individuals does not absolve the Government of its obligations under international law, including the obligation to provide compensation for harm suffered, if the deprivation of liberty is found to be arbitrary").

arbitrariness considered by the Working Group.

4.2.5 Cases of Detention Arising Under States of Emergency

Detentions pursuant to states of emergency are also reviewable by the Working Group.[48] In such instances, the Working Group has explicitly held that it is not prevented from considering allegations of arbitrary detention, particularly given the risks of arbitrary detention when certain rights are suspended.[49] In a case in which the government asked the Working Group not to take up the matter on the basis that it had detained the individual pursuant to laws under its state of emergency, the Working Group stressed that "there is no rule that impedes the treatment of any communication related to an arbitrary detention submitted by a source when a state of emergency has been declared" and further emphasized that "owing to the security concerns of a given country and to the judicial system being overwhelmed through the receipt of large amounts of cases derived from such an emergency situation, the communications procedure of the Working Group is one of the few international mechanisms of redress for people who are held under any form of arbitrary deprivation of liberty."[50] Moreover, the ICCPR does not recognize derogations from any legal safeguards concerning persons deprived of their liberty, such as the right to bring proceedings before a court, the right to be informed of the reasons for arrest, the right to be informed of the legal basis and of the judicial order for detention and the right to legal counsel.[51] Accordingly, the Working Group will review allegations of arbitrary deprivation of liberty that take place under suspensive or restricted public orders or states of emergency.

4.2.6 Incorrectly Categorizing or Failing to Raise a Violation

Overall, in the period under review, the Working Group agreed with the source that the detention was arbitrary in 95.7% of cases in which it reached a decision and issued an opinion.[52] However, it sometimes determined that the facts presented

[48] *See, e.g.* ICCPR art. 4 (providing that: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision; and 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation").

[49] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 75, Communication No. 41/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/41 (26 July 2017) (reminding the state party that it has a universal mandate to promote and protect the right of every individual not to be arbitrarily detained").

[50] *Id*.

[51] *Id*. at ¶ 76 (reminding the State that the right to challenge the legality of detention before a court is a rule of customary international law which does not permit derogations).

[52] This percentage excludes cases that were filed or pending in the period under review. Annually, the Working Group found the detention arbitrary in

constituted arbitrariness under a different category than that that the source alleged. These miscategorizations did not prevent the Working Group from finding violations, but when a source completely fails to argue a particular violation, the Working Group may not make a determination regarding it, even if the facts could justify finding an additional violation. For example, where the Working Group noted that a law permitting pretrial detention up to two years indicated that the State may have violated the detainee's right to trial without undue delay, which the source did not allege or raise, it "assum[ed] that in the present case there was no undue delay."[53] However, if the State's conduct in a particular case fits within a documented pattern of unlawful conduct, the Working Group may use reports from other bodies to inform its decision. In opinion 43/2018, the Working Group found the detention at issue violated Category III on the basis that the State did not provide a competent tribunal and denied the detainee his right to counsel based on documented patterns of similar abuses detailed in reports from the UN High Commissioner for Human Rights and the Council of Europe's High Commission for Human Rights, despite the fact the source did not raise these issues in the complaint.[54]

4.3 Establishing a Prima Facie Case

Establishing a *prima facie* case of arbitrary deprivation of liberty has different requirements depending on the category of the alleged violation. These specific requirements are explained below in the sections on each category. Where a source can establish a *prima facie* violation of category I, II, IV, or V, the Working Group will find the State has violated the prohibition on arbitrary detention. In other words, violations of categories I, II, IV and V are *per se* arbitrary. In contrast, violations of Category III are assessed to determine whether they are so grave as to give the detention an arbitrary character.[55] It is advantageous for sources to raise all the possible violations related to a particular case of detention to increase the chances of a favorable opinion - but particularly so for violations of the right to fair trial at issue in Category III. Presenting consistent and systematic evidence, including evidence of patterns of illegal State conduct, is especially helpful in laying out a *prima facie* case. Some patterns may even indicate crimes against humanity.

Establishing a *prima facie* case typically requires consistent and detailed evidence articulating how a State's actions have violated an individual's right not to be arbitrarily detained.[56] This standard has

92.9% of cases in 2015 (52/56 opinions); 95.1% in 2016 (58/61); 95.7% in 2017 (90/94); and 97.8% in 2018 (88/90).

[53] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 26, Communication No. 41/2016 (Egypt) U.N. Doc. AA/HRC/WGAD/2016/41 (1 November 2016) (observing that "only the specific circumstances of a case would permit an appropriate assessment" of whether there was undue delay, which the source did not raise).

[54] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 91-93, 97, 99, Communication No. 43/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/43 (15 January 2018).

[55] Methods of Work *supra* note 1 at ¶ 8 (c) (looking at whether violations of the right to a fair trial "is of such gravity as to give the deprivation of liberty an arbitrary character category III").

[56] As explained more in the section of the Report covering the Working Group's legal approach, the various State obligations regarding deprivation of

been distilled from the Working Group's opinions adopted from 2015 through 2018. Generally, a submission is considered consistent and detailed when the source provides corroborating evidence;[57] when co-claimants share similar accounts that are nearly the same in all material aspects;[58] when external documentation supports the source's claims, such as news reports and findings by other international human rights bodies;[59] and when the Working Group's own prior decisions finding detentions arbitrary under similar conditions are offered to support the source's claims.[60]

liberty are divided into five legal categories under which the Working Group evaluates complaints.

[57] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 61/2016 (Saudi Arabia), U.N. Doc. A/HRC/WGAD/2016/61 (6 February 2017) finding that "the arrest and detention of the three minors resulted from their participation in the protests, the nature of which was peaceful. Such observation derives from the detailed, consistent and credible submissions of the petition, as corroborated by other credible sources" and that the source "has submitted concrete information about the process of deprivation of liberty of the three minors in a consistent and detailed manner," ¶ 53).

[58] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 47, Communication No. 7/2016 (Egypt), U.N. Doc. A/HRC/WGAD/2016/7 (14 June 2017) (noting that it had taken into account all of the allegations made by the nine journalists in relation to the "Rabaa Operations Room" case and that even though the nine journalists were arrested and detained at different times and under different circumstances, their accounts are similar in all material respects, which lends credibility to their allegations); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 23, Communication No. 81/2017 (Democratic Peoples' Republic of Korea and China) U.N. Doc. A/HRC/WGAD/2017/81 (26 December 2017) (noting the "wealth of information concerning the allegations made in the present case and recall[ing] paragraph 38 of its opinion No. 35/2013, in which it was presented with similar facts and concluded that the detention had been arbitrary").

[59] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, 40, Communication No. 20/2017 (Kuwait), U.N. Doc. A/HRC/WGAD/2016/7 (18 July 2017) (noting recommendations from the Special Rapporteur on freedom of expression and peaceful assembly on his case and a Human Rights Council periodic report on State at issue regarding freedom of expression); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 74, Communication No. 22/2017 (Republic of Korea), U.N. Doc. A/HRC/WGAD/2017/22 (30 May 2017) (noting joint report from Special Rapporteur on the right to freedom of assembly and extrajudicial executions, a report on Korea by Special Rapporteur on the freedom of assembly, and a pattern of harassing union organizations); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 25-27, Communication No. 44/2016 (Thailand), U.N. Doc. A/HRC/WGAD/2016/44 (17 June 2017) (referencing the conclusions of "[o]ther experts and observers" who also consider that the country's lese-majesty laws are inconsistent with the State's international human rights commitments); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 29, Communication No. 15/2018 (Equatorial Guinea), U.N. Doc. A/HRC/WGAD/2018/15 (24 September 2018) (noting that political opponents and human rights defenders in the State at issue are especially subjected to repression "a matter of public record").

[60] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 27, Communication No. 11/2016 (China), U.N. Doc. A/HRC/WGAD/2016/11 (16 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 44/2016 (Thailand), U.N. Doc. A/HRC/WGAD/2016/44 (17 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 41, Communication No. 10/2016 (Ethiopia), U.N. Doc. A/HRC/WGAD/2016/10 (14 June 2016) (noting that the alleged silencing of prominent critical voices appeared to be a pattern of conduct by the Government seeking to criminalize the peaceful exercise of human rights as evidenced by its prior opinions No. 2/2015, No. 62/2012, No. 28/2009 and No.18/1999); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 27, Communication No. 19/2018 (Islamic Republic of Iran) U.N. Doc.

Such evidence was often explicitly identified as "consistent"[61] or "systematic"[62] in the period under review. The Working Group will typically list the evidence it relied on when examining an allegation and what it found credible. For instance, in a case pertaining to the detention of a member of a religious minority sect, the Working Group observed that the detainee was charged with vague crimes that were identical to other individuals of the same sect that were determined to be arbitrarily detained.[63] It further noted that it found "[s]uch past records add considerable weight to the observation that Mr. al-Jazeeri's arrest and detention were part of the widespread abuse of power aimed at silencing the critical media."[64]

Identifying patterns of State conduct is one way to demonstrate consistency, and patterns appear to be highly relevant to the Working Group's determinations. It may refer to patterns observed within its own opinions or those documented within external reports, usually from UN bodies or working groups.[65] In fact, within the years under review, in no instance did the Working Group find a deprivation of liberty "not arbitrary" if it fit within a documented pattern of unlawful State practice. This suggests that where the source or the Working Group is able to corroborate the facts of the claim with reports or findings from other human rights bodies, it considers the communication credible and persuasive. For instance, in opinion No. 69/2017, the Working Group noted there existed "a body of reliable evidence that supports the

A/HRC/WGAD/2018/19 (24 May 2018) (noting that "the Working Group has considered other reliable information that supports the source's claims, particularly its previous opinions concerning arbitrary arrests and detention in the Islamic Republic of Iran. In these cases, findings have been made about the arbitrary deprivation of liberty of individuals who had peacefully exercised their rights under the Universal Declaration of Human Rights and the Covenant, demonstrating that this is a systemic problem in the administration of criminal justice in the Islamic Republic of Iran"); and Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 26/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/26 (8 June 2017) (noting that it had considered the application of article 88 of the Penal Code (at issue in the present case) "in numerous cases of deprivation of liberty in recent years. In fact, a similar case concerning article 88 of the Penal Code is being considered by the Working Group at the present session").

[61] *See, e.g.*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 81/2017 (Democratic Peoples' Republic of Korea and China) U.N. Doc. A/HRC/WGAD/2017/81 (26 December 2017) (noting the consistent pattern of systematic deportation by China of nationals of the Democratic People's Republic of Korea arrested at the border, to their country of origin).

[62] *See id*.; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 59, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[63] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 17, Communication No. 55/2016 (Bahrain), U.N. Doc. A/HRC/WGAD/2016/55 (30 January 2016).

[64] *Id*.

[65] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 81/2017 (Democratic Peoples' Republic of Korea and China) U.N. Doc. A/HRC/WGAD/2017/81 (26 December 2017) (wherein the Working Group noted "with concern the consistent pattern of systemic deportation by China of nationals of the Democratic People's Republic of Korea arrested at the border, to their country of origin" citing to the concluding observation of the Committee against Torture CAT/C/CHN/CO/5).

source's claims" and that the practice of the State at issue of targeting individuals for exercising their rights "has been well documented over many years in cases brought to the Working Group."[66] This included reference to its prior opinions pertaining to the accused State;[67] its findings from its last two country visits;[68] statements from the Special Rapporteur on Torture corroborating the State practice of using incommunicado detention,[69] and similar findings by the Committee against Torture.[70]

In some cases, the Working Group has found that the pattern of violations in a State constitutes crimes against humanity. Crimes against humanity are "widespread or systematic attacks directed against any civilian population" and include "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law."[71] The Working Group has noted with concern possible crimes against humanity committed by a number of States. In a 2017 opinion regarding China, the Working Group emphasized that it had assessed 84 cases against China over 25 years and reminded the State that widespread violations can amount to crimes against humanity.[72] Similarly, the Working Group has expressed concern with the number of cases brought against Viet Nam regarding arbitrary deprivation of liberty, which suggests a widespread pattern.[73] The Working Group has raised similar concerns regarding the number of cases against Iraq in relation to a "widespread practice of arrests without warrants, protracted pretrial detention and systematic sentences to death based on confessions obtained under torture" that the government failed to address.[74] In numerous opinions regarding Iran, the Working Group cited past cases regarding its arbitrary detention of peaceful protesters, noting this may constitute a crime against humanity.[75] The Working Group has also cited several instances of arbitrary detention

[66] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017).

[67] *See id*.

[68] *See id*. at ¶ 32.

[69] *See id*. at ¶ 37.

[70] *See id*. at ¶ 41 (noting that it finds the source's allegations to be credible, particularly in the light of the statement by the Committee against Torture in its most recent review of China that it had received detailed reports of cases of torture, deaths in custody, arbitrary detention and disappearances of Tibetans, and acts directed at other minority groups).

[71] *See* Rome Statute of the International Criminal Court, art. 7(1)(e), entered into force July 1, 2002, 2187 U.N.T.S. 90.

[72] *See e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017).

[73] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 59, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (citing to opinions No. 27/2017, No. 26/2017, No. 40/2016, No. 46/2015, No. 45/2015, No. 33/2013, No. 26/2013, No. 42/2012, No. 27/2012, No. 46/2011, 24/2011, No. 6/2010 and No. 1/2009 as evidence of a pattern of systematic violations that constitute a crime against humanity).

[74] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 37, 40, Communication No. 32/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/32 (6 July 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 102, Communication No. 33/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/33 (3 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 110, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017).

[75] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 41, Communication No. 19/2018 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2018/19 (24 May 2018); Human Rights

in Thailand associated with enforcement of Thailand's lese-majeste laws, noting its systematic deprivation of liberty could constitute a crime against humanity.[76] As illustrated by these examples, should the detaining State have a history of complaints before the Working Group, advocates could cite the Working Group's previous findings and note that such a pattern of arbitrary detention may constitute crimes against humanity.

4.4 Timeline of Communications Process

Jurisprudence from the period under review reflects a typical time period of three and a half months between submitting a communication and receiving an opinion.[77] The timing of a communication's submission and whether the government replies or asks for an extension will have a bearing on the timeline. Governments may request an extension of up to one month if the request is timely (within the 60-day period it has to reply). Likewise, the source is provided an opportunity to respond to the Government's reply to rebut any contested facts. The length of time provided for the source to rebut appears the most variable, ranging from days (in order to meet a publication

Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 25/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/25 (21 September 2016); and Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 54, Communication No. 28/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/28 (21 September 2016).

[76] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 72, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 44/2016 (Thailand), U.N. Doc. A/HRC/WGAD/2016/44 (17 June 2017); see also patterns noted by the Working Group which may constitute crimes against humanity in Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 44/2016 (Thailand), U.N. Doc. A/HRC/WGAD/2016/44 (17 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 102, Communication No. 33/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/33 (3 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 110, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 57, Communication No. 51/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/51 (13 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 72, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 85, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018).

[77] *See*, for instance, the following timelines: opinion No. 87/2017: Communication transmitted to Govt. July 10, 2017 and requested to reply by September 8, 2017; Govt. requested ext. and sent reply October 9, 2018; Govt's reply transmitted to source, who replied on November 1, 2017; Decision adopted on November 23, 2017; opinion No. 86/2017: communication transmitted to Govt. August 2, 2017 and requested to reply by October 2, 2017; Govt. requested ext. of two weeks (Oct. 16, 2017) but ultimately did not reply; Decision adopted November 23, 2017. opinion No. 85/2017: communication transmitted to Govt. on Sept. 11, 2017 and requested to reply by November 12, 2017; Govt. did not reply and did not request an extension; Decision adopted November 23, 2017.

cycle) to months.[78] The source and the government will receive an unofficial version of the opinion as soon as it is prepared; however, it remains confidential until it is published in the report to the Human Rights Council issued at the end of each meeting cycle.

The Government's opportunity to respond

If the source has presented a *prima facie* case of arbitrary detention, the burden of proof shifts to the Government to refute the allegations.[79] The Government can meet its burden by producing documentary evidence in support of its claims.[80] However, "mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations."[81] Additionally, the Working Groups utilizes a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are restricted or where human rights defenders are involved.[82] Credible

[78] *Compare* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018) (response from the government transmitted to source on August 15, 2017, and source replied November 13, 2017) *and* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 59/2016 (Maldives) U.N. Doc. A/HRC/WGAD/2016/59 (1 February 2017) (response from the government transmitted to source on September 30, 2016, and the source replied on November 9, 2016) *with* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (Government's response was sent to the source on November 8, 2017. Response was requested by the Working Group by November 13, 2017 in order to facilitate consideration of the case during its eightieth session on November 20-24, 2017. No reply from the source was received).

[79] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 61, Communication No. 59/2016 (Maldives) U.N. Doc. A/HRC/WGAD/2016/59 (1 February 2017) citing A/HRC/19/57, ¶ 68: The Working Group's approach to this burden shift is in line with the ruling of the International Court of Justice in Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), which establishes the evidentiary position for claims to succeed in human rights cases. "Where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, it may be difficult to establish the negative fact that is asserted. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law – if such was the case – by producing documentary evidence of the actions that were carried out. In general the burden rests with the Government: it is for the Government to produce the necessary proof."

[80] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 20-25, 35-41, 54 Communication No. 32/2016 (New Zealand) U.N. Doc. A/HRC/WGAD/2016/32 (7 October 2016) (articulating the evidence provided by the Government in ¶¶ 20-25, 35-41 and finding in ¶ 54 that "[o]n the particular facts of the present case, the Working Group is satisfied that sufficient safeguards are in place at this stage to ensure that the justification for the preventive detention still exists, including regular periodic review of Mr. Isherwood's risk profile").

[81] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 34, Communication No.75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (referring to A/HRC/19/57, ¶ 68.

[82] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 03/2018 (Thailand) U.N. Doc. A/HRC/WGAD/2018/3 (9 July 2018).

violations of categories I and V are subject to a similar standard of review.

Additionally, the Working Group considers the Government to be better placed to demonstrate that it has afforded the petitioner his or her rights, as guaranteed by law.[83] Moreover, because the arbitrary deprivation of liberty is typically intertwined with a failure to provide the procedural guarantees to which the petitioner is entitled, whether States can produce documentation that these rights were ensured is important to the Working Group's determination.

If the Government fails to respond, the Working Group interprets its lack of response as accepting the source's allegations as fact, even when this is against the State's interest.[84] Per its Methods of Work, the Working Group is empowered to make a determination on the lawfulness of the detention even in cases where the government concerned does not respond.[85] For instance, in opinion No. 90/2017, the source disputed the government's claim that the warrantless arrest fell under the exception of *in flagrante delicto*, advancing several arguments in support of its position.[86] The Working Group noted that "[t]he Government has not contested these claims, even though the burden of proving the contrary rested with it. Complete confidence in the source's account is therefore warranted."[87] Similarly, in opinion No. 08/2016, in response to the State's failure to reply, the Working Group held that the "lack of response from the Government constitutes a waiver of its right to challenge the allegations made against it."[88]

[83] *See*, *e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 34, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (recalling that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 61, Communication No. 59/2016 (Maldives) U.N. Doc. A/HRC/WGAD/2016/59 (1 February 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 51, Communication No. 12/2018 (Azerbaijan) U.N. Doc. A/HRC/WGAD/2018/12 (20 July 2018).

[84] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 41, Communication No. 85/2017 (Rwanda) U.N. Doc. A/HRC/WGAD/2017/85 (4 January 2018) (explicitly noting that the lack of a response from the Government therefore implies that the latter has deliberately chosen, against its interests, not to contest prima facie credible allegations.

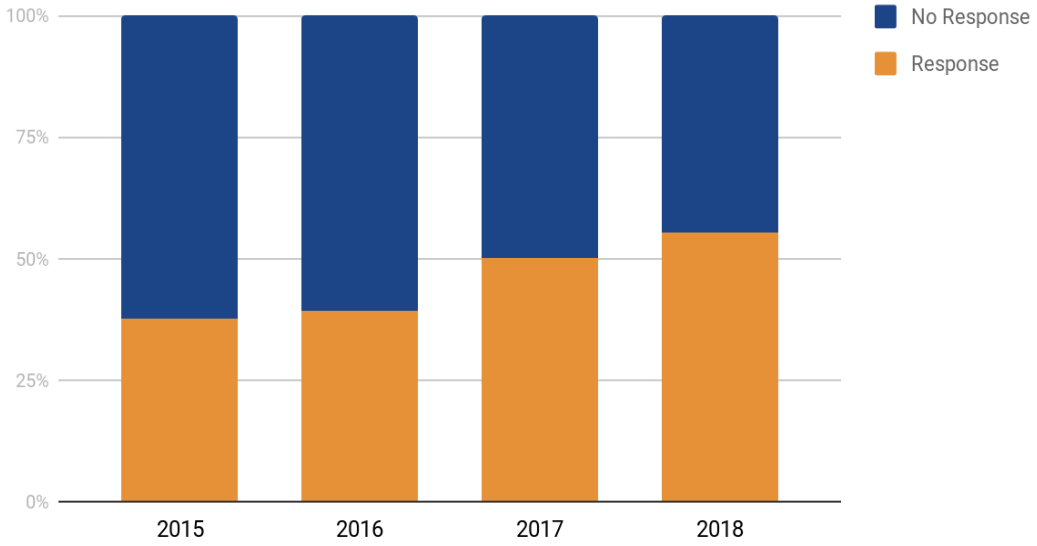
[85] Working Methods *supra* note 1 at ¶ 15.

[86] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 42, Communication No. 90/2017 (Mauritania) U.N. Doc. A/HRC/WGAD/2017/90 (5 January 2018).

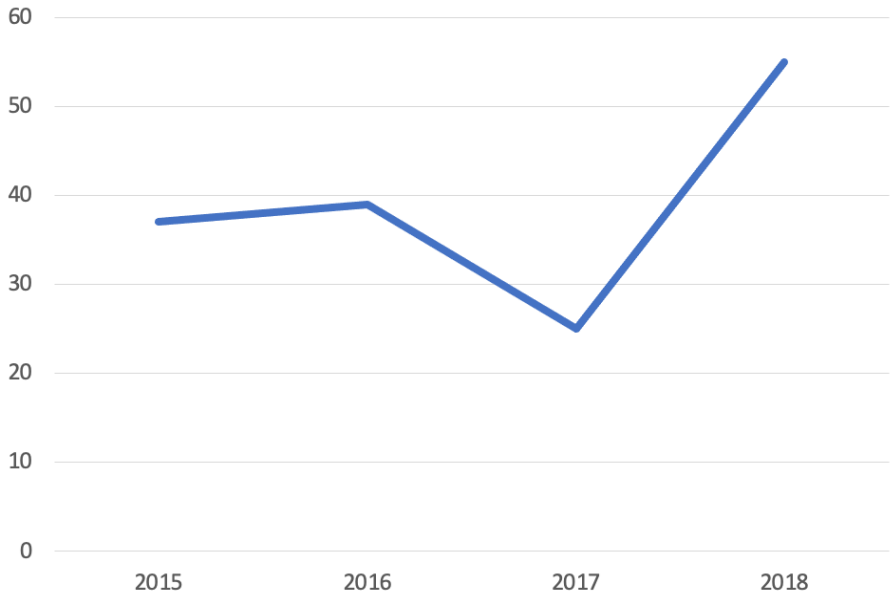
[87] *Id.*

[88] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 24, Communication No. 08/2016 (Burundi), U.N. Doc. A/HRC/WGAD/2016/8 (20 June 2016).

Percentage of Cases in which the Government Responded



Rate of Governments' Engagement with the WGAD from 2015-2018



If the government does reply and produces documentary evidence in support of its claim, the source of the communication is notified of the response and is given an additional opportunity to reply. The sufficiency of the government's evidence is relevant whether or not the source rebuts the government's reply. For instance, in a case regarding the detention of Costa Rican citizens in Nicaragua in which the source failed to rebut the government's reply, the Working Group still found the detention arbitrary based on the credibility of the facts asserted in the original communication.[89] The Working Group concluded that the government's reply did not provide enough detailed information, and merely stated that the detention was not arbitrary.[90] In contrast, in its opinion concerning the alleged arrest and detention of nine individuals in Ukraine, the Working Group noted that in responding to the Government's reply, the source "drew attention to the arrests and assumed their unlawful nature without providing the necessary information," while the government did provide the necessary details.[91] Ultimately, the Working Group concluded "it did not possess enough information to draw any definite conclusions"[92] and opted to "file the case" (the Working Group's terminology for cases on which it does not take action).[93]

5. The Working Group's Sources of Law and Fact

In evaluating the complaints it receives, the Working Group compares the facts alleged, as well as documented domestic law and practices regarding deprivation of liberty within a State, with the State's obligations under international law. Certain treaties, such as the Convention on the Rights of the Child (CRC), are routinely used by the Working Group in cases involving particularly vulnerable groups to ensure that States are meeting these higher standards of protection when relevant. The Working Group also uses concluding observations and country reports from other United Nations bodies and other international and regional organizations, as well as NGO reports and credible news sources to better understand patterns of treatment within a country and to corroborate its findings. As

[89] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 21, Communication No. 16/2016 (Nicaragua), U.N. Doc. A/HRC/WGAD/2016/16 (June 28, 2016) (finding "that the Government did not provide detailed information regarding the time, place and manner in which the claimant was deprived of his liberty, nor did it prove that, at the time of his arrest, the police officers showed an arrest warrant and informed him of the reasons for his arrest. The Government also failed to provide information that would invalidate the claim that the claimant was held in incommunicado detention or that he was denied access to his lawyer and to the Costa Rican consular authorities for a period of one month, starting from the time of his arrest in May 2015").

[90] *Id.* at ¶¶ 19, 21; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 53,Communication No. 61/2016 (Saudi Arabia), U.N. Doc. A/HRC/WGAD/2016/61 (6 February 2017): "Although the Government, in its response, denied the claims regarding the arrest, incommunicado detention and the application of torture, it has not provided any information about the details of the facts and circumstances to establish the authenticity of its claims.

[91] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 4, 25 Communication No.05/2016 (Ukraine), U.N. Doc. A/HRC/WGAD/2016/5 (October 10, 2016).

[92] *Id.* at ¶ 28.

[93] N.B. The Working Group can file or set aside a case if the individual has been released or if the Working Group decides that it has not been able to obtain sufficient information. *See* Fact Sheet *supra* note 2, p. 7-8.

this Report explores in more detail, the Working Group's incorporation of "other legal instruments" within its opinions has resulted in a rich jurisprudence, offering insight into how it characterizes arbitrary detention and defines the level of process States must afford individuals to ensure any deprivation of liberty complies with law.

Advocates and human rights defenders thinking of engaging with the Working Group should review its jurisprudence. Among other reasons, this strategy can be useful for learning which contextual sources the Working Group finds credible for understanding the social and political dynamics within a State, and also for reviewing the sources of law and context informing the Working Group's definition of "arbitrary" and "deprivation of liberty." An understanding of both elements can help advocates draft persuasive communications by anticipating the kinds of evidence the Working Group will find credible and convincing in its determinations. This section reviews the main sources of law and fact the Working Group relies on its opinions.

5.1 Relevant Treaty-Based International Law

In discharging its mandate, The Working Group is guided by the principles enshrined in the UDHR, as well as the protections afforded by the ICCPR,[94] which it considers to be customary international law. The Working Group also evaluates compliance with other treaty obligations the State concerned is bound by, such as the Convention relating to the Status of Refugees of 1951, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child, among others.[95] The Working Group also utilizes the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) and other legal sources, such as resolutions, declarations, and guidance issued by international organizations and tribunals.[96] The Working Group's Methods of Work list at least fourteen different international instruments it considers when drafting its opinions. Therefore, advocates should include references in their communications to specific violations of these conventions as evidence that a deprivation of liberty is arbitrary.

The Working Group's jurisprudence also indicates that it will not hesitate to remind a government of its obligations—even when it is only a signatory, but not a party, to an international treaty. The Working Group evaluates State conduct against the obligations the State has as a signatory, namely that the State is prohibited under international law from taking any action that would defeat the object and purpose of the treaty.[97]

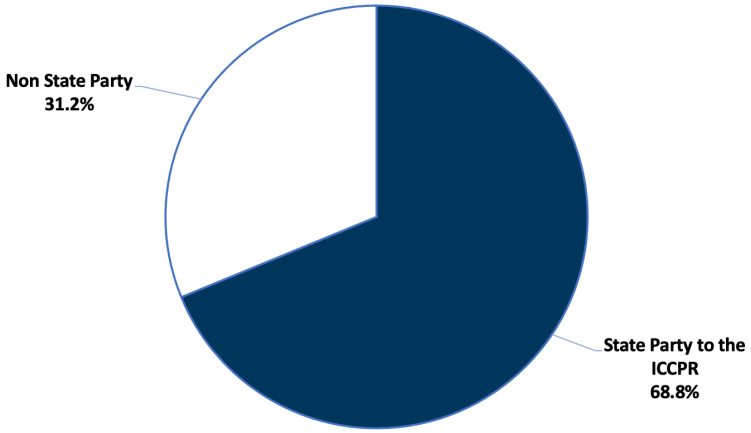
[94] Methods of Work *supra* note 1 at ¶ 7.

[95] *Id.*

[96] *See id.*; *see also* 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, available at: https://www.un.org/ruleoflaw/files/Body%20of%20Principles%20Detention.%20pdf.pdf.

[97] *See* United Nations Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 80, Communication No. 62/2018 (China) U.N. Doc. A/HRC/WGAD/2018/62 (12 October 2018) (noting that "as a signatory to the International Covenant on Civil and Political Rights since 1998, China is obliged, under article 18 of the 1969 Vienna Convention on

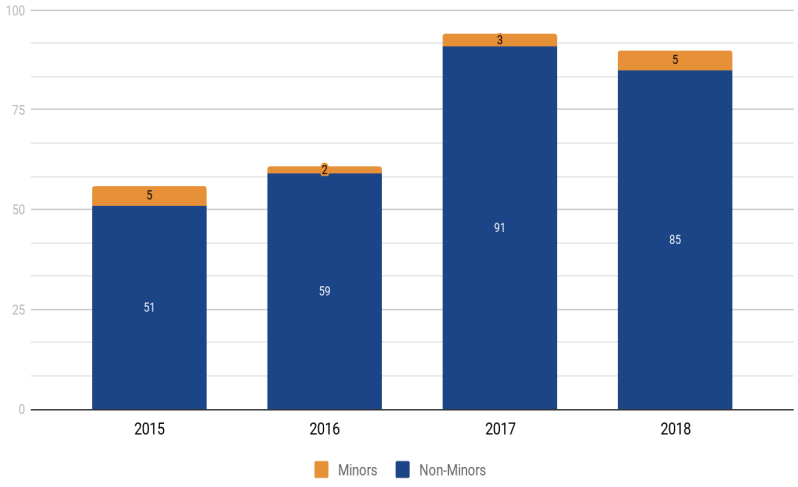
Percentage of Communications under the Period of Review Pertaining to State parties to the ICCPR and States that are not a party to the Covenant



Special Considerations Regarding the Arbitrary Deprivation of Liberty of Minors

While the Working Group will assess a minor detainee's claims similarly to an adult's claims by assessing conformity with the UDHR and ICCPR, the Working Group will hold the State to a higher standard and ensure its compliance with the CRC and other child-specific instruments. Advocates should therefore highlight the relevant articles of the CRC that are likely being violated by the State when the detention of a minor is at issue.

Percentage of Cases that Pertained to Minors



the Law of Treaties, to refrain from acts that would defeat the object and purpose of the Covenant, including the repeated denial of the rights to liberty and to a fair trial under its articles 9 and 14").

In cases involving minors, the Working Group consistently cites the CRC, particularly article 37(b), which provides "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[98] The CRC also explicitly provides that minors are entitled to a presumption of innocence, humane treatment with respect for their human dignity, prompt access to legal assistance, and the ability to challenge the legality of their detention.[99] The CRC does not displace other rights provided for by other human rights treaties; however, the conduct of State Parties is assessed against the obligation under the CRC to ensure that the best interests of the minor were a primary consideration in the Government's conduct.[100]

5.2 Relevant Principles of Customary International Law

As mentioned previously, the Working Group considers many provisions of the UDHR and the ICCPR to be part of customary international law. Specifically, it recognizes a series of fair trial protections and fundamental human rights norms related to deprivation of liberty that cannot be legal under any circumstances. In cases alleging a *jus cogens* violation, such as the prohibition on torture, that is lawful under a State's domestic law, advocates can both point out

[98] Convention on the Rights of the Child art. 37(b), Nov. 20, 1989, 1577 U.N.T.S. 3, available at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx; *see also*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 31, Communication No. 53/2015 (Egypt) U.N. Doc. A/HRC/WGAD/2015 (18 December 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 28, Communication No. 14/2015 (Egypt) U.N. Doc. A/HRC/WGAD/2015 (22 June 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 23, Communication No. 13/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/13 (24 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 17, Communication No. 52/2016 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2016/52 (20 January 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 29, Communication No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 59, 79, Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc.A/HRC/WGAD/2018/11 (25 May 2018).

[99] *See* Convention on the Rights of the Child art. 40; Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 59, Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc. A/HRC/WGAD/2018/11 (25 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 31, 33, Communication No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3 (16 June 2017); United Nations Working Group on Arbitrary Detention, ¶ 23, Communication No. 13/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/13 (24 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 31, Communication No. 53/2015 (Egypt) U.N. Doc. A/HRC/WGAD/2015 (18 December 2015).

[100] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 37/2018 (Malaysia) U.N. Doc. A/HRC/WGAD/2018/3 (24 May 2018) (noting that as a party to the CRC, the Government's conduct may be assessed against the obligations found in articles 3 (1) and 40 (2) (b) (i) of the Convention to ensure that the best interests of the minor were a primary consideration); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 59, 79, Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc. A/HRC/WGAD/2018/11 (25 May 2018) (reminding the State that as a party to the CRC since 1990, it is obliged under article 3 (1) to ensure that the best interests of the child is a primary consideration).

the illegality in their particular case and highlight for the Working Group those domestic laws that do not comport with peremptory norms and, as such, could lead to a pattern of violations.

Several fair trial rights related to the prohibition on arbitrary detention have customary status. For instance, the right to *habeas corpus*, codified in article 9(4) of the ICCPR, is routinely referred to in the Working Group's Opinions as a "self-standing right" and a peremptory norm of international law, guaranteeing an individual the right to go before a court to establish the lawfulness of his or her detention.[101] The Working Group also recognizes the customary nature of general principles of law, including, inter alia, the principle of *non bis in idem* (double jeopardy)[102] and *nullum crimin sine lege* (retroactive application of law),[103] and it has consistently noted the customary status of the prohibition on trying civilians in military courts.[104] The Working Group reiterates the customary status of these rights again in Opinion No. 93/2017, wherein it "recalls that these minimum due process and fair trial guarantees are protected under articles 9, 10 and 11 of the Universal Declaration of Human Rights, as well as peremptory norms (*jus cogens*) of customary international law."[105]

The Working Group also recognizes certain other rights and freedoms as having customary status and as being particularly relevant to the issue of arbitrary detention. For instance, it explicitly clarifies that States must respect and protect the right to freedom of opinion and expression,[106] even if such opinions "are not in accordance with official government policy" or "the rights-holder is not to its liking under the peremptory norms (jus cogens) of customary international law."[107] Likewise, arbitrary interference with a person's

[101] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 92/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/92 (20 December 2017) (noting that the right to challenge the lawfulness of detention is "a self-standing right" and "a peremptory norm"); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 38, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017).

[102] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 71, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018) (noting that "the doctrine of ne bis in idem is another fundamental element of the international norms on detention that is universally recognized in countries where the rule of law prevails and is inherent in the prohibition of arbitrary detention (art. 10) and the right to a fair trial (art. 11)").

[103] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 61/2016 (Saudi Arabia), U.N. Doc. A/HRC/WGAD/2016/61 (6 February 2017) (finding the retroactive application of law a contravention of "a cardinal principle of international human rights law" as enshrined in article 11(2) of the Universal Declaration of Human Rights).

[104] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 89, Communication No. 28/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/28 (30 May 2018): "In its jurisprudence, the Working Group has consistently argued that the trial of civilians by military courts is in violation of the Covenant and of customary international law and that under international law, military tribunals can be competent to try only military personnel for military offences."

[105] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 53, Communication No. 93/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/93 (19 January 2018).

[106] *See e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 36, 37, Communication No. 34/2016 (Sudan) U.N. Doc. A/HRC/WGAD/2016/34 (21 October 2016).

[107] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 70,

privacy, family, home, and correspondence is prohibited under articles 3, 9, and 12 of the UDHR, and such privacy rights are also protected under customary international law.[108] Another customary right that is consistently articulated is the prohibition of torture.[109]

5.3 Other Sources of Law and Factual Corroboration

In addition to considering a complaint on the basis of the legal obligations mentioned above, the Working Group also examines relevant information from a variety of other sources that might shed light on the situation in a particular country. The Working Group commonly analyzes the social and political situation in a country and cites patterns of State conduct to support a source's claim. Reviewing this practice indicates that the Working Group finds patterns of behavior within a State particularly relevant to its determinations; it will rely on the findings of treaty bodies that identify such patterns as additional sources of law. The Working Group also commonly refers to its own work, the work of other bodies both inside and outside the UN system, and reports from NGOs and credible news sources.

5.3.1 The Working Group's Jurisprudence

The Working Group frequently cites to its own jurisprudence, soft law instruments,[110] the work of other UN treaty bodies and

Communication No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 23, Communication No. 13/2018 (Bahrain) U.N. Doc. A/HRC/WGAD/2018/13 (13 August 2018): "The Government must respect, protect and fulfil the right to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the peremptory norms (jus cogens) of customary international law," and referencing opinions No. 94/2017 (Oman) U.N. Doc. A/HRC/WGAD/2017/94 (17 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 32, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/88 (23 January 2018) and Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 62, Communication No. 76/2017 (United Arab Emirates) U.N. Doc.A/HRC/WGAD/2017/76 (15 January 2018) of its jurisprudence for additional support.

[108] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 60, Communication No.93/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/93 (19 January 2018).

[109] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 91, Communication No. 33/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/33 (3 August 2017) (articulating that rape in certain cases can constitute torture and that it is "also the Working Group's firm conclusion that, if the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens), then the uncommon appellation must also apply a fortiori to the outlawry of rape as torture during deprivation of liberty"); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 12/2018 (Azerbaijan) U.N. Doc. A/HRC/WGAD/2018/12 (20 July 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 16/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/16 (17 July 2018).

[110] Examples of soft law instruments include the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), and The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court. These instruments help inform not only the Working Group's deliberations, but also provide interpretive guidance to States on what is meant by "arbitrary detention of liberty."

special mandate holders, and the work of organizations such as the Council of Europe, the African Union, and the Organization of American States, in its opinions. As a subsidiary body of the Human Rights Committee, the Working Group also regularly integrates the Committee's jurisprudence and general comments into its own work. It also cites concluding observations and recommendations from thematic and country-specific special mandate holders, as well as State reporting to these bodies, to demonstrate patterns of human rights abuses and corroborate individual claims. Accordingly, advocates should try to incorporate into their communications facts from these sources that support their claims or establish a pattern of practice in the State concerned to strengthen the credibility of the facts asserted within their communications.

In the period under review, the Working Group routinely relied on these other legal sources. For example, in two opinions regarding Mauritania, the Working Group cited the Government's well known practice of slavery along with the reports of several special rapporteurs.[111] Similarly, in its opinion regarding the detention of a human rights activist in Uzbekistan, the Working Group cited findings from the Committee against Torture that there are "numerous and consistent reports" of the arbitrary detention of human rights defenders.[112] Similarly, in a case pertaining to the detention of a political dissident, the Working Group noted that "[t]here is a wealth of information concerning the allegations made in the present case," recalling its own prior opinions, a 2014 report of the commission of inquiry on human rights in the Democratic People's Republic of Korea that pointed to the continued existence of political prison camps, and the concerns of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea in relation to the widespread practices of arbitrary detention and enforced disappearances.[113] In other instances, the Working Group signals its familiarity with particular places of detention,[114]

[111] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 90/2017 (Mauritania) U.N. Doc. A/HRC/WGAD/2017/9 (5 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 28, Communication No. 36/2016 (Mauritania) U.N. Doc. A/HRC/WGAD/2016/36 (28 December 2016) (noting that "[t]he ongoing practice of slavery in Mauritania is no secret. It is being discussed by any number of institutions. The events reported by the source in the case in question are also a matter of common knowledge, and the source submitted administrative and judicial documents in support of the account provided to the Working Group").

[112] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 89, Communication No. 47/2016 (Uzbekistan) U.N. Doc. A/HRC/WGAD/2016/47 (8 February 2017); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 57-58, Communication No. 50/2017 (Malaysia) U.N. Doc. A/HRC/WGAD/2017/50 (21 September 2017) (citing findings of four Special Mandate holders and a recent Universal Periodic Review); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 8, Communication No. 51/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/51 (13 October 2017) (citing findings of the Universal Periodic Review regarding an increase in detention under lese-majeste laws in Thailand).

[113] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 23, Communication No. 81/2017 (Democratic Peoples' Republic of Korea and China) U.N. Doc. A/HRC/WGAD/2017/81 (26 December 2017).

[114] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 82, Communication

tribunals,[115] or law enforcement divisions[116] as the sources of ongoing complaints.

5.3.2 Sources of Factual Corroboration

Additionally, the Working Group also relies on reports from human rights organizations, domestic and international NGOs, and reputable news agencies in reaching its conclusions. For instance, in a case concerning the detention of a man affiliated with Al-Jazeera in Egypt, the Working Group referenced an Amnesty International report detailing the Government's known, widespread crackdown on independent journalists.[117] In Opinion No. 85/2017, the Working Group found that the allegations submitted by the source were credible because they were substantiated by other evidence, consistent with information in the public domain, and aligned with a long series of similar cases.[118] Accordingly, contextual sources, even if not legally binding, can still add credibility to communications. Advocates should review State-specific content and integrate relevant sources to bolster and facilitate the Working Group's determination that the communication is credible, and that the deprivation of liberty is arbitrary.

6. The Working Group's Legal Approach

The Working Group's mandate allows it great latitude in assessing the lawfulness of an individual's detention, both in regard to what constitutes a deprivation of liberty and the conditions that bear on whether such

No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018) (noting that the Claimant's ordeal occurred at the "at the notorious Tora Prison"); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 17, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018) (observing that the Claimant "is being held in Tora prison, one of the most notorious prisons in Egypt").

[115] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 32/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/32 (6 July 2017) (wherein the Working Group held that "widespread practice of arrests without warrants, protracted pretrial detention and systematic sentences to death based on confessions obtained under torture" was related to trials conducted by the Central Criminal Court in Iraq. "[T]he Working Group has, in the past, expressed concerns about a number of individual cases of detention, often for prolonged periods, without charge or trial in Iraq. The detainees have often been subjected to enforced disappearance, tortured and otherwise ill-treated in custody").

[116] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 93/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/93 (19 January 2018) (noting that it had heard "numerous complaints about the prolonged incommunicado detention, as well as torture, for months if not years, of Saudi citizens and foreign nationals by the Directorate of General Investigation, the Ministry of the Interior's domestic intelligence service doubling as a secret police agency, which has been nearly ubiquitous in the cases referred to the Working Group from Saudi Arabia for over two decades, since the first appearance in a decision by the Working Group in its eighth session, in 1993").

[117] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 86-87, Communication No.83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018).

[118] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 41, Communication No. 85/2017 (Rwanda) U.N. Doc. A/HRC/WGAD/2017/85 (4 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 31, Communication No. 21/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/21 (13 July 2017) (noting "with concern a series of cases in recent years in which the Government of the United Arab Emirates has subjected its citizens and foreign nationals to secret detention or incommunicado detention: opinion No. 33/2015, para. 80; No. 40/2005; opinion Nos. 51/2015, 35/2015, 56/2014,12/2014, 60/2013, 42/2013, 27/2013, 61/2012 and 64/2011").

deprivation is arbitrary. Because detention itself does not necessarily violate human rights, the Working Group must distinguish between the lawful exercise of police power, properly adjudicated in accordance with domestic law and relevant international standards, and detention so lacking in lawful basis that it must be considered arbitrary. This section explains how the Working Group defines the concepts of "deprivation of liberty" and "arbitrary." It also reviews the Working Group's jurisprudence regarding each of its categories of arbitrariness.

The Working Group interprets "deprivation of liberty" broadly, as: when an individual is not, as a factual matter, able to leave where he or she is detained.[119] This gives it considerable flexibility to analyze detentions in criminal justice settings, like police stations and prisons, as well as within seaports and airports, embassies, migrant holding centers, re-education camps, labor camps, military camps, psychiatric facilities, and hospitals.[120] It also means that individuals alleging they are being arbitrarily deprived of their liberty through administrative detention, i.e. in non-criminal contexts, are not excluded from availing themselves of the Working Group's communication mechanisms. Notably, the Working Group also reviews the lawfulness of detentions in the context of counter-terrorism considering that the possible application of international humanitarian law does not preclude it from assessing the arbitrariness of such detention.[121]

The Working Group's analysis of "arbitrariness" is likewise fairly unrestricted. Since the question of when detention is, or becomes, arbitrary is not definitively answered by international instruments,[122] the Working Group looks to whether the

[119] *See* Fact Sheet, *supra* note 2 at p. 5 (noting that international instruments do not always use the same terminology to refer to deprivations of liberty. They may refer to "arrest," "apprehension," "holding," "detention," "incarceration," "prison," "reclusion," "custody," "remand," etc. For this reason, the former Commission on Human Rights, in its Resolution 1997/50, opted for the term "deprivation of liberty," a term that eliminates any differences in interpretation between the different terminologies.

[120] *See* Deliberations, *supra* note 28 at ¶ 59 (explaining that deprivation of liberty includes not only criminal detention, but also "placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty. The Working Group has confirmed this in its previous deliberations on house arrest, rehabilitation through labour, retention in non-recognized centres for migrants or asylum seekers, psychiatric facilities and so-called international or transit zones in ports or international airports, gathering centres or hospitals"); *see also* Report of the Working Group on Arbitrary Detention, Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court, ¶ 9, U.N. Doc. A/HRC/30/37 (July 6, 2015).

[121] The Working Group has issued several Opinions (for example, No.s 2/2009 and 3/2009) finding the detention of individuals in the U.S. military base of Guantanamo Cuba arbitrary, arguing that the possible application of international humanitarian law does not displace the State's obligations under international human rights law, nor does it preclude the Working Group from assessing whether the detention is arbitrary. *See* joint study on global practices in relation to secret detention in the context of countering terrorism, A/HRC/13/42 at ¶ 51.

[122] For instance, the Universal Declaration of Human Rights provides in article 9 that "no one shall be subjected to arbitrary arrest, detention or exile." Article 9(1) of the International Covenant on Civil and Political Rights states: "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 procedure as are established by law." While these instruments codify the prohibition

deprivation of liberty at issue is in accordance with the standards set forth in the UDHR, ICCPR, and other relevant international instruments accepted by the State concerned.[123] While the standards laid out in each of these instruments provide guidance for States and advocates regarding the inquiry process, on their own they do not succinctly answer what constitutes arbitrary detention as it manifests in practice. For this reason, looking to the Working Group's jurisprudence, and specifically to its analysis of the five legal categories of arbitrariness, provides a useful framework to determine whether a State's detention practices accord with international law.

7. The Working Group's Categories of Arbitrary Detention and Identified Rules

In determining whether a State has arbitrarily deprived an individual of liberty, the Working Group refers to categories, defined in its Methods of Work, that characterize how the detention is arbitrary. These categories are organizational and respond to the evolving ways the Working Group conceives of arbitrariness and how it can manifest.[124] Currently, the Working Group refers to five legal categories. The Working Group's jurisprudence regarding each of these categories is tremendously useful to sources submitting communications. Even when a particular case presents distinguishable facts, novel situations, or emerging trends, the Working Group's jurisprudence offers insight into how to persuasively weave similar reasoning from past opinions into new communications resting on substantially similar sets of circumstances.

The Working Group may refer to one, multiple, or all categories in its determination; however, a violation of one category can be sufficient. While a violation of only one category is sufficient to establish that a person was arbitrarily deprived of his or her liberty, it is nonetheless advantageous to identify all the categories which may credibly be raised in a communication, as these signal to the State what needs to be changed or observed to comply with the absolute prohibition on arbitrary detention. Advocates are therefore encouraged to think comprehensively about what information is relevant to the Working

on arbitrary detention, they do not expand on what constitutes arbitrariness.

[123] *See e.g.*, UN Commission on Human Rights, *Question of Arbitrary Detention*, 15 April 1997, E/CN.4/RES/1997/50, available at: https://www.refworld.org/docid/3b00f0ba5c.html [accessed August 4, 2020] (Bearing in mind that, in accordance with resolution 1991/42, the task of the Working Group on Arbitrary Detention is to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned); *see also* Methods of Work *supra* note 1 at ¶ 7.

[124] In its first annual report to the Commission on Human Rights in 1992, the Working Group initially considered detention to be arbitrary when it has no legal basis (Category I), when it results from the exercise of rights or freedoms (Category II), or when there is a grave violation of the right to a fair trial (Category III). In 1997, the Commission extended the Working Group's mandate by requesting it to "devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy." This requirement has become Category IV. Most recently, the Working Group added Category V, which allows the Working Group to consider allegations involving detention on discriminatory grounds.

Group and how the facts of an individual's arrest and detention may implicate more than one category.

Moreover, the same set of facts can, and often does, result in findings of arbitrariness under more than one category. Although the Working Group's jurisprudence does indicate some clear distinctions between the categories, contending in a communication that a detention is arbitrary under one category when the Working Group ultimately determines it to be arbitrary under another has no bearing on the credibility of the communication. In fact, the Working Group regularly attributes arbitrariness to a different category than the communication. It will also find a detention is arbitrary under more categories than just those raised or identified by the source, if supported by the facts.

Understanding each of the five categories, however, is critical to ensuring that a communication contains all the relevant facts of the arrest, any trials or the lack thereof, and the conditions of detention, so that the Working Group is able to complete a thorough analysis. Correctly characterizing the violations is also likely to be more persuasive. Generally, the more detail a source can provide regarding the dates of arrest and detention, the place of detention, the purported legal basis and reasons for the detention, any interaction with legal counsel, etc. the more likely the Working Group is to issue a favorable opinion.[125] For instance, a source may clearly establish that a detainee's fair trial rights have been violated to such a degree as to give the detention an arbitrary character (Category III), focusing on the insufficient process afforded to the detainee. Under the same facts it may also establish that the detention is arbitrary under Category I because the law providing the legal basis for the arrest violates the principle of non-retroactivity, is overly broad, or is vaguely defined.

The following sections provide examples from the Working Group's jurisprudence that help define which practices are considered arbitrary under each category. This is not an exhaustive review of the Working Group's jurisprudence; rather, it is meant as an aid for sources looking to draft persuasive communications that rely on rules and legal frameworks distilled from the Working Group's reasoning in past opinions. Adding to this general review, Section VIII provides a snapshot of the Working Group's jurisprudence between 2015–2018, highlighting trends within the communications received each year, as well as across the period of review. While the indicators selected in this publication will not be applicable to all individuals seeking guidance on persuasive submissions, the methodology and discussion of what the Working Group has found persuasive can be applied in all cases.

7.1 Category I: Deprivation of Liberty without Legal Justification

The Working Group's Working Methods define Category I as:

> When it is clearly impossible to invoke any legal basis justifying the deprivation of

[125] *See* Methods of Work *supra* note 1 at ¶ 10 (advising that "[a]n absence of information or an absence of a response by the source may lead the Working Group to terminate its consideration of the case").

> liberty, such as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her.[126]

In analyzing detentions under this category, the Working Group considers whether the detention of an individual is based in law; any deprivation of liberty must be carried out with respect for the rule of law.[127] Situations that fall into Category I include those where detainees have never been presented with legal justification for their arrest or deprivation of liberty, the legal justification for their arrest has expired, or the basis for arrest violates a general principle of law. It is not necessary for the government to acknowledge the deprivation of liberty as corrective, penal, or administrative for the Working Group to make a determination. Thus, the cases of persons detained under protective custody, which the Working Group views as punitive, will likely be considered under Category I. The Working Group also considers cases under this category when the detainee is held in secret detention - when the detainee is held incommunicado without being charged or afforded a trial and the detaining authorities refuse to acknowledge the detention - because if the State is denying the detention, it is not invoking a legitimate legal basis.

The ICCPR requires that procedures for depriving individuals of their liberty be established by law and followed, including determining which officials have the authority to make arrests, when a warrant is required, where arrests can be made, and when a judicial authority must authorize one's continued detention.[128] Moreover, it is not sufficient for there to be a law authorizing the arrest; authorities must invoke that legal basis and apply it to the circumstances throughout the judicial process.[129] This speaks to the notions of predictability and notice that are essential to the detainee's ability to challenge the basis for arrest and the lawfulness of the detention. Relevant provisions of the ICCPR that are commonly invoked under this

[126] *See* Methods of Work *supra* note 1 at ¶ 8 (a).

[127] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 26, Communication No. 21/2015 (New Zealand) U.N. Doc. A/HRC/WGAD/2015 (17 June 2015).

[128] *See, e.g.* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 28/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/28 (21 September 2016) (citing ¶ 23 of the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person for additional guidance of the scope of obligations under article 9 of the ICCPR).

[129] *See, e.g.* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (holding that "in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant"). *See, e.g.*, Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 46/2017 (Jordan) U.N. Doc. A/HRC/WGAD/2017/46 (18 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 6/2017 (Libya) U.N. Doc. A/HRC/WGAD/2017/6 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 1/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/1 (8 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/28 (21 September 2016).

category include article 9. Articles 9 and 10 of the UDHR are also relevant to determinations under this category.

If the detention in question has no legal basis, it is *per se* arbitrary. Accordingly, to establish a *prima facie* case of a violation under Category I, a source may establish one of the following rules has been violated.

Rule 1: Detention that is justified by a domestic law that does not comply with international law lacks a legal basis

The Working Group's jurisprudence reaffirms that "any national law allowing deprivation of liberty should be made and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other relevant international legal instruments."[130] The Working Group often finds detention, which is lawful under domestic law, arbitrary because the domestic legal basis for the detention does not comply with international law. Domestic laws that criminalize the exercise of fundamental rights or that violate other norms of international law cannot form an adequate legal basis for arrest, and any resulting deprivation of liberty will be deemed arbitrary.

The unlawful restriction of fundamental rights violates international law and, thus, has no legal basis. For instance, in an opinion regarding a detainee held by the United States under its Authorization for Use of Military Force, which allowed for the trial of the detainee by a military commission rather than the criminal justice system, the Working Group found the detentions arbitrary for lack of an adequate legal basis.[131] The United States law violated international humanitarian law and international human rights law and, as such, could not provide an adequate legal basis for the detainee's arrest or detention.[132] In another opinion, the Working Group found that a Korean law criminalizing conscientious objection to military service could not form an adequate legal basis for detention because the law criminalized the absolutely protected right to religious belief.[133]

The right to *habeas corpus* review, the right to challenge the legality of detention before a court, is a *jus cogens* norm, which cannot be restricted under any circumstances; domestic laws that violate this right cannot form an adequate legal basis for detention.[134] The Working Group considers that "judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and that it is essential to ensuring that detention has a legal basis."[135]

[130] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 27, Communication No. 51/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/51 (13 October 2017).

[131] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 41-44, Communication No.53/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017).

[132] *Id.*

[133] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 20-21, Communication No.69/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/69 (27 December 2018).

[134] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 76, Communication No. 41/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/41 (26 July 2017).

[135] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 36, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

Therefore, situations like incommunicado detention[136] and excessive pretrial detention with no possibility to review the necessity of the pretrial detention lack legitimate legal basis. For instance, in a case concerning a detainee in Viet Nam, the Working Group concluded her detention lacked a legal basis because she "was arrested without a warrant and held in pretrial detention without a judicial determination of the lawfulness of that detention."[137]

Rule 2: Detention that is not lawful under domestic law lacks a legal basis

If the conditions of an individual's detention violate the State's domestic laws, the Working Group will find the detention arbitrary. For instance, pretrial detention that extends beyond the permissible period defined in a State's criminal code will likely be deemed arbitrary. In its opinion concerning the detention of a photojournalist in Egypt, the Working Group held that because the photojournalist's pretrial detention from August 14, 2013 until March 26, 2016 exceeded the two-year maximum allowed under Egyptian law, his detention lacked a valid legal basis and was therefore arbitrary.[138] While the source did not also argue that the detainee faced an undue delay to his right to trial, the Working Group nevertheless noted that such an excessive pretrial detention regime may also violate fair trial rights and constitute arbitrary detention under Category III.[139]

Rule 3: Deprivation of liberty following arrest without a warrant lacks legal basis, unless a recognized exception applies

An individual must be presented with a warrant and be informed of the reasons for his or her arrest at the time of arrest. The Working Group has found detention arbitrary if the individual was not provided with an arrest warrant and informed of the charges at the time of arrest. For instance, a woman's detention in Viet Nam was found to be arbitrary, even though the Government claimed it issued a warrant for her arrest in accordance with law, because the Government failed to present a copy of the arrest warrant at the time of her arrest.[140] Similarly, in a case concerning the detention of a student in Jordan, the Working Group held that his arrest by intelligence officers without a warrant was an arbitrary deprivation of his liberty.[141] By

[136] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 78, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017) (concluding that "Mr. Al-Alwani's arrest and incommunicado detention between 28 December 2013 and 27 January 2014 lacks a legal basis"). *See* Section 7.2 for a discussion on how incommunicado detention can also be a violation of Category III.

[137] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No.75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[138] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 5, 13, 26 Communication No. 41/2016 (Egypt) U.N. Doc. A/HRC/WGAD/2016/41 (1 November 2016).

[139] *Id*. (finding that "even a legal framework that allows pretrial detention to last two years could violate the right of an accused person to be tried without undue delay (*see* art. 14 (3) (c) of the Covenant), and that only the specific circumstances of a case would permit an appropriate assessment. However, assuming that in the present case there was no undue delay, as the source does not allege any, the Working Group is of the view that, since 5 August 2015, Mr. Attitallah's continued detention has ceased to be grounded in law").

[140] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[141] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 19, Communication

failing to present an arrest warrant, give reasons for the arrest, or promptly notify the detainee of the charges against him, the Working Group held that the Government failed to invoke an adequate legal basis justifying his detention and had therefore arbitrarily deprived him of liberty.[142]

Warrantless arrest pursuant to preventative detention can also constitute arbitrary detention. A person may not be detained due to the alleged threat he or she poses or the supposed risk that the individual may commit an offense in the future. The Working Group has found that laws that allow for the detention of "any person indefinitely without trial in the name of crime prevention" violate the "principle of legality."[143]

The Working Group has found that when the accused is arrested *in flagrante delicto*—either apprehended during the commission of a crime or immediately thereafter, or arrested in hot pursuit shortly after a crime has been committed—there may be a valid exception to the warrant requirement.[144] It has noted that arrests made pursuant to this exception are "unique" in that "the circumstances of the arrest should make clear to anyone the cause of the arrest."[145] If the person is not released, authorities must promptly inform the detainee of the reasons for the detention, and formally charge the detainee if the detention is the result of criminal charges, so the individual may challenge the detention and prepare a defense.[146] If there is no arrest warrant presented at the time of arrest, and this exception does not apply, then there is no legal basis for the arrest and it will be considered arbitrary.

To qualify under the *in flagrante delicto* exception, the arrest must be immediate. For instance, in opinion No. 03/2018, the Working Group found that the arrest of a woman based upon five Facebook messages posted between 10 and 12 June 2015, could not be characterized as *in flagrante delicto* when authorities did not arrest her until 19 June 2015.[147] Meeting neither the conditions of apprehension in the act nor "hot pursuit," the Working Group found that the exception did not apply and, therefore, her arrest without a warrant deemed her

No. 46/2017 (Jordan) U.N. Doc. A/HRC/WGAD/2017/46 (18 September 2017).

[142] *Id*. at ¶19, ¶21.

[143] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 40, 47, Communication No.88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/88 (23 January 2018).

[144] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 38, Communication No. 9/2018 (Cambodia) U.N. Doc. A/HRC/WGAD/2018/9 (5 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 85, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 42, Communication No. 53/2014 (Oman) U.N. Doc. A/HRC/WGAD/2014/53 (11 February 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 46/2012 (Guatemala) U.N. Doc. A/HRC/WGAD/2012/46 (22 February 2013); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 67/2011 (Mexico) U.N. Doc. A/HRC/WGAD/2011/67 (22 February 2013) and E/CN.4/2003/8/Add.3, ¶¶ 39, 72 (a).

[145] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 26, Communication No. 41/2016 (Egypt) U.N. Doc. AA/HRC/WGAD/2016/41 (1 November 2016).

[146] *Id.*

[147] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 03/2018 (Thailand) U.N. Doc. A/HRC/WGAD/2018/3 (9 July 2018).

detention arbitrary.[148] Under similar facts, the Working Group held that the exception did not apply to the arrest of an individual in 2017 for an allegedly treasonous video he posted in 2013.[149]

Rule 4: Continued detention after completion of sentence, court-ordered release, or dismissal of charges lacks legal basis

Detention that continues after a detainee has received an early release order or has been acquitted of all charges will be deemed arbitrary, as the continued detention has no legal basis. For instance, in its opinion concerning an Iraqi detainee charged under an anti-terrorism law, the Working Group found his detention arbitrary because he was not released following an early release order.[150] Similarly, in a case concerning a detainee in Afghanistan, the Working Group found the detention was arbitrary because the man remained in detention even after being acquitted of all charges at both the trial and appellate court levels.[151] From the date of his acquittal by the Appellate Court, there was no legal basis for his continued detention.[152]

Rule 5: Detention ordered by a body other than a competent court or independent and impartial authority lacks legal basis

The Working Group's jurisprudence recognizes "the requirement that any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law" and that "any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks legal basis."[153] In an opinion regarding Saudi Arabia, the Working Group held that the State law providing the legal basis for the detainee's arrest violated international law because it allowed the executive branch to authorize arrest warrants.[154] Accordingly, arrests executed under that law lacked an adequate legal basis, and the resulting detention was arbitrary under Category I.[155]

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[148] *Id.*

[149] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 7, 35, 38, 39, CommunicationNo. 09/2018 (Cambodia) U.N. Doc. A/HRC/WGAD/2018/9 (5 June 2018).

[150] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 24-26, Communication No.20/2016 (Iraq), U.N. Doc. A/HRC/WGAD/2016/20 (24 June 2016).

[151] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 54, Communication No. 53/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017).

[152] *Id.*

[153] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 93/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/93 (19 January 2018).

[154] *Id*.; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 46, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018) (noting that "an arrest warrant, even assuming that it has been issued by the Minister for the Interior or by delegated organs such as the Directorate of General Investigation, under article 4 of the law, does not meet the requirement that any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment").

[155] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 44, 60, Communication No. 93/2017 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2017/93 (19 January 2018) (explaining that "a valid arrest and search warrant must be issued not by the executive branch that carries out the arrest

Furthermore, the Working Group has found that effective habeas review, another requirement under Category I, is impossible if the court authorized to review the detention is not impartial and independent from the authority that originally authorized the detention.[156]

Especially in its earlier opinions during the period under review, the Working Group developed a practice of considering the independence of the authority issuing the arrest warrant in relation to its cumulative analysis of fair trial rights under Category III.[157] In these opinions, the Working Group defines a judicial authority as a lawful authority "whose status and tenure should afford the strongest possible guarantees of competence, impartiality, and independence."[158] Accordingly, it has found prosecutors' offices located within the executive branch,[159] courts established under states of emergency under the control of the executive branch,[160] and by military tribunals[161] insufficiently independent to be considered judicial authorities. Therefore, detentions authorized by these bodies are likely arbitrary because such detentions lack a legitimate legal basis.

or search but by a competent, independent and impartial judicial authority").

[156] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 26-30, 39, Communication No. 39/2018 (Libya) U.N. Doc. A/HRC/WGAD/2018/39 (22 June 2016) (finding that the lack of independence of the authority authorizing his detention meant the detainee did not have the ability to effectively challenge his detention, in violation of his habeas rights).

[157] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 20-21, Communication No. 43/2016 (China) U.N. Doc. A/HRC/WGAD/2016/43 (12 October 2016) (explaining that "the detention of Ms. Phan-Gillis was authorized by the district People's Procuratorate....which is responsible for prosecutions, [and] cannot be considered to be an independent and impartial authority" and concluding that "the non-observance of the international norms relating to the right to a fair trial and to liberty and security....is of such gravity as to give the deprivation of liberty of Ms. Phan-Gillis an arbitrary character").

[158] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 19, Communication No. 12/2016 (China) U.N. Doc. A/HRC/WGAD/2016/12 (22 June 2016).

[159] *Id*. at ¶¶ 20-21 (noting that "the People's Procuratorate, which is responsible for prosecutions, cannot be considered to be an independent and impartial authority" and therefore the claimant "has not been brought before a judicial or other impartial and independent authority"); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 20, Communication No. 43/2016 (China) U.N. Doc. A/HRC/WGAD/2016/43 (12 October 2016) ("[c]ontrary to the requirements set out in the Body of Principles, the arrest and detention of the applicant were authorized by a procurator, who is a person also responsible for prosecutions and who therefore cannot be considered to be an independent and impartial authority").

[160] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 91-93, Communication No. 43/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/43 (15 January 2018) (considering that the independence of special courts established pursuant to a state of emergency in Turkey, and determining that since the courts were under the control of the executive, which oversaw both the investigative process, including the issuance of detention and arrest warrants, and tried suspects, they could not be considered impartial or independent.).

[161] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 54, Communication No. 84/2017 (Venezuela) U.N. Doc. A/HRC/WGAD/2017/84 (23 January 2018) (explaining that military judges "generally are not independent, since they must obey the orders of their superiors and are appointed by the executive branch").

Rule 6: Protracted detention for the purposes of determining whether an individual represents a threat to himself, others, or State security lacks a legal basis

While the Working Group acknowledges that States may temporarily detain an individual that poses a "present, direct and imperative threat that cannot be addressed through alternative measures,"[162] or to make a determination of whether someone poses such a threat, detention that continues past this initial period lacks any legal basis. Because many safeguards against arbitrary detention typically available under the criminal justice system are not available in administrative detention, when individuals are detained under preventative detention, the burden of proof rests upon the government concerned to show that the detainee posed a threat, and the burden increases the longer the person is detained.[163] Outside of psychiatric or immigration detention, the practice of detaining individuals to determine whether they pose a threat generally arises in the context of counter-terrorism investigations. Under such laws, persons can be detained for limited periods of time without charge, however, the Working Group will not allow this period to continue indefinitely. In a case where a man was administratively detained under a military order, ostensibly for interrogation, and held without trial for two years, the Working Group determined that the State's burden to prove the detainee posed a "direct and imperative threat" was not met.[164] After being detained for two years, the Working Group concluded that the State's inability to establish that the man posed a "direct and imperative threat" meant his detention lacked a legal basis.[165]

Rule 7: Automatic non-punitive detention following the completion of a punitive sentence may lack a legal basis

The Working Group holds that non-punitive detention (detention intended to protect the safety of other individuals) following a punitive sentence must be "justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future."[166] Furthermore, such detention should only be used as a last resort and be subject to "regular periodic reviews by an independent body."[167] Non-punitive detention conditions must also be distinct from punitive detention, with a focus on treatment, rehabilitation, and reintegration.[168] For instance, the Working Group found the continued detention of a man with severe intellectual disabilities arbitrary because the nature of his non-punitive detention was indistinguishable from his punitive detention and there was no plan for his rehabilitation or

[162] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 20, Communication No. 53/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017).

[163] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 31, 32, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017) (citing General Comment No. 35 (2014) of the Human Rights Committee).

[164] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 31, 32, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017).

[165] *Id*.

[166] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 43, Communication No. 32/2016 (New Zealand) U.N. Doc. A/HRC/WGAD/2016/32 (7 October 2016).

[167] *Id.*

[168] *Id.*

reintegration.[169] Thus, his deprivation of liberty lacked legal basis and was arbitrary.[170]

Rule 8: Arrest and detention of a person protected by immunity, without first abiding by the relevant procedures regarding waiver of immunity, lacks a legal basis

When a detainee enjoys the privilege of immunity from arrest, detention, and prosecution, the Working Group will consider their detention arbitrary unless the proper procedures for waiving such immunity are observed. Once immunity has been waived pursuant to a valid legal process, competent judicial authorities may order a person's detention. If an individual is arrested prior to a valid waiver of his immunity, the arrest is lacking in adequate legal basis and arbitrary under Category I.[171] For instance, the Working Group determined that the arrest of a member of parliament in the Congo was arbitrary because his immunity was not properly waived until nine days after his arrest.[172] Similarly, in a case involving an Iraqi member of parliament, the Working Group found that his detention, "in the absence of the implementation of the corresponding procedure for the removal of his immunity, was carried out in violation of applicable Iraqi law under its Constitution as well as legal standards deriving from international instruments…".[173] Therefore, his detention lacked legal basis and was found arbitrary under Category I.[174] The Working Group also considers the failure to properly waive immunity grounds for determining that the detention was not carried out pursuant to relevant fair trial guarantees, in violation of Category III.[175]

7.2 Category II: Deprivation of Liberty resulting from the exercise of fundamental rights

The Working Group's Working Methods define Category II as:

> When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the International Covenant on Civil and Political Rights.[176]

[169] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 23-27, Communication No. 21/2015 (New Zealand) U.N. Doc. A/HRC/WGAD/2015 (17 June 2015).

[170] *Id.*

[171] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 36, 39, Communication No. 05/2018 (Congo) U.N. Doc. A/HRC/WGAD/2018/5 (1 October 2018); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 87, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/3 (14 August 2017).

[172] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 36, 39, Communication No. 05/2018 (Congo) U.N. Doc. A/HRC/WGAD/2018/5 (1 October 2018).

[173] United Nations Working Group on Arbitrary Detention, ¶ 87, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017).

[174] *Id.*

[175] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 114, Communication No. 31/2016 (Argentina) U.N. Doc. A/HRC/WGAD/2016/31 (2 November 2016) (finding that in a case where a member of Argentinian Parliament was detained before procedures to waive her immunity were instituted or completed her detention was arbitrary because due process was not afforded to her).

[176] Methods of Work, *supra* note 1, ¶ 8 (b).

The cases falling under this category are those where "detention is used in response to the legitimate exercise of human rights."[177] As noted in the subsection above on Category I, any law that has the effect of criminalizing the exercise of a fundamental right can never serve as the adequate legal basis for an arrest or detention because it is a *per se* violation of customary international law.[178] However, the Working Group most often evaluates such cases under Category II, using its framework for analyzing whether restrictions on fundamental rights comport with law.

Cases considered under Category II often include the exercise of the fundamental rights of freedom of thought, conscience, and religion, freedom of opinion and expression, freedom of peaceful assembly, the freedom of association, and the right to take part in public affairs. This is because these rights can all be restricted under the same limitations.[179] In practice, other rights, listed in Category II, are analyzed under separate categories because they are subject to different standards of review. For instance, cases involving asylum rights are analyzed under Category IV, because international law recognizes more limitations on the exercise of this right.[180] Cases involving discrimination are analyzed under Category V, because the prohibition on discrimination is absolute and cannot be derogated from in any case.[181]

[177] *See* Fact Sheet *supra* note 2 at pg. 6 (the rights mentioned in this category include the rights of/to: freedom of movement (art. 12 ICCPR and art. 13 UDHR), asylum (art. 14 UDHR), freedom of thought, conscience, and religion (art. 18 ICCPR and art. 18 UDHR), freedom of opinion and expression (art. 19 ICCPR and art. 19 UDHR), freedom of peaceful assembly (art. 21 ICCPR and art. 20 UDHR), freedom of association (art. 22 and art. 20 UDHR), take part in public affairs (art. 25 ICCPR and art. 21 UDHR), equal protection of the law without discrimination (art. 26 ICCPR and art. 7 UDHR), and the free exercise of culture, religion, and language by minority groups (art. 27 ICCPR).

[178] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 28, Communication No.41/2016 (Egypt) U.N. Doc. A/HRC/WGAD/2016/41 (1 November 2016) (holding that [j]ournalists are specifically covered by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. As Mr. Attitallah was a photojournalist, he cannot be arrested and detained for the exercise of freedoms guaranteed to him in these international instruments. Consequently, his arrest and detention are arbitrary and fall within category II" and "whenever arrests and detentions are arbitrary because their only justification is the exercise of rights and freedoms, it is void to question their legal basis or the fairness of the criminal justice process").

[179] The rights to freedom of movement, opinion and expression, peaceful assembly, and association may only be restricted if provided for in law and necessary for the protection of the rights of others or of national security, public order, or public health and morals. The Working Group's analysis of restrictions on the right to take part in public affairs seems to follow the same framework as its analysis of the aforementioned rights, despite that art. 25 of the ICCPR only provides that the right shall be exercised "without unreasonable restrictions." The freedom to religious *belief* is absolute, whereas the freedom to *manifest* a religious belief is subject to the same limitations on restriction as the above rights. *See, e.g.,* ICCPR art. 19(3) (restrictions "shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others [or] (b) For the protection of national security or of public order (ordre public), or of public health or morals"); *accord* ICCPR arts. 12(3), 18(1) and (3), 21, 22(2), and 25; *see also* UDHR art. 29(2).

[180] ICCPR art. 13.

[181] Restrictions on the rights to equal protection of the law and the exercise of rights by religious, ethnic, or linguistic minorities are not provided for in the ICCPR. However, art. 29(2) of the UDHR provides that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and

Analyzing the Legitimacy of Restrictions on Fundamental Rights

Category II is often violated in practice either by the criminalization of protected behavior by overly broad or vague laws or by the targeted persecution of individuals advocating for the full protection of these or other human rights. When a communication credibly alleges arbitrary detention of a human rights defender or infringement of any of the rights listed under this category,[182] the Working Group employs a heightened standard of review.[183] The effect of this heightened standard means that an accused State will need to present substantial, credible evidence that the restriction on fundamental rights is necessary and proportional for the protection of the rights of others or of national security, public order, or public health and morals.

The fundamental human rights subject to review under Category II can be restricted only in very limited circumstances.[184] A source will establish a *prima facie* case of arbitrary detention for exercising these freedoms if he or she proves that the law providing the legal basis for detention could result in punishing protected conduct and the State's limitations on such conduct are neither necessary to achieve a legitimate purpose nor proportional.[185] Once it is established that protected conduct may be criminalized by law, a violation of either necessity or proportionality is sufficient to deem the detention arbitrary. Because the Working Group uses tests, rather than rules

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of meeting the just requirements of morality, public order and the general welfare in a democratic society," and this limitation in theory should apply to laws that restrict equal protection under the law. But, as it is a fundamental principle of law that laws shall not be applied in a discriminatory fashion, any law that discriminates on any basis could never be necessary and proportional to protect the needs of society. *See* ICCPR arts. 26 and 27.

[182] Rights subjected to this heightened standard include: freedom of movement, freedom of thought, conscience, and religion, freedom of expression and opinion, the right to peaceful assembly, the freedom of association, and the right to take part in public affairs.

[183] Justification for this heightened standard of review is derived from the General Assembly's Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. The Declaration provides that: it is the responsibility of each State to protect, promote, and implement fundamental human rights and freedoms by taking the necessary actions to ensure that all people in its jurisdiction can exercise such rights (art. 2), everyone has the right to protection and effective remedy if their human rights are violated, including that all persons, individually or in a group, have the following rights: 1) to complain about policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms by petition or other means, 2) to attend public hearings and proceedings to determine the State's compliance with national law and international obligations, and 3) to provide professional legal assistance or advice for the defense of human rights and fundamental freedoms (art. 9), and all persons shall be from "any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or *any other arbitrary action* as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration" (art. 12); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 3/2018 (Thailand) U.N. Doc. A/HRC/WGAD/2018/3 (9 July 2018).

[184] *See* ICCPR art. 4 (providing the scope and process States must adhere to when limiting certain rights, as well as which rights may not be limited or restricted at all).

[185] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 46-47, 50, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017).

to analyze detentions under Category II, the findings in this section are presented as tests.

Special Protections for Human Rights Defenders

When an individual is detained in connection with the defense of human rights, the Working Group assumes that the detention both violates fundamental rights and is discriminatory, and it will apply the same necessary and proportional analysis it does in cases alleging arbitrary deprivation of liberty based on the exercise of fundamental rights. This is because the full realization of human rights requires that individuals have the ability to hold States accountable when their rights are violated.

The Working Group uses an expansive definition of "human rights defender" in its opinions, including journalists who are critical of the State,[186] social activists,[187] users of social media calling for democratic reform through peaceful protests,[188] and providers of professional legal assistance or other relevant advice and assistance to people deprived of their rights.[189] Generally, engaging with activities based on advocacy for the recognition of rights and equal treatment of peoples appears to be sufficient for the Working Group to apply heightened scrutiny.

Since establishing Category V, the Working Group has found targeting human rights defenders to also be a violation of Category V, since these individuals are essentially being targeted and detained solely on the basis of their identification as human rights defenders, in violation of the principles against non-discrimination and equality before the law.[190] Therefore, any communications alleging arbitrary detention of human rights defenders should include arguments under at least categories II and V.

Test 1: The criminalized conduct must fall within the protected boundaries of fundamental rights

The first step to establishing a *prima facie* case under Category II is to show that the detainee was arrested for acting in the defense of human rights or that the conduct that predicated the detention falls within the boundaries of protected rights. In practice, activities exercising the fundamental rights analyzed under this category often fall under

[186] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 94/2017 (Oman) U.N. Doc. A/HRC/WGAD/2017/94 (17 January 2018) (on the basis of the detainee being a human rights defender and exercising his right to freedom of expression); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 61, Communication No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018).

[187] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/88 (23 January 2018).

[188] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶37, Communication No. 82/2017 (Zimbabwe) U.N. Doc. A/HRC/WGAD/2017/82 (15 December 2017).

[189] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 45, Communication No. 45/2016 (Cambodia) U.N. Doc. A/HRC/WGAD/2016/45 (17 January 2017).

[190] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 82/2017 (Zimbabwe), U.N. Doc. A/HRC/WGAD/2017/82 (15 December 2017) ("detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant)".

the protection of multiple rights. In its opinions, the Working Group often considers the necessity and proportionality of restrictions on various rights together in one analysis. Therefore, in situations where an individual is detained for conduct that may be fairly characterized as an exercise of the freedom of expression and the freedom of assembly, for example, advocates should argue in their communications how the conduct is protected under each right. Examples of activities exercising the rights to freedom of movement, freedom of thought, conscience, and religion, freedom of opinion and expression, and freedom of peaceful assembly and association, and the right to take part in public affairs are explained below.

Freedom of Movement

The right to freedom of movement is codified in article 13 of the UDHR and article 12 of the ICCPR. Article 12(3) of the ICCPR provides for restriction on this right in the same limited circumstances as other rights assessed under this category. This right includes the right of individuals lawfully within a State to move freely and choose a residence, the right of anyone to leave a country, and the right of anyone to return to his or her country.[191]

> Right of Re-Entry: A citizen of Myanmar "was detained and sentenced to six months of imprisonment with hard labor for 'illegally' returning to his country.[192] His re-entry into Myanmar was deemed "illegal" because he failed to cross at a designated checkpoint and he was not carrying a passport or other identity document.[193] The Working Group found this was a restriction on his freedom of movement.[194]

Freedom of Thought, Conscience, and Religion

The right to freedom of thought, conscience, and religion is codified in article 18 of the ICCPR and article 18 of the UDHR. This right includes the right to have or adopt a religion or belief, to manifest a religious or other belief, either individually or collectively, and the right to not be coerced into a religion or belief.[195] In the view of the Working Group, the right to hold a belief is an absolutely protected right, which cannot be restricted by the State.[196] The right to manifest beliefs, in contrast, may be limited under the same limited circumstances as other rights analyzed in this category.[197]

> Conscientious Objection to Military Service: Laws criminalizing conscientious objection to military service violate the fundamental right to freedom of thought, conscience,

[191] ICCPR art. 12.

[192] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 32/2015 (Myanmar), U.N. Doc. A/HRC/WGAD/2015/32 (7 September 2016).

[193] *Id.* at 23-24.

[194] *Id.*

[195] ICCPR art 18.

[196] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 19, Communication No. 69/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/69 (27 December 2018) (explaining that the right to conscientious objection to perform military service "had evolved over time to a more progressive view that treats the detention of a conscientious objector as a *per se* violation of article 18 (1) of the Covenant"); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 43, Communication No. 40/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/40 (17 September 2018).

[197] ICCPR Art. 18.

and religion and cannot be the basis of lawful detention. The Working Group articulates its position in Opinion No. 69/2018, noting that "it is clear that Mr. Kim's deprivation of liberty is the direct result of his genuinely held religious and conscientious beliefs as a Jehovah's Witness in refusing to enlist in military service….Unlike the manifestation of religious belief, the absolutely protected right to hold or adopt a religion or belief is not subject to limitation under article 18 (3) of the Covenant."[198]

Freedom of Expression and Opinion

The right to freedom of expression is codified in article 19 of the ICCPR and article 19 of the UDHR. Article 19(3) of the ICCPR provides for restrictions on the exercise of this right in the same limited circumstances as other rights assessed under this category. This right includes the right to hold an opinion and the freedom to seek, impart, and receive information and ideas of all kinds in any form.[199]

Peaceful, Non-Violent Expression: The Working Group has affirmed that freedom of expression that is a peaceful, non-violent expression or manifestation of one's opinion does not constitute incitement to national, racial, or religious hatred or violence, and remains within the boundaries of the freedom of expression.[200]

Promoting Social and Political Rights: In an opinion concerning a human rights activist in Iran who was charged with conducting "propaganda activities," the Working Group determined she was targeted based on her activities promoting the social and political rights of Kurdish women, which are protected freedom of expression rights.[201]

Calling for Government Accountability: In a case concerning the detention of a Vietnamese advocate, the Working Group determined that the advocate's activities, including posting calls for government accountability on social media and blocking a major road with a vehicle during a demonstration, fell within the

[198] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 20, Communication No. 69/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/69 (27 December 2018) (emphasizing that it does not accept that this interpretation may result in a *de facto* invalidation of article 18 (3) of the Covenant, which applies to various forms of manifestation of religion or belief, and noting that conscientious objection that is not so directly tied to the holding of belief as military service, but may be more of a manifestation of a belief, could be found to be subject to limitations in the future).

[199] ICCPR art. 19(1)-(2).

[200] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 48, 50, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017) (citing deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet).

[201] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016) (finding that her "activities as a social and political activist for the rights of Kurdish women clearly fall within the protection given by article 19 of the Covenant to freedom of opinion and expression" and that her "freedom of opinion and expression was targeted through charges of conducting "propaganda activities").

boundaries of the right to freedom of expression."[202]

Criticizing or Insulting Public Figures: The Working Group emphasizes that "it considers that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties and that all public figures, including those exercising the highest political authority such as heads of State and Government, are legitimately subject to criticism and political opposition."[203] For instance, lese-majeste laws, such as those in Thailand, suppress public debate and encourage self-censorship, putting the right to freedom of expression in jeopardy.[204]

Organizing a Peaceful Demonstration: Some conduct may fall under the protection of multiple rights under this category. For instance, in an opinion concerning the detention of a human rights activist in China, the Working Group noted a government pattern of charging individuals with "gathering a crowd to disrupt the order of a public space" to detain activists that were peacefully exercising their freedom of expression and association.[205]

Expressing Opinions that Offend, Shock, or Disturb: "Even the statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection."[206] The

[202] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018).

[203] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 62, 63, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018) (referencing Human Rights Council Resolution 12/16 ¶ 5 (p) (i), in which it stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant).

[204] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 24, 25, Communication No. 44/2016 (Thailand), U.N. Doc. A/HRC/WGAD/2016/44 (17 June 2017) (finding that the present case raises the issue of the compatibility of the State's lese-majesty laws with the right to freedom of opinion and expression enshrined in international human rights law, including the Universal Declaration of Human Rights and the Covenant and concurring with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who found that the law at issue encourages self-censorship and suppresses important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 32, Communication No. 51/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/51 (13 October 2017) (expressing concern about "the vague, broad and open-ended definition of "insult" as used in section 112 of the Penal Code. The Working Group is mindful of the chilling effect on freedom of expression that such vaguely and broadly worded regulations resulting in unjustified criminalization may have. The Special Rapporteur on the promotion and protection of the right to freedom of opinion expression has warned that threat of a long prison sentence and vagueness about what kinds of expression constitute defamation, insult, or threat to the monarchy encourage self-censorship and stifle important debates on matters of public interest," citing A/HRC/20/17, ¶ 20).

[205] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 27, Communication No. 11/2016 (China), U.N. Doc. A/HRC/WGAD/2016/11 (16 June 2016).

[206] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 63, Communication

> Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has indicated that the right to freedom of expression "includes expression of views and opinions that offend, shock or disturb."[207] The Working Group found that a human rights activist detained in Saudi Arabia for criticizing the persecution of peaceful dissidents there had had his right to freedom of expression violated, despite that his speech offended the government.[208]

Freedom of Association and Assembly

The rights to freedom of association and assembly are codified together in article 20 of the UDHR and separately in articles 21 (assembly) and 22 (association) of the ICCPR.[209] In practice, much of the Working Group's analysis regarding these rights is done jointly, which is why they are also analyzed together here. These rights can be restricted under the same limited circumstances as other rights analyzed in this category. The freedom of assembly includes the right to peaceful assembly.[210] The freedom of association includes the right to freely associate with others and join unions for the protection of one's interests.[211] Advocates may consider highlighting for the Working Group whether the subject of the communication was detained for participation in meetings, protests, or other activities.

> Being a Religious Figure: In a case concerning the detention of a Shia Muslim religious leader in Bahrain, the Working Group determined that his detention was predicated on an unlawful restriction of his right to expression and association.[212] His arrest took place two days after his election as Secretary General of Al-Wefaq (a religious minority party) and that the Government did not refute that "the allegations that the arrest, detention and prosecution of Sheikh Ali Al-Salman was directly related to the public expression of his opinions as a political opposition leader, a Shi'a Muslim and a religious figure."[213]

No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018).

[207] *Id*.

[208] *Id*.

[209] The Working Group has also cited regional instruments that endorse the freedoms of expression and assembly, such as articles 4 and 21 of the American Declaration on the Rights and Duties of Man and articles 13 and 15 of the American Convention on Human Rights. *See e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 35, 108-109, Communication No. 31/2016 (Argentina), U.N. Doc. A/HRC/WGAD/2016/31 (2 November 2016) (recalling that it holds that peaceful assemblies (a) are an essential element in economic, social and personal growth within a democratic context; (b) make positive contributions to the development of democratic systems; (c) make it possible to hold Governments to account and to express the will of the people as part of democratic processes; (d) play a critical role in the protection and promotion of a broad range of human rights; (e) amplify the voices of people who have been marginalized or who present an alternative narrative to established political and economic interests; and (f) are a means of engaging not only with the State but also with others, including corporations, religious, educational and cultural institutions, and the public in general).

[210] ICCPR art. 21.

[211] ICCPR art. 22.

[212] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 23/2015 (Bahrain) U.N. Doc. A/HRC/WGAD/2015/23 (17 November 2015).

[213] *Id*. ¶¶ 32-35.

Being Involved in a Labor Movement: The Working Group has determined that being involved with labor movements is a legitimate exercise of one's right to freedom of association. In an opinion regarding a Vietnamese advocate, the Working Group found the detainee's "involvement with No U Sai Gon and the Viet Nam Labour Movement," was an exercise of his right to freedom of association."[214]

Being Associated with a Television Station that is Affiliated with an Opposition Party: In an opinion concerning the detention of a political opponent in Iraq, the Working Group found an infringement of the detainee's right to association because his arrest and detention were linked to his association with a local television station affiliated with an Islamist opposition political party.[215] He was also arrested shortly after attending a meeting.[216] Because his arrest and detention were in response to his exercise of his freedoms of association and assembly, the Working Group found his detention arbitrary.[217] As this case exemplifies, there is often an overlap in how the rights analyzed under this category manifest.

Freedom to Engage in Public Affairs

The right to engage in public affairs is codified in article 25 of the ICCPR and article 21 of the UDHR. This right can be restricted under the same limited circumstances as other rights analyzed in this category. This right includes the right to take part in the government of one's country, either directly or through chosen representatives, to vote and be elected in genuine, periodic elections by universal and equal suffrage, and to have equal access to public service.[218] The Working Group employs the Human Rights Committee's broad definition of engagement in public affairs, noting that "citizens take part in the conduct of public affairs by 'exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.'"[219]

Promoting the Rights of Certain Groups: In a case concerning a Kurdish activist, the Working Group determined that the detainee's "activist work in promoting the rights of Kurdish women" falls within the definition of the right to engage in public affairs.[220]

[214] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018).

[215] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 29, Communication No. 20/2016 (Iraq), U.N. Doc. A/HRC/WGAD/2016/20 (24 June 2016).

[216] *Id.* ¶ 30.

[217] *Id.* ¶ 30.

[218] ICCPR art. 25; UDHR art. 21.

[219] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 36, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49 Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018) (finding that the detainee was engaging in advocacy relating directly to government policies in Viet Nam and was deprived of his liberty as a result of exercising his right to take part in the conduct of public affairs).

[220] *Id.*

> Advocacy for Government Policies: In the case of a Vietnamese advocate, the Working Group determined the detainee "was engaging in advocacy relating directly to government policies in Viet Nam and was deprived of his liberty as a result of exercising his right to take part in the conduct of public affairs."[221]

Test 2: Any restriction on fundamental rights must be necessary to meet a legitimate State interest and proportional

Once a source presents credible evidence that the detainee was detained in the exercise of a fundamental human right or in the act of defending fundamental human rights, a State must provide credible evidence showing that its restriction of that right or rights is necessary and proportional on the basis of a legitimate state interest. The Working Group applies a four-part test to determine whether a State's restrictions on the right of freedom of expression are necessary and proportional. The four elements are: (a) whether the objective of the restriction is sufficiently important to justify the limitation of a protected right, (b) whether there is a rational connection between the restriction and the objective, (c) whether a less intrusive restriction was possible, and (d) whether the importance of the objective and the likelihood that the restriction will help achieve it outweighs the severity of the limitation on fundamental rights.[222]

Element 1: The objective must be important enough to justify a restriction of fundamental rights

To satisfy this element, the State must show that its objective, e.g. maintaining friendly relations with other countries, can be considered necessary to protect a legitimate State interest, e.g. public safety. Legitimate interests are limited to the protection of public safety, order, health, or morals or the protection of the fundamental rights and freedoms of others. States often claim that restrictions on fundamental rights are necessary for national security, typically to combat terrorism, or are necessary for maintaining public order and respect for the State.

Anti-Terrorism and Restrictions on Fundamental Rights

The Working Group recognizes that combatting terrorism is a legitimate government interest, falling within a State's duty to protect public safety. However, any restrictions related to counter-terrorism efforts must still comply with necessity and proportionality requirements. In analyzing restrictions in the context of counter-terrorism, the Working Group relies on principle 6 of the Johannesburg Principles, which provides that no restrictions on

[221] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018).

[222] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 51, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017) (explaining that the four factors are: "(a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter").

fundamental rights will be deemed necessary "unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."[223] This test is a conjunctive test, meaning that a State looking to restrict fundamental freedoms in an effort to combat terrorism must prove all three elements for the restriction to be lawful.

The Working Group will not find that the peaceful exercise of a right is intended to incite violence. To comply with international human rights standards of legal certainty, the definition of terrorism in anti-terrorism laws "should be confined to acts or threats of violence that are committed for religious, political or ideological motives, and that are aimed at putting the public or section of the public in fear or to coerce a Government or international organization to take or refrain from taking a particular action."[224] Accordingly, laws that define terrorism as endangering "national unity" or undermining "the reputation or position of the State," enable the criminalization of a wide spectrum of acts of peaceful expression and do not comply with international law.[225]

Anti-terrorism laws must not be so broad as to make distinguishing between expression that is likely to be violent and that which is peaceful and unlikely to incite violence impossible. Furthermore, anti-terrorism laws must be capable of distinguishing between those individuals engaged in illegal activity and mere supporters of an organization. The Working Group found that a Vietnamese law that did not "distinguish between violent acts capable of threatening national security and the peaceful exercise of the right to freedom of opinion and expression" was inconsistent with the UDHR and the ICCPR.[226] Similarly, in a series of cases relating to individuals detained on the basis of their real or perceived membership with the Gülen movement in Turkey, the Working Group emphasized the need to distinguish between persons who engaged in illegal activities as opposed to sympathizers, supporters, or members, without any individualized evidence of a "readiness to engage in violence."[227]

[223] The Working Group applied this analysis to an infringement on the right to freedom of expression, however, considering that the rights listed under category II often overlap and are analyzed jointly, it follows that this test would also be applied in counter-terrorism cases that implicate other fundamental rights, such as the freedom of association and assembly. *See, e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (referencing A/HRC/17/27, ¶¶ 36-37).

[224] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 67, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018) (citing the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016) (concluding that the government failed to provide evidence that the detainee was involved in any violent political activities and there were therefore no legitimate grounds for her arrest and detention).

[225] *Id.*

[226] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[227] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 72-76,

Finally, to prove that an anti-terrorism law lawfully restricts fundamental freedoms, the State must undertake an individualized analysis comparing the detainee's conduct with the likelihood that it will incite violence. This requires providing specific evidence of the immediate connection between the exercise of fundamental rights and violence. In the Vietnamese case mentioned above, the Working Group did not find that the detainee's conduct could be restricted on terrorism grounds because the State failed to provide any evidence of specific violent action on the part of the detainee that showed that the detainee's conduct was likely to go beyond peaceful behavior and amount to acts of terrorism.[228]

In another case related to anti-terrorism laws in Viet Nam, the Working Group noted that "the Government did not point to any specific words or conduct by Mr. Binh or provide any evidence" supporting its assertions that by "posting material about State policy on social media, joining and establishing various associations, such as the Viet Nam Labour Movement or the Association of Central Fishermen, and blocking a major road with a vehicle" he incited others to violence.[229] Therefore, the Working Group found that those acts "do not amount to acts of inciting others to cause public disorder or violence."[230] In a related case, one detainee was indicted on the basis that he admitted to using an encrypted communication program that shared information about the Fetullahist organization and gave orders to its members. In that case, the Working Group found that "the Government of Turkey ha[d] not given a satisfactory explanation of how these admissions, if they were made of Mr. Kaçmaz's free will, demonstrate[d] his membership of an armed terrorist organization or that he ha[d] committed any criminal activity."[231]

Other Situations That May Necessitate Restrictions on Fundamental Rights

Other situations, like the maintenance of public order and preserving friendly relations with other countries,[232] may, in certain cases, necessitate the restriction of fundamental rights. However, simply invoking one of these accepted situations, without clearly explaining how the government's stated goal contributes to public order, public safety, or public health or protects the freedoms of others, is insufficient. For instance, the Working Group has found that speech which is critical of the government or official policy cannot be restricted on the basis that it is necessary for maintaining public order.[233] Similarly, lese-

Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc. A/HRC/WGAD/2018/11 (25 May 2018).

[228]Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[229] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 48, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018).

[230] *Id.*

[231] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 72-76, Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc. A/HRC/WGAD/2018/11 (25 May 2018).

[232] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 69, Communication No. 76/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/76 (15 January 2018) (explaining that, "[i]n the view of the Working Group, the maintenance of friendly relations with a foreign nation, Egypt in this case, may be a legitimate aim").

[233] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 62, 63, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018) (noting that

majeste laws that punish harmless adversarial comments on the internet do not promote national security and public order.[234] In such a case, the Working Group held that lese-majeste laws were not proportional or necessary to meet their stated objectives, and detention pursuant to such laws is arbitrary.[235]

Element 2: The restriction must be rationally related to a legitimate objective

For a restriction to be rationally connected to a legitimate objective, it must actually contribute to achieving the objective. Therefore, a State may not just invoke one of the situations of necessity without justifying how the restriction is rationally connected to the objective. In a case regarding China where the government confirmed that the detainees were arrested for peaceful religious activities and could not explain how restricting their religious activity helped maintain public order, the Working Group found the detention arbitrary.[236] In another example of the application of this requirement, the Working Group found that the detention of an activist in the UAE for posting online comments criticizing massive human rights violations against the Egyptian people could not be rationally connected to the government's stated objective of maintaining friendly relations with Egypt.[237]

Element 3: The restriction must be the least intrusive option available

For a restriction to qualify as the least intrusive option available, it must be both narrowly tailored in terms of the conduct punished and able to distinguish between those acting illegally and those acting peacefully. Accordingly, overbroad restrictions cannot be the least intrusive option and, therefore, cannot be considered proportional.

The Working Group's analysis on this element commonly involves situations where a law is "so vague and broad that it could result in penalties being imposed on persons who have merely exercised their legitimate rights."[238] For this reason, a claim by a State that the arrest and detention in

"penalization of a media outlet, publishers or journalist solely for being critical of the Government or the political or social system espoused by the Government can never be considered to be a necessary restriction of the freedom of expression)."

[234] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 51-55, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017).

[235] *Id.* at ¶ 54.

[236] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 61, 62, Communication No. 46/2016, (China) U.N. Doc. A/HRC/WGAD/2016/46 (27 January 2017).

[237] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 69, Communication No. 76/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/76 (15 January 2018).

[238] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 46, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (citing the Human Rights Committee's General Comment No. 34 at ¶ 23: "States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19").

question complied with domestic law is not dispositive.[239] Of course, participating in human rights advocacy and exercising fundamental rights does not confer immunity for criminal acts.[240] But, broadly criminalizing protected conduct can have a chilling effect on the realization of fundamental rights, and is inconsistent with international law.[241] For example, the Working Group expressed concern with Kazakhstan's criminal code in an opinion involving the detention of a Jehovah's Witness who was detained under a charge of instigating religious hatred, which included the act of insulting "religious feelings" and "incitement to religious enmity."[242] The Working Group considered such broad formulations would lead to "legal insecurity with concomitant adverse repercussions on freedom of expression and freedom of religion or belief."[243] Accordingly, it held that the law was overly broad and threatened the "full enjoyment of the right to freedom of religion in Kazakhstan."[244]

Additionally, when a law criminalizes peaceful as well as violent behavior and subjects innocent people to criminal consequences for exercising their rights, solely on the basis that others connected to them or in the same area committed criminal acts, the law will be deemed overly broad and not proportional. Accordingly, imposing liability on the organizers of

[239] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 45, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018) (recalling that even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law).

[240] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 24, Communication No. 09/2016 (Jordan) U.N. Doc. A/HRC/WGAD/2016/9 (10 October 2016) (expanding that "being a human rights advocate cannot exonerate anyone from his or her legal responsibility for general crimes, let alone terrorist activities").

[241] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/88 (23 January 2018); *see also*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 54, Communication No. 22/2018 (China) U.N. Doc. A/HRC/WGAD/2018/22 (27 June 2018) (noting that following its official visits to China in 1997 and 2004, the Working Group emphasized in its reports that vague and imprecise offences jeopardize the fundamental rights of those who wish to exercise their right to hold an opinion, or exercise their freedoms of expression, the press, assembly and religion, and that they are likely to result in arbitrary deprivation of liberty, and, therefore, recommended that those crimes be defined in precise terms to exempt from criminal responsibility for those who peacefully exercise their rights guaranteed in the Universal Declaration of Human Rights).

[242] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 62/2017 (Kazakhstan) U.N. Doc. A/HRC/WGAD/2017/62 (2 October 2017) (noting that the Government did not provide a "single violent action or incitement of others to violence" by the claimant to justify his detention pursuant to a lawful restriction to his right to freedom of religion on the basis of public order. "On the contrary, as the Government has itself argued in its late reply, the prosecution of Mr. Akhmedov rests on witnesses testifying that he only described other religions as "lies" and argued that Jehovah's Witnesses were the only true religion, without any incitement to violence or religious hatred").

[243] *Id.*

[244] *Id.* ¶ 36 (noting that it agreed "with the views expressed by the Human Rights Committee and the Special Rapporteur on freedom of religion or belief, in relation to the formulation of article 174 of the Criminal Code. The definitions of "inciting social or class hatred" and "religious hatred or enmity" are extremely broad and lack the requisite degree of legal certainty. As such, this provision presents a serious threat to the full enjoyment of the right to freedom of religion in Kazakhstan as enshrined in article 18 of the Covenant").

peaceful protests, or on anyone attending or reporting on a peaceful, for violent actions taken by some attendees is not a proportional restriction on the freedom to peaceful assembly.[245] Holding organizers liable for the acts of violent participants would "violate the principle of individual liability" and discourage future peaceful assemblies.[246] In a case concerning the detention of a journalist in Egypt, the Working Group found credible the source's allegations that the journalist was arrested while covering the violent dispersal of a protest and subsequently charged with the same offenses as over 700 other people arrested in connection with the protest.[247] The Working Group found that the government failed to make any argument for the journalist's individual liability for the alleged crimes, and as such, that he was being detained in response to his exercise of peaceful assembly and association.[248]

Finally, if a criminal penalty is imposed on individuals in cases where a civil penalty would suffice, the restriction is not the least intrusive option available. Therefore, in applying its four-factor proportionality test, the Working Group found that Thailand's lese-majesty laws provide too severe a punishment for online criticism of the Government and that a civil alternative would be more proportional.[249]

Element 4: The importance of the objective and the likelihood that the restriction will help achieve it must outweigh the severity of the limitation on fundamental rights

The Working Group will look to whether the State has provided specific evidence for why the restriction was necessary and proportional in the particular case and also to patterns of State conduct if it senses that a State is subjecting too many people to unjustified restrictions of their rights. Therefore, general assertions by the government that it had a legitimate objective for restricting a detainee's rights and the measures invoked were likely to achieve it, without explaining why the restrictions were proportional in the particular case, will be insufficient.[250] For

[245] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 84, Communication No. 91/2017 (Maldives), U.N. Doc. A/HRC/WGAD/2017/91 (22 January 2018) (holding that to attribute the acts of others to a group would "violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights. The right to freedom of peaceful assembly is held by each individual participating in an assembly. Acts of sporadic violence or offences by some should not be attributed to others whose intentions and behaviour remain peaceful in nature").

[246] *Id.* (referencing the joint report by the Special Rapporteurs, A/HRC/31/66, ¶ 26); *see also*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 74, Communication No. 22/2017 (Republic of Korea), U.N. Doc. A/HRC/WGAD/2017/22 (30 May 2017).

[247] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 8, Communication No. 41/2016 (Egypt) U.N. Doc. A/HRC/WGAD/2016/41 (1 November 2016).

[248] *Id.* at ¶ 28.

[249] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 51-55, Communication No. 56/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/56 (13 October 2017).

[250] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018) ((noting that "the Government did not present any evidence to the Working Group to invoke any of the restrictions, nor did it demonstrate why bringing charges against Mr. Binh was a legitimate, necessary and proportionate response to his activities").

instance, the Working Group found the State's detention of an independent journalist violated his rights to freedom of expression because the nature of the charges against him reflected "a broader scheme of suppression."[251] In making this determination, the Working Group recalled that the charges against the detainee in this case were the same charges filed against another opposition leader, who was the subject of an earlier communication.[252]

7.3 Category III: Deprivation of Liberty Resulting from Violations of Right to a Fair Trial

The Working Group's Working Methods define Category III as: 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.[253]

When there is a lawful basis for an individual's detention, which comports with international law, a detention may still be arbitrary if the individual's right to a fair trial is denied. According to article 9, paragraphs 3 and 4 of the ICCPR, anyone deprived of his or her liberty has a right to be "brought promptly before a judge or other officer authorized by law to exercise judicial power;" a right to a trial "within a reasonable time;" and the right to have a court decide "without delay on the lawfulness of his detention."[254] Article 14 of the ICCPR also provides that an individual has the right to a "fair and public hearing by a competent, independent and impartial tribunal established by the law," as well as the presumption of innocence until proven guilty and other minimum due process guarantees.[255] Article 14 also includes an individual's right to be promptly informed of charges in a language the individual understands, the right to adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing, the right to be present at one's own trial and to participate in one's own defense, the right to examine witnesses, the right to an interpreter for trial proceedings, and the right not to be compelled to confess guilt.[256]

To establish a *prima facie* case under Category III, a source needs to present credible evidence that the detainee's fair trial rights have been violated to such an extent that his detention has an arbitrary character.[257] There is not a bright line rule regarding how many rights related to fair trial must be violated to give the detention an arbitrary character. Rather, States'

[251] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 19, 21, Communication No. 55/2016 (Bahrain), U.N. Doc. A/HRC/WGAD/2016/55 (30 January 2016) (referring as well to the Bahrain Independent Commission of Inquiry which reported that there had been "numerous arrests and detentions of journalists during the 2011 crackdown on the press").

[252] *See id.* ¶ 17 (noting that the detainee was charged with "vague political crimes, such as joining the unauthorized Al-Wafa opposition movement and inciting hatred against the regime").

[253] Methods of Work, *supra* note 1, ¶ 8 (c).

[254] *See* ICCPR art. 9 (3-4).

[255] *See* ICCPR art. 14 (1) and 14 (2).

[256] *See* ICCPR art. 14 (3).

[257] *See* Methods of Work *supra* note 1, ¶ 8(c); *see e.g.*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 66, Communication No. 74/2017 (Democratic Republic of Congo), U.N. Doc. A/HRC/WGAD/2017/74 (28 December 2017).

infringement of the right to a fair trial to the extent that the detention has an arbitrary character may be evidenced by its violation of one right or multiple infringements in the aggregate.[258] In this regard, the Working Group takes a totality of the circumstances approach to assessing whether the violations of the right to fair trial and enjoyment of due process constitute a violation of Category III. This conceptualization speaks to the importance of sufficient and genuine process to the notion of arbitrariness. In practice, the Working Group often finds that violations of many fair trial rights negate any possible legal basis for the detention at issue. In these cases, the Working Group will find the violation of fair trial rights deems the detention arbitrary under both Category I and Category III. Therefore, when relevant, sources should allege violations under both categories. In preparing a communication, sources should consider whether a detainee's detention violates any of the following fair trial rights.

Rule 1: A generalized practice of pretrial detention that fails to provide individualized review and the consideration of alternatives to pretrial detention is a violation of fair trial rights

Under article 9(3) of the ICCPR, pretrial detention should be limited in its use and as short as possible. Additionally, pretrial detention must be based on an individualized assessment that it is "reasonable and necessary" in light of the circumstances, to detain the individual prior to trial because they present a flight risk or are likely to destroy evidence.[259] The

[258] *See, e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 52, Communication No. 61/2016 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2016/61 (6 February 2017) (raising the following facts and circumstances as relevant to its determination that the States' violations of the right to fair trial were sufficiently grave as to give the detention an arbitrary character: "(a) at the time of the arrest of the three minors, no warrant was presented; (b) their pretrial detention lasted between 20 and 22 months prior to the commencement of their court trials; (c) the practice of torture and ill-treatment was conducted to extract false confessions; (d) the minors had no recourse to effective habeas corpus and were held incommunicado; (e) they were given limited access to lawyers and to the evidence against them, and were not permitted to cross-examine witnesses; (f) they were tried in the Specialized Criminal Court; and (g) the endorsement of the death sentences by the upper courts was made in proceedings held in camera." The Working Group finds support for this cumulative analysis in International Criminal Court, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06 (OA4), 14 December 2006, ¶ 39; which provides "where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place. . . . Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial."

[259] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 36, 37, Communication No. 17/2018 (Romania) U.N. Doc. A/HRC/WGAD/2018/17 (28 May 2018); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018) (stressing "the nearly automatic extension of pretrial detention every 45 days from 26 December 2016 to July 2017 by the Supreme State Security Prosecution cannot be considered to be compatible with article 9 (3) of the Covenant. The Working Group concurs with the Human Rights Committee, when it observed in its general comment No. 35 that detention pending trial must be based on an individualized determination that is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of

circumstances that a State considers in determining whether a particular individual should be detained prior to trial should be established in legislation and should not include "vague and expansive standards such as 'public security,'" as this could undermine the aim of limiting pretrial detention.[260]

In a case involving the detention of a woman in Viet Nam who was held for nearly six months in pretrial detention before being brought before a judge, the Working Group found that the State failed to provide individualized review of the necessity of her detention, nor did it consider alternatives to her detention, such as bail.[261] It therefore held that the State's failure to undertake an individualized review constituted a violation of article 9(3) of the ICCPR.[262] In contrast, in a case where the Working Group was asked to consider the appropriateness of pretrial detention imposed on a detainee before ultimately moving him to house arrest, the Working Group considered it was possible that the State made an individual determination of his circumstances, including his need for medical treatment.[263] However, because neither the source nor the Government provided details on how it came to the decision to place the detainee under house arrest, the Working Group decided it was "unable to state with certainty that the Government did not meet its obligation to provide Mr. Herscovici with an individualized determination, and therefore does not have sufficient information to conclude whether his detention was arbitrary."[264] This suggests that the Working Group places weight on the details of the process afforded the detainee, not just whether the outcome was an alternative to pretrial detention.

In keeping with the proposition that pretrial detention should be the exception rather than the rule, the Working Group also finds automatic pretrial detention regimes for certain offenses (so-called non-bailable offenses), incompatible with the idea of individualized assessment as it precludes consideration of the detainee's individual circumstances.[265] Thus, regimes that make pretrial detention automatic based on the

crime. Pretrial detention should not be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity; courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case. The Working Group reiterates its view that the consideration of alternative non-custodial measures allows ascertainment of whether the principles of necessity and proportionality have been met (A/HRC/19/57, para. 55)."

[260] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 22, Communication No. 51/2017 (Thailand) U.N. Doc. A/HRC/WGAD/2017/51 (13 October 2017).

[261] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 48, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[262] *Id*.

[263] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 17/2018 (Romania) U.N. Doc. A/HRC/WGAD/2018/17 (28 May 2018).

[264] *Id*.

[265] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 47, 48, Communication No. 61/2018 (Philippines) U.N. Doc. A/HRC/WGAD/2018/61 (30 November 2018) (revisiting "the incompatibility of a non-bailable offence under Philippine law, which precludes consideration — or reconsideration on a periodic basis — of a detainee's individual circumstances" and concurring with the fact that "automatic rejection of the applicant's applications for bail ..., devoid of any judicial control of the particular circumstances of his detention, [is] incompatible with the guarantees" of article 9 (3) of the Covenant").

offense charged and provide no opportunity for judicial review have no legal basis and may also be deemed arbitrary under Category I.[266] This is because the application of automatic pre-trial or non-bailable offenses precludes consideration of alternatives to detention.[267]

Rule 2: The necessity of pretrial detention must be judged "promptly" to comply with fair trial guarantees

Since detention while awaiting trial should be the exception rather than the rule, the Working Group holds that individuals deprived of liberty should be promptly brought before a judicial authority to determine whether detention is appropriate.[268] "Promptly" should be considered to mean within the first few days following detention.[269] In general, "any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances," and "an especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles."[270]

In a case where the pretrial detention of several people exceeded over 20 months, the Working Group noted that it was not only a violation of the State's law of Criminal Procedure (which reportedly required pretrial detention to last not more than six months) but also a violation of the international norms on detention dictating that pretrial detention should be an exception and should be as short as possible.[271] Similarly, in an opinion concerning the detention of Buddhists in China, the Working Group found that 10 months of pretrial detention without being brought before a court violated the detainees' right to challenge the basis of their detention.[272]

[266] *See id.* at ¶ 48 (citing to European Court of Human Rights, *Piruzyan v. Armeni*a (application No. 33376/07) judgment of 26 June 2012, ¶ 105).

[267] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 24/2015 (Philippines) U.N. Doc. A/HRC/WGAD/2015/24 (16 November 2015) (referring to the case of *Baban v. Australia*, Communication No. 1014/2001, paragraph 7.2, of the Human Rights Committee finding that the "State party must demonstrate that there were no less invasive means available of achieving the same ends of detention (i.e. mitigating the risk of flight, interference with evidence or re-offending that may arise from release on bail" and to General Comment No. 35 in which the Human Rights Committee stated that "Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case" (¶ 38).

[268] Human Rights Committee, General Comment No. 35 on Article 9, CCPR/C/GC/35, 16 December 2014, ¶ 32.

[269] *Id.* ¶ 33.

[270] *Id.* (citing Human Rights Committee decision 1787/2008, *Kovsh* v. *Belarus*, ¶¶ 7.3–7.5, 336/1988, *Fillastre and Bizouarn* v. *Bolivia*, ¶ 6.4, and Committee on the Rights of the Child, general comment No. 10, ¶ 83).

[271] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 55, Communication No. 61/2016 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2016/61 (6 February 2017).

[272] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 53, Communication No. 46/2016, (China) U.N. Doc. A/HRC/WGAD/2016/46 (27 January 2017) (finding that the States' failure to allow the individuals to challenge their detentions in court constitutes a violation of article 10 of the Universal Declaration of Human Rights, giving the deprivation of their liberty an arbitrary character under category III).

Rule 3: Detainees must be afforded the right to challenge the basis of their detention

Closely related to the right to be brought promptly before a judge is the right to challenge the basis of one's detention. The right to challenge the basis of detention begins at the time of arrest and includes the right to know the reason for arrest and the nature of the charges.[273] This ensures that detainees have the ability to "challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies."[274] Importantly, under its deliberation No. 9, the Working Group recognized the right to challenge one's detention as a non-derogable right;[275] it is a peremptory norm of international law and applies to all forms and places of detention.[276]

The right to challenge the basis of detention applies to all categories of detention, including administrative detention, which is common in the immigration context (analyzed under Category IV)[277] and in the counter-terrorism or security context. While it is unclear exactly how long individuals may be detained in administrative custody, the Working Group considers that it should "not last for longer than absolutely necessary, that the overall length of possible detention is limited."[278] When administrative detention is in practice analogous to penal detention because of its purpose, character, or severity, the Working Group will regard it as penal even if the detention is qualified as

[273] *See* art. 9 UDHR; *see also* Principle 10 of the Body of Principles: "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."

[274] *See* Principle 7, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 53-54, Communication No. 46/2016, (China) U.N. Doc. A/HRC/WGAD/2016/46 (27 January 2017).

[275] *See* Deliberation No. 9 ¶ 49; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 52, Communication No. 53/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017) (noting that the Working Group has also confirmed the non-derogable status in its Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, "in which it states that the right to challenge the lawfulness of detention is a self-standing human right and a judicial remedy that is essential to preserve legality in a democratic society").

[276] *See* Deliberation No. 9 ¶ 57; *see also* United Nations Working Group on Arbitrary Detention, ¶ 83, Communication No. 38/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/38 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 56/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/56 (23 January 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 53, Communication No. 04/2018 (Turkmenistan), U.N. Doc. A/HRC/WGAD/2018/4 (23 May 2018) (noting that the right "applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes. Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation").

[277] *See* infra Section 7.4 for a discussion of Category IV.

[278] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 35, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017).

administrative under domestic law.[279] Accordingly, the Working Group considers that States are required to provide the due process procedures to detainees in administrative detention that would be received by detainees in criminal custody to avoid arbitrariness.[280] This includes prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary, access to independent legal advice, and disclosure to the detainee of the essence of the evidence on which the decision to detain him or her was taken.[281]

This right also comes up under Category I; therefore, sources should raise both Category III and Category I violations in cases where the detainee is denied the ability to challenge the lawfulness of his or her detention.

Rule 4: Failure to provide adequate time to prepare a defense may violate the right to fair trial

While States are required to ensure that detainees are brought promptly before the judiciary and informed without undue delay of the basis of their detention, the right to equality of arms provides that they must also have sufficient time to prepare a defense. The right to equality of arms is guaranteed under article 14 of the ICCPR, providing in relevant part that all persons must "have adequate time and facilities for the preparation of his defense."[282] For instance, in a case concerning a detainee in Turkmenistan, the Working Group found that his trial resulting in a sentence of three years' imprisonment "lasted only ten minutes... cannot, under any circumstances, be said to fulfill" the "guarantees of a fair trial and of equality of arms as enshrined in article 14 of the Covenant."[283] It proceeded to note that "[i]n such a short period of time, it would have been impossible for the prosecution to present its case and witnesses, let alone for Mr. Matalaev and his lawyers to present their defense, examine the prosecution witnesses and present their own witnesses."[284] Accordingly, it concluded that the hearing was "a mere 'rubber stamping' of a predetermined decision" in violation of the principle of equality of arms and of such gravity as to give his detention an arbitrary character under Category III.[285]

Rule 5: The right to counsel envisions confidential access to legal assistance at all stages of the trial process and the ability to choose one's counsel

In accordance with fair trial rights recognized by the ICCPR and UDHR, the Working Group consistently affirms that persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, which attaches immediately after arrest.[286] This means that persons

[279] *See supra* note 28 at ¶ 68.

[280] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 35-38, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017).

[281] *Id*. ¶ 35.

[282] *See* ICCPR art. 14 (1) and 3 (b); *see also* UDHR art. 10.

[283] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 70, 75, Communication No. 04/2018 (Turkmenistan), U.N. Doc. A/HRC/WGAD/2018/4 (23 May 2018).

[284] *Id*. ¶ 71.

[285] *Id*. ¶¶ 71-73.

[286] *See* ICCPR art. 14(d); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 22/2018 (China) U.N. Doc. A/HRC/WGAD/2018/22 (27 June 2018).

deprived of their liberty must be able to communicate effectively with their counsel.[287] The Working Group has held that having access to counsel only by phone is insufficient for protecting the right to effective assistance of counsel and protecting attorney-client confidentiality.[288] The right to counsel also includes the ability to consult adequately about one's case in order to meaningfully utilize counsel's advice.[289] For example, in a case involving the detention of 19 people in Burundi, the Working Group noted that when lawyers did not have an opportunity to review case files, the detainees did not have sufficient access to counsel.[290] Additionally, in an opinion concerning the Maldives, the Working Group found serious due process violations when the defense council was only given five days to prepare for a trial regarding a serious criminal charge.[291] In another case concerning the Maldives, the Working Group found that the detainee did not have adequate time or access to counsel to prepare for his first remand hearing, violating his due process rights.[292] While he later had sufficient access to counsel at the trial stage, the Working Group held that later access to counsel could not remedy the damage done to the detainee's position during the first hearing.[293] In its analysis, it considered that the detainee was denied the right to counsel at all stages of his detention, which constituted a violation of his right to counsel.[294]

The right to counsel also incorporates the freedom to choose counsel, which the Working Group examines both explicitly via *de jure* denial of the right to hire counsel of

[287] *See, e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 25/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/25 (21 September 2016).

[288] *Id.* (finding that providing access to a lawyer over the telephone and not in person is "insufficient within the circumstances of this case to meet the standard of effective access to a lawyer required by article 14(3)(b) of the Covenant" and referencing the Human Rights Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial ¶ 34 providing that counsel should be able to meet with clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications).

[289] *See* Principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

[290] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 32, Communication No. 7/2018 (Burundi) U.N. Doc. A/HRC/WGAD/2018/ (27 August 2018).

[291] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 63, Communication No. 59/2016 (Maldives) U.N. Doc. A/HRC/WGAD/2016/59 (1 February 2017); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 65, Communication No. 22/2018 (China) U.N. Doc. A/HRC/WGAD/2018/22 (27 June 2018) (finding that the detainees "were not informed of their right to legal counsel at the moment of the arrest, and neither of them could communicate nor consult with their legal counsel, nor were they allowed adequate time to prepare their defence in the first eight months of detention, in the case of Mr. Huang, and in the first six months of detention, in the case of Mr. Liu. The right to legal representation is a fundamental prerogative of persons deprived of their liberty in order to be able to guarantee their right to challenge the lawfulness of the detention. Such acts and omissions by the authorities are a violation of due process of law guarantees, and are of such gravity that they render the detention of Mr. Huang and Mr. Liu in violation of articles 9 and 10 of the Universal Declaration of Human Rights. Their deprivation of liberty is therefore arbitrary under category III").

[292] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 87-89, Communication No. 91/2017 (Maldives), U.N. Doc. A/HRC/WGAD/2017/91 (22 January 2018).

[293] *Id*.

[294] *Id*. ¶ 87.

one's choice, and via *de facto* denial by the government's harassment or retaliation against counsel who represent certain detainees.[295] The Working Group found that the right to counsel was denied in a case where the Government committed several acts of reprisal against the detainee's lawyer, including cancelling his law license, placing the lawyer in criminal detention and accusing him of "obstructing official duties," and placing him under residential surveillance on suspicion of "inciting subversion of State power."[296] Similarly, the first attorney representing Adnrei Sannikov, a detained opposition politician and civil rights activist, was disbarred after publicly raising concerns regarding the treatment of his client.[297] The Working Group found this act violated Mr. Sannikov's right to effective legal assistance.[298]

Denial of the right to counsel can also be triggered when the detainee is being held in incommunicado detention. For example, in a case concerning China where the detainee was held without access to his lawyer or family for at least five months, the Working Group found his right to counsel was violated.[299] In its analysis, the Working Group considered the impact of incommunicado detention on the detainee's ability to challenge the lawfulness of his detention in addition to his right to legal assistance.[300] In concluding, it found a violation under Category I (as his incommunicado detention lacked a legal basis) as well Category III, finding that his incommunicado detention was a violation of his right to legal assistance guaranteed under articles 10 and 11 (1) of the UDHR and principles 15, 17 and 18 of the Body of Principles giving his detention an arbitrary character.[301] Similarly, in a case involving the detention of a man in Syria, the Working Group found that his 9-month incommunicado detention infringed upon his right to counsel.[302] Accordingly, it found that he was unable to exercise his right to provide a full defense a relevant factor in finding his detention arbitrary under Category III.[303]

Rule 6: A State's prejudicial statements and treatment of detainees can violate the right to the presumption of innocence, in violation of fair trial rights

The right to the presumption of innocence is enshrined in article 11 of the UDHR, article 14(2) of the ICCPR, and Principle 36 of the Body of Principles.[304] The Working Group's

[295] *See, e.g.*, Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 45-47, Communication No. 62/2018 (China) U.N. Doc. A/HRC/WGAD/2018/62 (12 October 2018).
[296] *Id.*
[297] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 38, Communication No. 14/2012 (Belarus) U.N. Doc. A/HRC/WGAD/2012/14 (12 July 2012).
[298] *Id.*
[299] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 37-39, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017).
[300] *Id.*
[301] *Id.* ¶ 39.
[302] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 11, 25, Communication No. 05/2015 (Syria) U.N. Doc. A/HRC/WGAD/2015(6 May 2015).
[303] *Id.*; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 33, 39, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016) (finding that the detainee's month-long incommunicado detention violated her right to counsel and a relevant factor in finding her detention arbitrary under Category III).
[304] *See, e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 60, Communication No. 3/2018 (Thailand) U.N. Doc.

jurisprudence illustrates that States' failure to recognize the presumption can manifest through both presupposing guilt and through its treatment of the detainee through the criminal process. For instance, the Working Group will find a violation of the presumption when there is evident bias expressed by the judiciary. In an opinion concerning the detention of a human rights defender in Iran, the Working Group found that her right to the presumption of innocence was violated by the trial judge alleging that she was perhaps "involved in terrorist operations and refraining from telling the truth in transporting arms…even though such items were not found in her possession at the time of the arrest."[305] In the same case, the Working Group also considered the extremely short judgments evidence towards its conclusion that the court did not give substantive consideration to the facts and evidence that should have been afforded to the detainee.[306] Similarly, in a trial where the judge only deliberated for 45 minutes before handing down a life sentence, the Working Group found the facts indicated that the defendant's "guilt had been determined prior to the hearing."[307] This suggests that credible evidence of a court's unwillingness to meaningfully weigh and consider the charges against a defendant or to provide an opportunity to launch a defense may undermine the presumption of innocence.

States' treatment of a detainee can also violate the presumption of innocence. For instance, where defendants were required to sit in a soundproof box during their trial, the Working Group found that the presentation of the defendants before the court in a manner which indicated they were dangerous criminals undermined their right to the presumption of innocence.[308] A similar conclusion was reached where the accused was surrounded by 30 uniformed police officers as he was escorted into court.[309] Subjecting a detainee to prolonged pretrial detention can also be considered treatment which violates the presumption.[310] Likewise, "near-automatic extension" of pretrial detention without regard to due process and fair trial rights is also "indicative of the violation of the presumption of innocence."[311]

A/HRC/WGAD/2018/3 (9 July 2018) (noting that the Government failed to respect the detainee's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

[305] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 39, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016).

[306] *Id*.

[307] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 55, Communication No. 36/2018, (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/36 (5 June 2018).

[308] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 42/2019 (Egypt) U.N. Doc. A/HRC/WGAD/2019/42 (3 October 2019).

[309] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 55, Communication No. 36/2018, (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/36 (5 June 2018).

[310] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 18/2018 (Poland) U.N. Doc. A/HRC/WGAD/2018/18 (5 June 2018) (noting that "[p]rolonged pretrial detention may also be placing Mr. Piskorski's right to be presumed innocent in jeopardy").

[311] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018); *see also* Human Rights Council, United Nations Working Group

In cases where Government officials have publicly condemned individuals before charge or conviction, the Working Group considers that the State may have violated the presumption of innocence.[312] In a case where public officials broadcasted the accused names and labeled them members of the Muslim Brotherhood and terrorists before the men were charged, tried, or provided any ability to refute these claims, the Working Group found that the outcome of their trial had been "prejudged."[313] Likewise, in a case where the President of Venezuela publicly stated that the detainee was guilty of the crime he was charged with before the judiciary issued its ruling, the Working Group found that his presumption of innocence was violated.[314] The Working Group made similar determinations where the Prime Minister, the Ministry of Justice, the Ministry of Women's Affairs, the Cambodia Human Rights Committee, and the Head of the Anti-Corruption Unit made public statements portraying the accused as guilty and where the Deputy Prosecutor General appeared on multiple television news channels declaring that the detainee had been instructed to commit a murder.[315] This was followed two months later by the investigator claiming that he had irrefutable evidence of the detainee's guilt on television.[316] The Working Group found that detainees' right to the presumption of evidence was not respected in both cases.

Rule 7: In cases involving minors, trying a minor in an ordinary court, use of excessive force, use of "chain remand" procedures, and the failure to provide age-appropriate resources may violate fair trial rights

In addition to States' obligations under the CRC, the Working Group has emphasized other factors it considers when determining whether a minor's detention is arbitrary. For example, the Working Group has held that

on Arbitrary Detention, ¶ 65, Communication No. 87/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/ (22 March 2019) (finding that the "near-automatic extension of Mr. al-Yamani's pretrial detention by courts with no regard for his due process and fair trial rights also undermines the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights and 14 (2) of the Covenant").

[312] In ¶ 30 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stated that it was the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused; see also, Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 89/2018 (Russian Federation) U.N. Doc. A/HRC/WGAD/2018/89 (27 May 2019) (citing Opinion No. 26/2018, para. 64; No. 83/2017, para. 79; and No. 33/2017, para. 86 (e)).

[313] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018).

[314] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 57, Communication No. 84/2017 (Venezuela) U.N. Doc. A/HRC/WGAD/2017/8 (23 January 2018).

[315] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 48, Communication No. 45/2016 (Cambodia) U.N. Doc. A/HRC/WGAD/2016/45 (17 January 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 79, Communication No. 89/2018 (Russian Federation) U.N. Doc. A/HRC/WGAD/2018/89 (27 May 2019).

[316] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 79, Communication No. 89/2018 (Russian Federation) U.N. Doc. A/HRC/WGAD/2018/89 (27 May 2019) (recalling "that all public officials have a duty to refrain from prejudging the outcome of trials, for example by abstaining from making public statements affirming the guilt of the accused"); *see also*, No. 26/2018, para. 64; No. 83/2017, para. 79; and No. 33/2017, para. 86 (e).

trial of a minor by an ordinary court, rather than a specialized juvenile court, may amount to arbitrary detention.[317] Furthermore, when excessive use of force is used against a minor, the Working Group will find an "extremely serious abuse of power . . . constituting a prima facie breach of article 37 of the Convention."[318] The Working Group has also cited the CRC's guidance on implementing policies on juvenile justice, reminding States to ensure that children are provided age-appropriate resources and services, including "care, guidance and supervision, counselling, probation, foster care, educational and training programs, and other alternatives to institutional care."[319]

Additionally, in an opinion concerning Malaysia, the Working Group found that its use of "chain remand," in which detainees are re-arrested upon the termination of their initial remand period and subjected to new remand orders, fails to consider the best interests of the child.[320] The Working Group considered that chain remand "allows the police to detain a person for prolonged and indefinite periods by circumventing the time limits set out in the Criminal Procedure Code…The Working Group is of the view that "chain remand" is an abuse of power, as well as a violation of the right to liberty, freedom from arbitrary detention, and right to fair trial under articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights."[321] It then assessed the Government's conduct against its obligations as a State Party to the CRC finding that the best interest of the minor was not a primary consideration because by subjecting the minor to chain remand, the Government also failed to afford him the presumption of innocence by respecting his release from custody.[322]

[317] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 43, Communication No. 37/2018 (Malaysia) U.N. Doc. A/HRC/WGAD/2018/3 (24 May 2018) (finding in the present case that after taking "into account all the information available to it on this issue, the Working Group considers that the trial of the minor in the Magistrates' Court does not amount to a violation of the right to fair trial of such gravity as to render the minor's pretrial detention arbitrary. The Working Group wishes to emphasize that this finding is particular to the present case, and that the trial of a minor by an ordinary court in other circumstances may amount to arbitrary detention)."

[318] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3 (16 June 2017) (finding that "authorities clearly used disproportionate force when arresting the minor. The use of a taser on an unarmed, non-violent individual, let alone a child, is an extremely serious abuse of power, entirely lacking in necessity and proportionality, constituting a prima facie breach of article 37 of the Convention on the Rights of the Child").

[319] United Nations Working Group on Arbitrary Detention, ¶ 24, Communication No. 13/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/13 (24 June 2016) (citing to the Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 23); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 34, Communication No. 53/2015 (Egypt) U.N. Doc. A/HRC/WGAD/2015 (18 December 2015) (noting that these requirements have been ignored in the case under consideration).

[320] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 37/2018 (Malaysia) U.N. Doc. A/HRC/WGAD/2018/37 (24 May 2018).

[321] *Id*. at ¶ 32.

[322] *Id*. at ¶ 33; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3 (16 June 2017) (wherein the Working Group analyzed the Government's conduct first under the CRC, finding that the minors forced confession was a violation of article 40 (2) (b) (i) and (iv) of the CRC, and next under the ICCPR finding a violation of article 14 (2)).

Rule 8: Non-public trials may violate the minimum norms for a fair trial

Trials held in closed sessions can violate the right to a fair trial. Article 14(1) of the ICCPR provides in relevant part that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing" but that States may limit "press and the public…for reasons of morals, public order (ordre public) or national security…or to the extent strictly necessary in the opinion of the court."[323] However, the Working Group has stressed that public hearings protect the accused by placing the "administration of justice under public scrutiny" and, accordingly, appears to assess closed trials cautiously to ensure restriction to the right to a public trial does not give the detention arbitrary character.[324] For instance, where a detainee's "first trial finally took place, reportedly behind closed doors, with just one family member being permitted to observe," the Working Group considered it a factor in its determination that the State violated his right to a fair trial.[325] Similarly, in a case concerning the detention of a political activist in Iran, the Working Group found that the detainee's two trials that were closed to the public violated his right to a public trial under article 14(1) of the ICCPR, particularly since the government did not have an argument as to why the detainee's case would fit an exception to the right of a public trial.[326]

Rule 9: Trial by a tribunal that is not competent, independent, and impartial constitutes a violation of the right to a fair trial

The right to have a trial by a competent, independent, and impartial tribunal is enshrined in article 10 of the UDHR and article 14(1) of the ICCPR.[327] The Working Group has expressed concerns with courts that are, on their face, not independent, impartial, or competent. For example, throughout its jurisprudence, the Working Group has recommended that Jordan abolish its State Security Court on the basis that it cannot be considered a civilian court or independent because all of the judges act as members of the armed forces and are closely associated with the Government.[328]

[323] ICCPR, art. 14 (1): "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children;" *see also* 11 (1) of the Universal Declaration of Human Rights providing the right to a public trial.

[324] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 24, Communication No. 43/2016 (China) U.N. Doc. A/HRC/WGAD/2016/43 (12 October 2016).

[325] *Id.*

[326] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 25/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/25 (21 September 2016).

[327] *See* art. 10 UDHR and art 14(1) ICCPR; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 29, Communication No. 39/2016 (Jordan) U.N. Doc. A/HRC/WGAD/2016/39 (9 September 2016).

[328] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 27-29, Communication No. 46/2017 (Jordan) U.N. Doc.

The Working Group has similarly expressed concerns with the Federal Supreme Court in the United Arab Emirates, which acts as the first and last court of resort with no opportunity to appeal its decisions.[329] The Working Group has thus held that the Court violates defendants' rights to a fair trial because there is no right to review by a higher tribunal.[330] In a different manifestation of the same issue, the Working Group found that where the court reviewing the arbitrariness and lawfulness of detention had the same composition of judges as the court that determined the legality of the detainee's detention at both first and second instance, the standard of impartiality and independence was not met.[331] While conceding that the ICCPR does not require a court decision upholding the lawfulness of detention be subject to appeal, the Working Group considered that if the State does provide appeal, it must be provided by an impartial and independent tribunal.[332] Accordingly, if the State does provide appeal, "the court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention."[333]

A case concerning the detention of a man in Egypt illustrates the Working Group's position on the impartiality aspect of a competent tribunal, finding that the detainee's right to a fair hearing by a competent, independent, and impartial tribunal was prejudiced "by the court's apparent failure to order the prosecution to turn over the man's case files to his lawyers, to enjoin the authorities to end his 89-day solitary confinement and other ill-treatments and to allow reasonable access to his family and attorneys."[334] Accordingly, the Working Group found that his deprivation of liberty was arbitrary as a result of the court's impartiality, among other violations of his right to a fair trial.

A/HRC/WGAD/2017/46 (18 September 2017) (finding that "[a]s the State Security Court does not meet the fundamental principles of independence and impartiality, it fails to uphold Mr. Al Natour's right to a fair and public hearing by a competent tribunal in the determination of any criminal charge against him under article 10 of the Universal Declaration of Human Rights and article 14(1) of the Covenant").

[329] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 33, Communication No. 47/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/47 (15 September 2017) ("see, for example, Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 21/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/21 (13 July 2017); No. 60/2013 and No. 34/2011").

[330] *Id.* ¶ 33 (finding that "the absence of a right to review by a higher tribunal violates the right to an effective remedy and the right to a fair trial under articles 8, 10 and 11 (1) of the Universal Declaration of Human Rights. The Working Group has expressed concern in relation to this issue and found that the absence of a right to appeal decisions of the Federal Supreme Court violates the right to a fair trial").

[331] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 56, Communication No. 18/2018 (Poland) U.N. Doc. A/HRC/WGAD/2018/18 (5 June 2018).

[332] *Id.*

[333] *Id.* (referencing the United Nations Basic Principles and Guidelines principle 6, providing that "[a] court of law shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is arbitrary or unlawful").

[334] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 78, Communication No. 83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018).

Rule 10: The trial of civilians in military tribunals is a *per se* violation of the right to an impartial tribunal

The right to fair trial applies to all tribunals, including civilian and military tribunals.[335] In the period under review, the Working Group expressed concern over States' increasing reliance on the use of military tribunals in the context of states of emergency.[336] Even where the State has decided to lawfully restrict some rights pursuant to an emergency order, offenses of "rebellion, sedition, or attacks against democratic institutions, when committed by civilians, cannot be tried by military courts."[337] The Working Group has further held that military courts cannot be used to try civilians because they "cannot be considered to be independent and impartial tribunals for the civilian accused persons."[338] In such courts, the separation of powers is not guaranteed because military judges must obey the orders of superiors and are appointed by the executive branch.[339] The Working Group came to a similar conclusion in an opinion concerning the prosecution of a civilian in a Thai military court, which it held "cannot be considered competent, independent…of the executive branch of Government because military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defense. Moreover, they lack sufficient legal training and sit in closed sessions as representatives of their commanders."[340] In its opinion concerning the detention of a member of the Palestinian Legislative Council in Israel, the Working Group found the woman's detention arbitrary because the arrest was executed by Israeli soldiers without a warrant, she was detained at a military camp, and the subsequent trial was by a military tribunal.[341]

[335] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 36, Communication No. 09/2016 (Jordan) U.N. Doc. A/HRC/WGAD/2016/9 (10 October 2016) (recalling that the Human Rights Committee, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, stated that the provisions of article 14 apply to all courts and tribunals within the scope of that article, whether ordinary or specialized, civilian or military, ¶ 22).

[336] *Id.* ¶ 37 (recalling that that "in its annual report covering 2007, it expressed concern about the continuing tendency towards deprivation of liberty by States abusing states of emergency or derogation, invoking special powers specific to states of emergency without formal declaration, having recourse to military, special or emergency courts, not observing the principle of proportionality between the severity of the measures taken and the situation concerned, and employing vague definitions of offences allegedly designed to protect State security and combat terrorism (*see* A/HRC/7/4, para. 59)").

[337] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 55, Communication No. 84/2017 (Venezuela) U.N. Doc. A/HRC/WGAD/2017/8 (23 January 2018).

[338] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 15/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/15 (22 June 2016).

[339] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 54, Communication No. 84/2017 (Venezuela) U.N. Doc. A/HRC/WGAD/2017/8 (23 January 2018).

[340] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 57, 58, Communication No. 03/2018 (Thailand) U.N. Doc. A/HRC/WGAD/2018/3 (9 July 2018).

[341] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 29, Communication No. 15/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/15 (22 June 2016).

Rule 11: Torture or ill treatment of any kind is a *per se* violation of fair trial rights and *jus cogens* norms

In keeping with its Methods of Work, allegations of torture will generally be referred to the appropriate special mandate holder or treaty body to assess whether the State has violated the individual's right to be free from torture, cruel, inhuman or degrading treatment. However, to the extent that the State's use of torture may have inhibited a person's right to fair trial, the Working Group considers this within its mandate. While the Working Group's mandate does not extend to conditions of detention or States' treatment of detainees with respect to their right to be free from torture, cruel, inhuman or degrading treatment, the Working Group has held that "it must consider to what extent detention conditions can negatively affect the ability of detainees to prepare their defense . . . [and] their chances of a fair trial."[342] As Category III pertains to whether there has been a total or partial non-observance of international norms relating to the right to a fair trial, consideration of how the use of torture may have impacted the detainee's fair trail rights is within the Working Group's mandate.

In cases where the Working Group found credible evidence that a person was subjected to torture or other forms of ill-treatment or punishment, it considered this strong evidence that the detainee's ability to prepare an adequate defense had been undermined or violated.[343] For instance, in a case where the source and the State disagreed about whether the detainee was subjected to torture, the Working Group determined that the Government failed to refute the source's allegation that the detainee's medical check did not comport with the requirements of the Manual for the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (Istanbul Protocol).[344] The Working Group held that the credible allegations of torture "significantly decreased the probability" that the detainee would receive a fair trial.[345] It also considered that the judge's failure to order an investigation into the detainee's allegations of torture, communicated to prison and judicial authorities, amounted to "a violation of the right to be tried by an independent and impartial tribunal under article 14, paragraph 1, of the Covenant."[346]

[342] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 56, Communication No. 92/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/92 (20 December 2017).

[343] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 78, Communication No. 62/2018 (China) U.N. Doc. A/HRC/WGAD/2018/62 (12 October 2018) (finding that the allegations of torture and other forms of cruel or inhuman treatment or punishment by the authorities against Mr. Wang, Mr. Jiang and Ms. Li, in order to extract confessions of guilt "strengthen the conclusion that they did not receive a fair trial under the standards of category III. The Working Group has consistently concluded in its opinions that it is not possible for a person who is subjected to torture or other forms of ill-treatment or punishment to be capable of preparing an adequate defence for a trial that respects the equality of both parties before the judicial proceedings").

[344] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 76, Communication No. 53/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/53 (17 October 2018) (noting that "the examination report appears to be very superficial and is not signed by the legal counsel of Mr. Gómez Olivas and another health official, as required by paragraph 165 of the Istanbul Protocol").

[345] *Id*. ¶ 77.

[346] *Id*.

When a source raises allegation of torture, the State must provide substantial, credible evidence to meet its burden of proof. In a case where a detainee alleged that the State had subjected him to ill-treatment, the Working Group found that the Government's denial without supporting evidence unconvincing, "especially since it is up to the State to prove that there was no abuse, by presenting by example any document attesting to the good condition of Mr. Aliouat or any document showing that the authorities have carried out investigations relating to such allegations."[347] The Working Group also turned to its own observations from its recent visit to the State, wherein it noted that "torture and ill-treatment were practiced to extract confessions and that law enforcement officials used excessive force."[348] It therefore held it was convinced by the allegations raised by the source and concluded that his right to a fair trial was violated.[349] Additionally, in a case where the Government did not deny the allegation "that it has resorted to the threat and use of coercion, such as beatings that amount to torture" to force a confession from the applicant, the Working Group determined that "[n]o fair trial is possible under such an atmosphere of fear."[350]

The Working Group has also expressed concern that poor detention conditions, which may constitute torture or cruel, inhuman, or degrading treatment, may jeopardize the right to a fair trial.[351] Lack of sanitation, ventilation, overcrowding, and poor or unsafe drinking water and food can constitute poor conditions.[352] Additionally, denial of medical care and other conditions which undermine the dignity of a person, are noted explicitly as conditions constituting torture.[353] For instance, where "prison conditions are so poor as to weaken a person in pretrial detention," the Working Group has expressed serious concerns about how such conditions have affected the detainee's

[347] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 47, Communication No. 58/2018 (Morocco) U.N. Doc. A/HRC/WGAD/2018/58 (22 October 2018).

[348] *Id*.

[349] *Id*.

[350] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 76, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 65, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018) (finding the complainants' ordeals in prison amounted to cruel, inhuman and degrading treatment, in violation of article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant and principle 6 of the Body of Principles, in addition to the relevant provisions of the Convention against Torture, and that [s]uch a situation would seriously undermine their ability to defend themselves and hinder their exercise of the right to a fair trial").

[351] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018).

[352] *Id*. at ¶ 7.

[353] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 42, Communication No. 25/2018 (Gabon) U.N. Doc. A/HRC/WGAD/2018/25 (20 September 2018) (finding "that when prison conditions leave something to be desired to the point of weakening the person in pre-trial detention and, consequently, reducing equality of opportunity, the fairness of the trial is no longer guaranteed, even if the procedural guarantees are also rigorously respected. Even if the medical certificates judge Mr. Ngoubou's state of health to be satisfactory, the Working Group has serious reasons to be concerned about the conditions of Mr. Ngoubou's pre-trial detention which would have affected his ability to defend himself").

capacity to raise a defense and enjoy the right to equal arms before the law.[354] In another case where a detainee was unable to seek relief from beatings and denial of medical care, the Working Group determined that "[a]rrestees or detainees who have been beaten and are not provided the minimum conditions to maintain their health . . . will find it difficult to take proper judicial proceedings to challenge the lawfulness of their detention."[355]

Furthermore, "any instance of torture during pretrial detention constitutes a visceral risk for the trial that follows, making it *impossible* for such trial to be fair."[356] This suggests that credible evidence of torture or detention conditions that undermine the ability to prepare a defense will likely result in a violation of Category III.

Evidence extracted through torture also violates the right to a fair trial. The Working Group holds that statements extracted through torture violate the right to a fair trial and give the entire proceeding an unfair character, in accordance with the Human Rights Committee general comment No. 32 on the right to equality before the courts.[357] The State carries the burden of proving that evidence provided by the accused was offered freely.[358] Furthermore, a confession extracted through ill-treatment that "is tantamount if not equivalent to torture" can constitute a violation of a State's obligations under other international instruments, such as the UN Convention Against Torture.[359] In an opinion wherein the Working Group determined that the detainees were subjected to ill-treatment to obtain confessions, it noted that it agreed with "the European Court of Human Rights, which has found that the admission of statements obtained as a result of torture or of other ill-treatment as evidence in criminal proceedings renders the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's

[354] *Id*.; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 52, Communication No. 48/2016 (Qatar) U.N. Doc. A/HRC/WGAD/2016/48 (31 January 2017) (finding the inhuman and degrading conditions the detainee was subjected to a relevant aspect to its determination that the State "flagrantly undermine the guarantees necessary for his defence in the criminal proceedings, in contravention of article 11 (1) of the Universal Declaration of Human Rights").

[355] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 58, 65, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018).

[356] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 85/2017 (Rwanda) U.N. Doc. A/HRC/WGAD/2017/85 (4 January 2018) (emphasis added).

[357] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 48, Communication No. 10/2016 (Ethiopia), U.N. Doc. A/HRC/WGAD/2016/10 (14 June 2016) (citing CCPR/C/GC/3223 ¶ 14(3)(g) providing that it is unacceptable to torture or subject a person to other ill-treatment in order to extract a confession, and that the burden is on the State to prove that statements made by the accused have been given of their own free will).

[358] *Id.*

[359] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 52, Communication No. 48/2016 (Qatar) U.N. Doc. A/HRC/WGAD/2016/48 (31 January 2017) (noting that "the use of a confession extracted through ill-treatment that is tantamount if not equivalent to torture" is prohibited under article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

conviction."[360] When considering the case of a human rights activist in Saudi Arabia, the Working Group found "flagrant violation[s] of the right to a fair trial" because the activist was subject to psychological torture and coerced into making a false confession while in solitary confinement.[361] Similarly, in an opinion regarding Qatar, the Working Group found that extracting a confession from a detainee in incommunicado detention violated the detainee's right to a fair trial and undermined his ability to produce a defense.[362]

Like prolonged solitary confinement, incommunicado detention can constitute torture or cruel, inhuman, or degrading treatment when imposed for periods longer than 15 days.[363] To the extent that incommunicado detention raises fair trial issues by preventing detainees from challenging the basis of their detention, the Working Group will make a determination as to whether the incommunicado detention violated the detainee's right to fair trial.[364] The Working Group has also observed that incommunicado detention effectively places individuals outside the protection of the law, thereby exacerbating the circumstances which give rise to arbitrary deprivation of liberty.[365] In an opinion concerning the detention of a military officer in Egypt, the Working Group found that his incommunicado detention for one month at a military camp violated his right to a fair trial because he was denied access to his family, his right to counsel, and his right to be brought promptly before a judge.[366] Likewise, in its opinion concerning a detention authorized by U.S. authorities in Afghanistan, the Working Group found that the detained Uzbekistan national was denied his right to challenge the lawfulness of his detention because he was held incommunicado for the majority of his 4-year detention by U.S. authorities.[367]

[360] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 48, Communication No. 10/2016 (Ethiopia), U.N. Doc. A/HRC/WGAD/2016/10 (14 June 2016).

[361] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 24, 25, Communication No. 13/2015 (Saudi Arabia), U.N. Doc. A/HRC/WGAD/2015 (18 June 2015).

[362] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 52, Communication No. 48/2016 (Qatar) U.N. Doc. A/HRC/WGAD/2016/48 (31 January 2017).

[363] *See e.g.,* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 40, Communication No. 32/2019 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2019/32 (9 September 2019) (recalling that according to the General Assembly, prolonged incommunicado detention can itself constitute torture. *See* resolution 68/156, ¶ 27); *see also*, U.N. Doc. A/66/268, ¶¶ 61, 70–78; and U.N. Doc. A/63/175, ¶¶ 56, 77–85. In addition, prolonged solitary confinement exceeding 15-consecutive days violates applicable standards, such as rules 43 to 45 of the Nelson Mandela Rules.

[364] *See e.g.* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 47, Communication No. 53/2016 (Afghanistan and United States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017).

[365] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 37, Communication No. 69/2017 (China) U.N. Doc. A/HRC/WGAD/2017/69 (7 December 2017); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 50, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[366] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 8, 17, Communication No. 54/2016 (Egypt) U.N. Doc. A/HRC/WGAD/2018 (26 July 2018).

[367] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 41, 47, Communication No. 53/2016 (Afghanistan and United

Furthermore, the Working Group's jurisprudence on incommunicado detention shows that a State must provide affirmative evidence that it met its obligation to prevent incommunicado detention when a detainee has alleged he or she was denied visits and/or access to counsel. For instance, in a case where the Government denied that the detainee was held incommunicado, arguing that her family never requested a visit, the Working Group did not find its denial credible, noting that it did not provide evidence "such as a copy of the relevant Decree granting visitation rights or affidavits from Ms. Nga's family or detention officials."[368] The Working Group determined that in the absence of any documentation of formal visits it was credible that she was held incommunicado and effectively held outside of the protection of the law, in violation of her fair trial rights.[369]

7.4 Category IV: Prolonged administrative custody of asylum seekers, immigrants, or refugees

The Working Group's Working Methods define 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.[370]

Detaining individuals in the course of immigration proceedings is not *per se* arbitrary; however, to avoid arbitrariness, States' administrative custody of individuals must be "justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time" and "based on the individual assessment of each individual."[371]

The Commission on Human Rights first requested the Working Group to consider the situation of immigrants and asylum seekers being held in detention in 1997.[372] However, in the period under review, relatively few communications raised claims under Category IV. For instance, in 2015, only one opinion was published finding a violation of Category IV;[373] in 2016, no violations of Category IV were published; in 2017, three opinions were published finding a violation of Category IV;[374] and, in 2018,

States of America) U.N. Doc. A/HRC/WGAD/2016/53 (13 January 2017).

[368] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 49, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017).

[369] *Id*. ¶ 50.

[370] Methods of Work, *supra* note 1, para 8 (d). As noted previously, in cases where the source raised Category III fair trial violations related to the automatic detention of immigrants and asylum seekers without individual review or the ability to challenge detention, the Working Group categorized these claims under Category IV because the claims arose in the context of immigration. Claims related to the right to regular review in the context of administrative detention, such as in immigration and asylum cases, will be analyzed by the Working Group under Category IV, though this distinction should have no bearing on the Working Group's ultimate determination of whether a specific case of detention is arbitrary.

[371] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 42/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/4 (22 September 2017).

[372] Report of the Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/7/4, para. 41 (10 Jan. 2008).

[373] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 08/2015 (Australia) U.N. Doc. A/HRC/WGAD/2015 (18 June 2015).

[374] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2017 (Australia), U.N. Doc.

the Working Group found a violation of Category IV in five opinions.[375] Understanding why this category is used less than the other categories merits further attention, as it could be an indication that persons detained within asylum regimes are not able to avail themselves of the Working Group.[376]

Of the nine communications from the period of review raising Category IV violations, seven alleged violations of Category II on the basis that the right to asylum was violated.[377] While the right to asylum is listed under Category II, in practice, the Working Group reviews cases related to immigration separately from other fundamental rights because under international law States are afforded more discretion in how they handle immigration. Accordingly, alleged violations of the right to asylum are not reviewed under the same heightened standards of scrutiny as other rights, like the right to freedom of expression. Therefore, sources should raise alleged violations of the prohibition on arbitrary detention under Category IV. Any violations of the following rules should be noted in communications

A/HRC/WGAD/2017/28 (11 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 42/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/4 (22 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 71/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/71 (21 December 2017).

[375] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 21/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/21 (29 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/50 (1 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 72/2018 (Venezuela), U.N. Doc. A/HRC/WGAD/2018/7s (12 February 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 114, Communication No. 74/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/74 (10 January 2018).

[376] For instance, in the Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 08/2015 (Australia) U.N. Doc. A/HRC/WGAD/2015 (18 June 2015) (pertaining to Australia's immigration regime under the Migration Act of 1958, the WG stated it was "particularly concerned about the detention of vulnerable persons, particularly children, about the whole legal process governing the detention of asylum seekers and about the lack of adequate information given to the detainees. Other matters of concern mentioned in the report are the lack of proper complaints mechanisms and the implications of the management of the detention centres by a private company (*see* E/CN.4/2003/8/Add.2)").

[377] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 66-67, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 71/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/71 (21 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 42/2017 (Australia), U.N. Doc. A/HRC/WGAD/2017/42 (22 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2017 (Australia), U.N. Doc. A/HRC/WGAD/2017/28 (11 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 74/2017 (Democratic Republic of Congo), U.N. Doc. A/HRC/WGAD/2017/74 (28 December 2017; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2017 (Malaysia) U.N. Doc. A/HRC/WGAD/2017/50 (21 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 21/2017 (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2017/21 (13 July 2017).

concerning immigration or asylum detention.

Rule 1: States must provide automatic, periodic review of the necessity of immigration detention

The ability to challenge one's detention while detained in administrative immigration detention does not abrogate the State's responsibility to provide regular review. For instance, in a case in the United States, the Working Group observed that it was always the detainee who challenged his detention, noting that "his detention was not subject to automatic, periodic review to ensure that it was compatible with article 9 of the Covenant."[378] In its finding, the Working Group also recalled that providing immigrants automatic, periodic review at set times was among its recommendations to the United States following its 2016 country visit.[379] Accordingly, because the Government failed to comply with its obligation to ensure periodic, automatic review of detention in the course of immigration proceedings, and the detainee himself initiated the challenges, the Working Group determined that the State had breached article 9 of the Covenant.[380]

Rule 2: States must perform individualized review of the necessity of detention

The Working Group will also consider whether the alternatives provided by the State are realistic and tailored to the individual. For example, where granted bail as an alternative to immigration detention, the Working Group considered that the cost was prohibitively expensive and, therefore, not a real alternative to detention for the detainee.[381] "To offer only unrealistic alternatives to detention in cases such as his, which is to disregard the requirement to make detention in the course of immigration proceedings an exception, is a serious breach of article 9 of the Covenant."[382] Similarly, where a Government argued that individuals held in administrative detention under its immigration regime could "challenge" their detention through a habeas action, the Working Group held that habeas did not provide a meaningful form of redress because it cannot provide citizenship or change immigration status.[383] For example, under Australia's immigration regime, indefinite detention of asylum, refugee, and regular migrants is legal under domestic law until they obtain immigration status.[384] Therefore, habeas actions aimed at challenging illegal detention do not provide a realistic avenue for redress because under domestic law their detention

[378] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 60, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017).

[379] *Id*. ¶ 60. (recalling A/HRC/36/37/Add.2, ¶ 92).

[380] *Id*.

[381] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 59, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017).

[382] *Id*.

[383] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 114, Communication No. 74/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/74 (10 January 2018).

[384] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018).

is lawful.[385] "The Working Group recalls that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law."[386] This indicates that the Working Group will consider whether an available legal remedy is sufficiently linked to the issue of immigration and able to provide a meaningful remedy when determining the arbitrariness of detention.

Moreover, deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.[387] Accordingly, while States may detain asylum seekers for a brief initial period to document their entry, detaining asylum seekers beyond the duration of time needed to record their claims may be arbitrary, and States must articulate the basis on which they are continuing to detain someone administratively.[388] The Working Group will look at whether the Government has made an individualized assessment and provided specific reasons that would justify the need to deprive an asylum seeker of liberty.[389] Conversely, where administrative custody of asylum seekers is automatic and mandatory, the Working Group considers such policies contrary to article 9 of the ICCPR and to the right to seek asylum.[390]

7.5 Category V: Deprivation of Liberty as a violation of international anti-discrimination standards

The Working Group's Working Methods define Category V as: When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.[391]

Prohibited discriminatory treatment can manifest in different ways in the context of detention. The State's decision to arrest and detain a person in the first place may be based on an immutable characteristic, such as gender, race, or ethnic origin, and therefore be discriminatory on this basis. Or, the State may subject the person to differential treatment once the person is arrested by affording different levels of process and fairness. How the differential treatment manifests will have a bearing on the remedies that the Working Group recommends to address the violation. For example, if the Working Group observes that the State is targeting certain people for arrest, this may indicate that a review of legislation used to charge people and

[385] *Id*.; *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 114, Communication No. 74/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/74 (10 January 2018).

[386] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 64, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018).

[387] *See id*. ¶ 33 (citing A/HRC/10/21, ¶ 67).

[388] *Id*. (noting that where a person poses a flight risk, a danger to others or to national security, detention may be reasonable, provided it is also subject to regular review).

[389] *Id*. ¶¶ 35-42.

[390] *Id*. ¶ 36 (noting that it "already established that a policy of mandatory immigration detention breaches article 9 of the Covenant as it fails to respect the requirements of reasonableness, necessity and proportionality of detention as no individualized assessment of the need to detain is carried out").

[391] *See* Methods of Work, *supra* note 1, ¶ 8 (e).

profiling practices may be warranted. Where it observes discrimination during the trial process, it may recommend review of judicial practices and oversight to ensure impartiality. Alternatively, the allegations may warrant a systematic review of the arrest and detention process if discriminatory treatment is pervasive throughout the penal process from arrest to incarceration.

Violations of Category V do not occur in isolation. Where the Working Group determines that an individual's detention is arbitrary (analyzed under categories I-IV) it will also consider whether there was a discriminatory aspect of the State's treatment of the individual. For instance, in a case where an individual's right to a fair trial was violated, the Working Group may additionally analyze the facts through the lens of Category V by considering whether the individual was treated equally before the law or denied fair trial rights on the basis of one or more prohibited grounds of discrimination. Accordingly, Category V requires the Working Group to consider the facts at hand and the State's treatment of similarly situated people to assess whether there is differential treatment.

Advocates should also be aware that the Working Group's jurisprudence has not yet established whether a credible allegation of discrimination constitutes a *per se* violation of Category V or whether multiple forms of discrimination may have a cumulative discriminatory effect giving the detention an arbitrary character. For instance, where a source alleges multiple grounds of discrimination, the Working Group has not clarified whether the State must rebut each allegation or whether it must demonstrate that the totality of the circumstances or cumulative effect of the alleged discrimination did not result in an arbitrary detention.[392] More jurisprudence on Category V is needed to clarify what burden the source must meet to establish that the State's discriminatory treatment resulted in an arbitrary deprivation of liberty.

In its 2016 Annual Report, the Working Group laid out five rules it considers when determining whether a case establishes discriminatory treatment has given detention an arbitrary character. These rules, and additional rules derived from the Working Group's jurisprudence that have emerged under each of these categories, are explained below.

Rule 1: A pattern of persecution against a single person likely indicates discrimination against that person

If the deprivation of liberty was part of a pattern of persecution against the detained person, it is likely discriminatory. For instance, in cases where "a person was targeted on multiple occasions through previous detention, acts of violence, or threats," there is strong evidence that the current detention is arbitrary based on discrimination on a protected status.[393]

Rule 2: A pattern of persecution of persons with similar distinguishing characteristics likely indicates discrimination against a particular group

If the deprivation of liberty is part of a pattern of persecution of persons with

[392] *Supra* note 29, at 224-225.

[393] Report of the Working Group on Arbitrary Detention (11 July, 2016) A/HRC/33/50 ¶ 48, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/148/84/PDF/G1614884.pdf?OpenElement.

similar, distinguishing characteristics—for instance, members of a particular ethnic group—and these individuals appear to be detained for no apparent reason other than their ethnicity, there is strong evidence that the current deprivation of liberty is arbitrary due to discrimination against that group of people.[394] The Working Group has found this rule applicable in evaluating mandatory immigration regimes. For example, it has consistently held in its decisions concerning Australia that Australian citizens and non-citizens are not equal before the Australian courts and tribunals, namely, that citizens can challenge administrative detention while non-citizens cannot.[395] In so finding, the Working Group's opinions relating to asylum seekers in Australia has, to date, uniformly found that immigrants awaiting removal, deportation, or visa issuance in Australia are being arbitrarily detained because they are not afforded sufficient due process under the mandatory immigration system as enacted.[396] The Working Group has found this differential treatment violates Category V because it results in differential treatment of citizens versus non-citizens.[397]

Because differential treatment can manifest by a State's failure to recognize ethnic, religious, or linguistic minorities, the Working Group looks at objective criteria rather than formal or official recognition of groups.[398] In a communication involving the detention of 14 individuals who identified as Nubian, a minority group which suffers from social stigmatization in Egypt, the Working Group observed that their arrest was not an isolated incident and that it was aware of a pattern of discriminatory behavior on behalf of the Egyptian authorities towards Nubian people on the basis of their ethnic and social origin.[399] Thus, though Egypt did not formally recognize any minority groups within its territory, the Working Group determined that its treatment of the Nubians was in practice discriminatory, and therefore a violation of Category V.

As with all other categories, the Working Group will also analyze States' domestic legislation if it is alleged that domestic law violates international prohibitions and standards. Therefore, de jure patterns of discrimination may constitute a violation of Category V if Government fails to explain

[394] *Id.*

[395] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 63, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018); *see also* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 78, Communication No. 21/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/21 (29 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 80, Communication No. 50/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/50 (1 October 2018).

[396] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 80, Communication No. 50/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/50 (1 October 2018).

[397] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 63, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 78, Communication No. 21/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/21 (29 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 80, Communication No. 50/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/50 (1 October 2018).

[398] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 95, Communication No. 28/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/28 (30 May 2018) (citing CCPR/C/21/Rev.1/Add.5, para. 5.2).

[399] *Id*. ¶¶ 96, 97.

how such treatment is a proportionate response to a legitimate objective. In a case arising from the detention of a Muslim man in Guantanamo Bay, the Working Group found that the man was subjected to detention on the basis of his status as a foreign national and his religious beliefs as a Muslim.[400] The Government contended that under the United States Constitution, "distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status" are "to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective."[401] However, the Working Group considered that the Government had failed to show how the establishment of military commissions, which have in practice only prosecuted a select group of Muslim men who are not nationals of the United States, would be a proportionate means of achieving a legitimate objective.[402] The Working Group additionally found support for the source's claim in the wording of the 2009 Military Commissions Act itself, which provides that the U.S. military commissions may prosecute "alien unprivileged enemy belligerents" defined as "non-United States citizens who have engaged in or supported hostilities against the United States."[403] Accordingly, it found that the detainee had been deprived of due process guarantees that would otherwise be afforded to citizens of the State, and concluded that his case falls within Category V.[404]

This rule may also include the prohibition on discrimination based on a person's occupation. The Working Group has held that discrimination and harassment based on one's occupation, an emerging category of discrimination, can form the basis of arbitrary detention under Category V.[405] The Working Group's holdings are supported by the Declaration on Human Rights Defenders, which prohibits discrimination based on the "lawful exercise of one's occupation or profession."[406] In a case concerning the detention of a political figure in the Philippines, the Working Group found that her detention impeded her ability to serve as an elected member of the Philippines House of Representatives and that her detention was premised on political discrimination.[407] Because her occupation (and prior roles as

[400] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 62-68, Communication No. 89/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2018/28 (24 January 2018).

[401] *Id.* ¶ 64 (finding that: "(a) Guantánamo Bay military commissions are held solely for defendants who are not citizens of the United States; and (b) the Government has never prosecuted any person of any religious faith, other than Muslim men, before a Guantánamo Bay military commission").

[402] *Id.* ¶ 62.

[403] *Id.*

[404] *Id.* ¶ 65.

[405] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 45, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 20, Communication No. 58/2016, (Mexico) U.N. Doc. A/HRC/WGAD/2016/58 (30 January 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 45, Communication No. 45/2016 (Cambodia) U.N. Doc. A/HRC/WGAD/2016/45 (17 January 2017).

[406] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, art. 11 (1999), https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf.

[407] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 24/2015 (Philippines) U.N. Doc. A/HRC/WGAD/2015/24 (16 November 2015).

the Philippines' President and Vice President) was necessarily political in nature, she was also discriminated against based on her occupation. In a case concerning the detention of a corporate lawyer in Mexico, the Working Group found his detention arbitrary under Category V because the Government perpetuated continual harassment against the lawyer for his work and the work of his employer.[408]

The Working Group recently held that detention based solely on one's affiliation with independent media is arbitrary under Category V.[409] In a case concerning the detention of a documentary filmmaker in Egypt, the Working Group found that she was targeted, harassed, and discriminated against for her "alleged journalistic affiliation" with Al-Jazeera. The Working Group consequently held that her detention was arbitrary under Category V.[410] Similarly, in a case concerning the detention of a media activist in Morocco, the Working Group found that the activist was discriminated against for his work with the independent media in violation of article 2(1) of the ICCPR and that his detention, therefore, violated Category V.[411]

Another emerging trend is the Working Group's willingness to find detention arbitrary when a detainee is discriminated against for his or her economic status, including one's inability to meet bail. The Working Group has noted, with concern, the practice of setting bail out of the economic reach of a detainee, effectively making bail unfeasible because it is economically impossible.[412] This practice was evidenced in the United States in the context of immigration detention[413] and held to be discriminatory because it disproportionately disadvantages those of a lower economic status.[414] Moreover, the Working Group may extend the impact of economic discrimination to a Category III violation, finding that it also impacts the ability of detainees to prepare a defense.[415]

Rule 3: If the detainee is treated by the authorities in a way that indicates a discriminatory attitude, the detainee is likely being discriminated against

In cases where the authorities involved have made statements to, or conducted themselves toward, the detained person in a manner that indicates a discriminatory attitude—for instance, "female detainees threatened with rape or forced to undergo virginity testing, or a detainee is held in

[408] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 20, Communication No. 58/2016, (Mexico) U.N. Doc. A/HRC/WGAD/2016/58 (30 January 2017).

[409] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 31/2018 (Morocco) U.N. Doc. A/HRC/WGAD/2018/31 (27 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018).

[410] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 45, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018).

[411] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 4, 51, Communication No. 31/2018 (Morocco) U.N. Doc. A/HRC/WGAD/2018/31 (27 September 2018).

[412] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 66-67, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017).

[413] *Id*.

[414] *Id.* ¶ 67.

[415] *Id.* ¶ 69.

worse conditions or for a longer period than other detainees in similar circumstances"—there is strong evidence of discrimination on the basis of a protected status.[416] For instance, in a case involving the detention of an elected member of the Philippines House of Representatives, the Working Group found that her detention was "politically motivated" and that she was "specifically targeted" through a "pattern of [government] conduct," including the government's refusal to comply with a court order lifting travel bans against her and comments by government officials implying she was guilty while she was on trial.[417] As the State had detained her for exercising her political and expressive rights, and had targeted her on these bases as well, the Working Group concluded that her detention was arbitrary under Categories II and V.[418]

Rule 4: If the facts of the case indicate the individual was detained to prevent him or her from exercising his or her fundamental human rights, the detention is likely discriminatory

If the circumstances of a case suggest "that the authorities have detained a person on discriminatory grounds or to prevent them from exercising their human rights"—for instance, in cases where political leaders are detained "after expressing their political opinions or detained for offences that disqualify them from holding political office"—there is strong evidence of discrimination on the basis the individual's status.[419]

In the period under review, detention on the basis of political views was a very common form of discrimination.[420] For example, in its opinion concerning the detention of the founder of a human rights monitoring organization in Saudi Arabia, the Working Group held that "the detainee's political views were at the center of the case, and having already established that deprivation of liberty resulted from the active exercise of civil and political rights, there is a strong presumption that the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on political or other views."[421] Accordingly, it determined that the State unlawfully prevented him from exercising his right to freedom of expression and improperly discriminated against him for his political views.[422] Likewise, in an opinion concerning a detained member of the Palestinian

[416] Report of the Working Group on Arbitrary Detention (11 July, 2016) A/HRC/33/50 ¶ 48, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/148/84/PDF/G1614884.pdf?OpenElement.

[417] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 24/2015 (Philippines) U.N. Doc. A/HRC/WGAD/2015/24 (16 November 2015).

[418] *Id.*

[419] Report of the Working Group on Arbitrary Detention (11 July, 2016) A/HRC/33/50 ¶ 48, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/148/84/PDF/G1614884.pdf?OpenElement.

[420] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 81, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 34, Communication No. 13/2018 (Bahrain) U.N. Doc. A/HRC/WGAD/2018/13 (13 August 2018).

[421] *Id*. ¶¶ 81, 82.

[422] *Id*. ¶ 83 ("For these reasons, the Working Group considers that Mr. Abulkhair's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination based on political or other opinion, as well as on his status as a human rights

Legislative Council, the Working Group determined that the arrest and detention of the member related to her political role and her active participation in demonstrations against the Israeli occupation of the Occupied Palestinian Territory.[423] It therefore determined that her detention was based on the unlawful criminalization of her right to freedom of expression, the right to freedom of peaceful assembly and association—as well as discriminatory treatment based on her political views and association.[424] In its opinion regarding the detention of a Kurdish activist in Iran, the Working Group found that she was persecuted for her advocacy activities and political opinions promoting the rights of Kurdish women.[425] Accordingly, the Working Group concluded that her detention was arbitrary under Categories II and V.[426] Similarly, in a case concerning the detention of a man in Ethiopia, the Working Group found that he was detained solely for his political beliefs and because he exercised his right to express these beliefs; his detention was considered arbitrary under Categories II and V.[427]

When a government's sole justification for one's deprivation of liberty is membership in a particular organization, the Working Group will find that detention arbitrary under Category V as discrimination on the basis of political opinion or other status. In an opinion regarding the detention of activists in the Democratic Republic of Congo affiliated with a political movement known as Lucha, the Working Group held that the prisoners were detained with the underlying intent of targeting members of Lucha and that such practice was arbitrary.[428] Likewise, in a case concerning the detention of individuals with alleged links to the Gülen group, the Working Group found that the State failed to make any individualized link to violence, relying instead on the perceived membership of the individuals.[429] "In all these cases, the connection between the individuals concerned and the Gülen group has not been one of active membership and support of the group and its criminal activities, but rather…of those who were sympathizers or supporters of, or members of, legally established entities affiliated with the movement, without being aware of its readiness to engage in violence."[430] The Working Group, therefore, considered the detention arbitrary as it constitutes discrimination on the basis of political

defender, aimed at and resulting in ignoring the equality of human beings. His deprivation of liberty therefore falls under category V").

[423] *Id*.

[424] *Id*. ¶ 30 (finding her detention arbitrary under Categories II and V, as well as III for related fair trial violations).

[425] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 37, 38, Communication No. 01/2016 (Islamic Republic of Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016).

[426] *Id*.

[427] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 02/2015 (Ethiopia and Yemen) U.N. Doc. A/HRC/WGAD/2015 (8 May 2015).

[428] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 30, Communication No. 23/2016 (Democratic Republic of Congo) U.N. Doc. A/HRC/WGAD/2016/23 (29 December 2016).

[429] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 107, Communication No. 42/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/42 (18 October 2018).

[430] *Id*. (citing Council of Europe, Commissioner for Human Rights, "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey," p. 4).

opinion under Category V.[431] Accordingly, advocates could highlight whether individuals concerned have been detained solely for their affiliation with a banned group, absent any individualized violence.

The rule also prohibits discriminating against human rights defenders based on their status as human rights defenders. The Working Group considers "political or other opinion" and "other status," as codified in article 26 of the ICCPR, to include a person's status as a human rights defender.[432] In reaching this conclusion, it draws on the Human Rights Committee's general comment No. 18 on non-discrimination, which provides that "discrimination…should be understood to imply any distinction, exclusion, restriction or preference that is based on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[433] In the view of the Working Group, reference to "political or other opinion" and "other status" should be interpreted to include a person's status as a human rights defender as human rights defenders by definition advocate for rights.[434] For example, in a case concerning the detention of a woman in Viet Nam, the Working Group found that her alleged affiliation with the Việt Tân, a political party working to establish democracy and reform in Viet Nam, was not a sufficient basis to justify her detention.[435] In its analysis, the Working Group observed that the Government did not demonstrate how the detainee's membership in the organization constituted a threat to national security or how its restrictions to her political activities were consistent with article 19 (3) of the ICCPR.[436] It therefore concluded that her detention was based on her status as a human rights defender and that she was deprived of her liberty based on this status, violation of Category V.[437] Similarly, in a case regarding a human rights defender in India, the Working Group found that because of his

[431] The Working Group reached the same conclusion in a series of cases arising from the discriminatory detention of suspected Gülen members. *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/1 (8 June 2017); United Nations Working Group on Arbitrary Detention, Communication No. 38/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/38 (16 June 2017); 41/2017; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 43/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/43 (15 January 2018); and Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 44/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/44 (2 October 2018).

[432] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 45/2016 (Cambodia) U.N. Doc. A/HRC/WGAD/2016/45 (17 January 2017).

[433] Human Rights Council, General Comment No. 18 (1989) on Non-Discrimination, ¶ 7.

[434] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 44, Communication No. 45/2016 (Cambodia) U.N. Doc. A/HRC/WGAD/2016/45 (17 January 2017).

[435] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 43, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017) (noting that "even if the detainee was affiliated with the Việt Tân, as alleged by the Government, the Working Group has repeatedly found that membership of this group alone does not justify deprivation of liberty (see, for example, opinions No. 40/2016, No. 26/2013 and No. 46/2011)."

[436] *Id*. ¶ 44.

[437] *Id*. ¶¶ 55, 56.

status as a human rights defender, government officials "displayed an attitude towards [the detainee] that can only be characterized as discriminatory," thus violating his right to equality before the law, a Category V violation.[438]

Rule 5: If the individual is detained based on conduct that is only considered criminal for members of his or her group, the detention is likely discriminatory

If the "alleged conduct for which the person is detained is only a criminal offence for members of his or her group,"—for instance, in States where consensual same-sex conduct between adults is criminalized—there is strong evidence of discrimination based on the group to which the individual belongs to.[439]

Where a detainee is charged with a criminal offense that precludes the use of alternatives for imprisonment (non-bailable crime), the Working Group has considered that such laws create differential treatment by nullifying or impairing the right to judicial review and the ability to seek alternatives to detention based on one's conviction.[440] The Working Group has clarified that any legislation or constitutional provision which draws a distinction between persons who may or may not apply for bail or other alternatives to detention violates both the right to equality before the law and equal protection by the law within the meaning of article 7 of the UDHR and article 26 of the ICCPR. It will therefore consider whether individuals detained under non-bailable offenses have been arbitrarily deprived of liberty under both Categories II and V.[441]

Recent Trends Under Category V

The Working Group's jurisprudence on Category V appears to be increasing over time. In 2015, 16.09% of its opinions found a violation of Category V, whereas in 2018, 60% of its opinions found a violation of Category V. Discriminatory treatment on the basis of one's political belief or opinion and on the basis of one's status as a human rights defender were the most common manifestations of discrimination identified by the Working Group. In 2019 and 2020, the two years directly following the review period for this Report, the Working Group has substantially added to its jurisprudence on Category V, and advocates are encouraged to review those recent opinions if they believe someone is detained on discriminatory grounds.

In assessing whether a detention is arbitrary on a discriminatory basis, the Working Group generally describes the basis on which the detainee was discriminated in a narrative paragraph. For instance, it may note that the detainee was discriminated against on the basis of "his defense of human rights." In other cases, it may use an alternative phrasing for the same status, such as "on the basis of his status as a human rights defender." Thus, it does not use consistent terminology when determining the relevant status of the individual

[438] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 45, 46, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/881 (23 January 2018).

[439] Report of the Working Group on Arbitrary Detention (11 July, 2016) A/HRC/33/50 ¶ 48, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/148/84/PDF/G1614884.pdf?OpenElement.

[440] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 68, Communication No. 01/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/1 (12 July 2018).

[441] *Id.* ¶ 70.

subjected to discriminatory treatment. This has some relevance for advocates looking for prior opinions that may be relevant to strengthening their own communications for similarly situated individuals. Additionally, it is more challenging to see trends and changes within protected statuses at issue in the Working Group's jurisprudence. Accordingly, the bases identified in the annual observations below are taken directly from the phrasing used in the Working Group's opinions.

In 2015, the Working Group found a violation of Category V in nine of its 56 issued opinions (16.07%) on the basis of: political opinion (5 cases);[442] defense of human rights (2 cases);[443] disability (1 case);[444] and religion (1 case).[445] None of the cases in 2015 involved discrimination on multiple bases.

In 2016, only eight cases involved findings of Category V violations (13.11%). The Working Group found that detainees were discriminated against on the following bases: national origin (2 cases);[446] political opinion or political association (3 cases);[447] gender (1 case);[448] dual nationality (1 case);[449] membership to a minority ethnic group (1 case);[450] status as an abolitionists (1 case);[451] religious beliefs and associations (1

[442] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 02/2015 (Ethiopia and Yemen) U.N. Doc. A/HRC/WGAD/2015 (8 May 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 07/2015 (Venezuela) U.N. Doc. A/HRC/WGAD/2015 (8 May 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 24/2015 (Philippines) U.N. Doc. A/HRC/WGAD/2015/24 (16 November 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 30/2015 (Burundi) U.N. Doc. A/HRC/WGAD/2015 (5 October 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 33/2015 (Maldives) U.N. Doc. A/HRC/WGAD/2015 (12 October 2015).

[443] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 18/2015 (Mexico) U.N. Doc. A/HRC/WGAD/2015 (29 June 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 19/2015 (Mexico) U.N. Doc. A/HRC/WGAD/2015 (29 June 2015).

[444] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 21/2015 (New Zealand) U.N. Doc. A/HRC/WGAD/2015 (17 June 2015).

[445] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 29/2015 (Democratic People's Republic of Korea) U.N. Doc. A/HRC/WGAD/2015 (17 September 2015).

[446] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016); United Nations Working Group on Arbitrary Detention, Communication No. 13/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/13 (24 June 2016).

[447] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 15/2016 (Israel) U.N. Doc. A/HRC/WGAD/2016/15 (22 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 23/2016 (Democratic Republic of Congo) U.N. Doc. A/HRC/WGAD/2016/23 (29 December 2016).

[448] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016).

[449] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/28 (21 September 2016).

[450] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/36 (28 December 2016).

[451] *Id.*

case);[452] and on the basis of the detainee's employer (1 case).[453] Of the eight cases where a discriminatory treatment was found, three involved multiple forms of discrimination.[454]

In 2017, the Working Group found a violation of Category V in 41 (44.56%) of its 92 published opinions. Where a violation of Category V was found, the Working Group determined that the detainees had been differentially treated on the basis of: political or other opinion (11 cases);[455] status as a human rights defender (7 cases);[456] national

[452] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 46/2016, (China) U.N. Doc. A/HRC/WGAD/2016/46 (27 January 2017).

[453] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 58/2016, (Mexico) U.N. Doc. A/HRC/WGAD/2016/58 (30 January 2017).

[454] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2016 (Iran), U.N. Doc. A/HRC/WGAD/2016/1 (13 June 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/36 (28 December 2016); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2016 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2016/28 (21 September 2016).

[455] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 08/2017 (Pakistan), U.N. Doc. A/HRC/WGAD/2017/8 (2 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 18/2017 (Venezuela), U.N. Doc. A/HRC/WGAD/2017/18 (4 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 04/2017 (China), U.N. Doc. A/HRC/WGAD/2017/4 (11 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 15/2017 (Maldives), U.N. Doc. A/HRC/WGAD/2017/15 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 33/2017 (Iraq), U.N. Doc. A/HRC/WGAD/2017/33 (3 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2017 (Malaysia) U.N. Doc. A/HRC/WGAD/2017/50 (21 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 52/2017 (Venezuela) U.N. Doc. A/HRC/WGAD/2017/52 (23 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 60/2017 (Ethiopia) U.N. Doc. A/HRC/WGAD/2017/60 (5 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 65/2017 (Mexico) U.N. Doc. A/HRC/WGAD/2017/65 (6 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/881 (23 January 2018).

[456] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 26/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/26 (8 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 48/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/48 (22 September 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2017 (Malaysia) U.N. Doc. A/HRC/WGAD/2017/50 (21 September 2017); 67/2017; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 75/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/75 (15 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 79/2017 (Viet Nam) U.N. Doc. A/HRC/WGAD/2017/79 (12 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/881 (23 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 16/2017 (Kazakhstan) U.N. Doc. A/HRC/WGAD/2017/16 (27 June 2017).

origin (4 cases);[457] religion (6 cases);[458] being a non-citizen (3 cases);[459] dual nationality (2 cases);[460] freedom of expression and assembly (1 case);[461] status as a social leader (1 case);[462] ethnic origin (1 case);[463] physical impairment (1 case);[464] economic condition (1 case);[465] language (1 case);[466] sexual orientation (1 case);[467] status as a journalist (1 case);[468] and for self-determination (1

[457] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 03/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/3 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 31/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/31 (25 July 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 44/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/44 (2 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 86/2017 (Israel) U.N. Doc. A/HRC/WGAD/2017/86 (18 December 2017).

[458] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 09/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/9 (29 May 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 29/2017 (Uzbekistan) U.N. Doc. A/HRC/WGAD/2017/29 (28 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 43/2017 (Tajikistan) U.N. Doc. A/HRC/WGAD/2017/43 (5 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 62/2017 (Kazakhstan) U.N. Doc. A/HRC/WGAD/2017/62 (2 October 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 89/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/89 (29 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017).

[459] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2017 (Australia), U.N. Doc. A/HRC/WGAD/2017/28 (11 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 71/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/71 (21 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 89/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/89 (29 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 42/2017 (Australia) U.N. Doc. A/HRC/WGAD/2017/4 (22 September 2017).

[460] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 07/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/7 (30 May 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 49/2017 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2017/49 (22 September 2017).

[461] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 16/2017 (Kazakhstan) U.N. Doc. A/HRC/WGAD/2017/16 (27 June 2017).

[462] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 23/2017 (Mexico) U.N. Doc. A/HRC/WGAD/2017/23 (13 June 2017).

[463] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 29/2017. (Uzbekistan) U.N. Doc. A/HRC/WGAD/2017/29 (28 June 2017).

[464] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 68/2017. (Trinidad and Tobago) U.N. Doc. A/HRC/WGAD/2017/68 (20 December 2017).

[465] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017).

[466] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017).

[467] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 14/2017 (Cameroon) U.N. Doc. A/HRC/WGAD/2017/14 (3 July 2017).

[468] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No.

case).[469] In seven of the 41 cases, the Working Group found that the detention was motivated by more than one ground of discrimination.[470]

In 2018, the Working Group found a violation of Category V in 54 of the 90 opinions it issued (60.0%). Of these, the Working Group determined that detention was discriminatory on the basis of political or other opinion (16 cases);[471] status as a

83/2017 (Egypt) U.N. Doc. A/HRC/WGAD/2017/83 (15 January 2018).

[469] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 11/2017. (Morocco) U.N. Doc. A/HRC/WGAD/2017/11 (27 July 2017).

[470] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 29/2017. (Uzbekistan) U.N. Doc. A/HRC/WGAD/2017/29 (28 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 72/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/72 (28 December 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 88/2017 (India) U.N. Doc. A/HRC/WGAD/2017/88 (23 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 16/2017 (Kazakhstan) U.N. Doc. A/HRC/WGAD/2017/16 (27 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 89/2017 (United States of America) U.N. Doc. A/HRC/WGAD/2017/89 (29 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2017 (Malaysia) U.N. Doc. A/HRC/WGAD/2017/50 (21 September 2017).

[471] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 05/2018 (Congo) U.N. Doc. A/HRC/WGAD/2018/5 (1 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 09/2018 (Cambodia) U.N. Doc. A/HRC/WGAD/2018/9 (5 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 11/2018 (Pakistan and Turkey) U.N. Doc. A/HRC/WGAD/2018/11 (25 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 13/2018 (Bahrain) U.N. Doc. A/HRC/WGAD/2018/13 (13 August 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 15/2018 (Equatorial Guinea), U.N. Doc. A/HRC/WGAD/2018/15 (24 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2017 (Iraq) U.N. Doc. A/HRC/WGAD/2017/36 (14 August 2017); United Nations Working Group on Arbitrary Detention, Communication No. 38/2017 (Turkey) U.N. Doc. A/HRC/WGAD/2017/38 (16 June 2017); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 41/2018 (Venezuela) U.N. Doc. A/HRC/WGAD/2018/41 (12 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 42/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/42 (18 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 43/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/43 (15 January 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 47/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/47 (17 December 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 61/2018 (Philippines) U.N. Doc. A/HRC/WGAD/2018/61 (30 November 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 78/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/78 (31 January 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 86/2018 (Venezuela) U.N. Doc. A/HRC/WGAD/2018/86 (4 March 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 87/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/87 (22 March 2019).

human rights defender (12 cases);[472] national origin (6 cases);[473] religion (5 cases);[474] status as a non-citizen (4 cases);[475]

[472] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 04/2018 (Turkmenistan), U.N. Doc. A/HRC/WGAD/2018/4 (23 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 13/2018 (Bahrain) U.N. Doc. A/HRC/WGAD/2018/13 (13 August 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 19/2018 (Poland) U.N. Doc. A/HRC/WGAD/2018/18 (5 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 25, Communication No. 35/2018 (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/35 (17 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2018, (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/36 (5 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 45/2018 (Viet Nam), U.N. Doc. A/HRC/WGAD/2018/45 (1 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 46/2018 (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/46 (25 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 47/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/47 (17 December 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 61/2018 (Philippines) U.N. Doc. A/HRC/WGAD/2018/61 (30 November 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 82/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/82 (9 April 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 83/2018 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2018/83 (22 January 2019).

[473] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 34/2018 (Israel) U.N. Doc. A/HRC/WGAD/2018/34 (29 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 52/2018 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2018/52 (21 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 54/2018 (China and the Democratic People's Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/54 (23 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 58/2018 (Morocco) U.N. Doc. A/HRC/WGAD/2018/58 (22 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 73/2018 (Israel) U.N. Doc. A/HRC/WGAD/2018/73 (18 February 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 84/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/84 (15 February 2019).

[474] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 40/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/40 (17 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 19, Communication No. 69/2018 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2018/69 (27 December 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 84/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/84 (15 February 2019); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 82/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/82 (9 April 2019); United Nations Working Group on Arbitrary Detention, Communication No. 83/2018 (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2018/83 (22 January 2019).

[475] Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 63, Communication No. 20/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/20 (20 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 21/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/21 (29 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 50/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/50 (1 October 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶ 114, Communication No.

ethnic group (2 cases);[476] psychiatric diagnosis (2 cases);[477] status as a person charged with a certain offense (2 cases);[478] association with independent media (2 cases);[479] birth (1 case);[480] differential application of amnesty law (1 case);[481] and economic status (1 case).[482] In six of the 54 cases finding a violation of Category V, the Working Group found that the detention was motivated by more than one ground of discrimination.[483]

8. Data Distilled from the Working Group's Opinions and Annual Reports by Year

As a general note, it is important to remember that the data distilled from the Working Group's opinions is not necessarily a reflection of State practice in general or of global trends in arbitrary detention. First, the Working Group only considers cases which it receives via its communication procedures. Second, it appears that some form of case selection criteria is used as not all communications lead to an opinion. Given these "filters" on the available data, it should not be assumed that a State is a particularly bad actor based solely on its frequency in the Working Group's jurisprudence. Likewise, the absence of a State from the Working Group's jurisprudence does not mean that

74/2018 (Australia), U.N. Doc. A/HRC/WGAD/2018/74 (10 January 2018).

[476] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 7/2018 (Burundi) U.N. Doc. A/HRC/WGAD/2018/ (27 August 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 28/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/28 (30 May 2018).

[477] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 08/2018 (Japan) U.N. Doc. A/HRC/WGAD/2018/8 (23 May 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 70/2018 (Japan) U.N. Doc. A/HRC/WGAD/2018/70 (16 January 2019).

[478] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 01/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/1 (12 July 2018).

[479] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 31/2018 (Morocco) U.N. Doc. A/HRC/WGAD/2018/31 (27 September 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 63/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/6 (14 December 2018)

[480] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 26/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/26 (12 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 75/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/75 (11 February 2019).

[481] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 23/2018 (Democratic Republic of Congo) U.N. Doc. A/HRC/WGAD/2018/23 (27 August 2018).

[482] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 88/2018 (Mexico) U.N. Doc. A/HRC/WGAD/2018/88 (4 February 2019).

[483] Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 10/2018 (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2018/10 (4 July 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 13/2018 (Bahrain) U.N. Doc. A/HRC/WGAD/2018/13 (13 August 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2018, (Viet Nam) U.N. Doc. A/HRC/WGAD/2018/36 (5 June 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 47/2018 (Egypt) U.N. Doc. A/HRC/WGAD/2018/47 (17 December 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 61/2018 (Philippines) U.N. Doc. A/HRC/WGAD/2018/61 (30 November 2018); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 84/2018 (Turkey) U.N. Doc. A/HRC/WGAD/2018/84 (15 February 2019).

arbitrary deprivation of liberty does not take place within its jurisdiction. What can be discerned, however, are trends within States that are the subject of opinions, which may be relevant to advocates who wish to submit a communication on behalf of an individual detained in the same country or under similar circumstances.

Data within the Working Group's opinions can also show who is utilizing the communication process—and who is not. For instance, there are very few opinions pertaining to the Caribbean and the Pacific Island Nations. This could be because arbitrary detention is not an issue in these regions, or it could simply mean that advocates in these regions are either not aware of the Working Group or choose not to use its individual communication procedures. As such, the relevance of the absence or presence of certain countries is not analyzed further but simply presented for consideration. Further, the data collected may shed light on whether there are any commonalities to the situation or status of the detainees at issue in the opinions. For example, where it is observed that a high proportion of the cases relate to the detention of human rights defenders, it could be an indication that individuals with social or political recognition have greater success in finding a source that can send a communication or that the Working Group is interested in taking up cases which pertain to human rights defenders. Or, it could be an indication that more human rights defenders are detained arbitrarily. Accordingly, advocates should bear in mind what the data presented below can illuminate, and its limitations given the case selection process and knowledge that the Working Group only considers information that it receives.

With these considerations in mind, the annual snapshots below provide data on some characteristics of the detainee(s) which are provided in each opinion, namely the gender, age (minor or of majority), and status of the detainee in cases where the discriminatory treatment was at issue.

In addition, information was collected from the jurisprudence in each year on State engagement with the Working Group, namely, in what percentage of cases the State responded. The percentage of cases in which the Working Group found the detention arbitrary was also calculated, as well as the percentage of cases in which it referred some aspect of the case to another Special Mandate holder or Working Group. This data, which is not presented in the Working Group's Annual Reports, may help inform strategic decisions by advocates regarding whether or not to submit a joint communication to multiple Special Procedures if the facts of the case relate to Special Mandate holders.

Lastly, charts and graphs showing the basis on which the Working Group found the detention arbitrary, i.e. which Category or Categories it determined were violated, are provided for each year. These are intended to shed light on possible relationships between different Categories and stimulate considerations for advocates working on arbitrary detention. For instance, it appears that very few communications pertain to asylum seekers, evidenced by the lack of opinions on Category IV. This is notable given that under the period of review the Working Group found the detention of asylum seekers arbitrary in 100% of the cases it did consider. Some Categories are also often raised in conjunction with one another, while others more commonly occur in

isolation. This may have relevance to sources drafting communications and to advocates analyzing how and in what ways States are violating the prohibition on arbitrary detention. Because the relevance of the data will vary depending on the strategy or objective of the reader, these observations are only offered as possible analyses, among many, of the data provided below.

8.1 Year 2015 Snapshot

In 2015, the Working Group adopted 56 opinions under its regular procedure concerning the detention of 91 persons in 37 countries.[484] Under the urgent action procedure, it transmitted 83 appeals to 42 Governments concerning 241 individuals.[485] Of the opinions issued through the regular procedure, the Working Group found the detention arbitrary in 52 of its 56 opinions. The Working Group did not make a determination in four cases. Accordingly, in the cases in which the Working Group did make a determination, it found that the deprivation of liberty arbitrary in all cases, or 100% of the time.

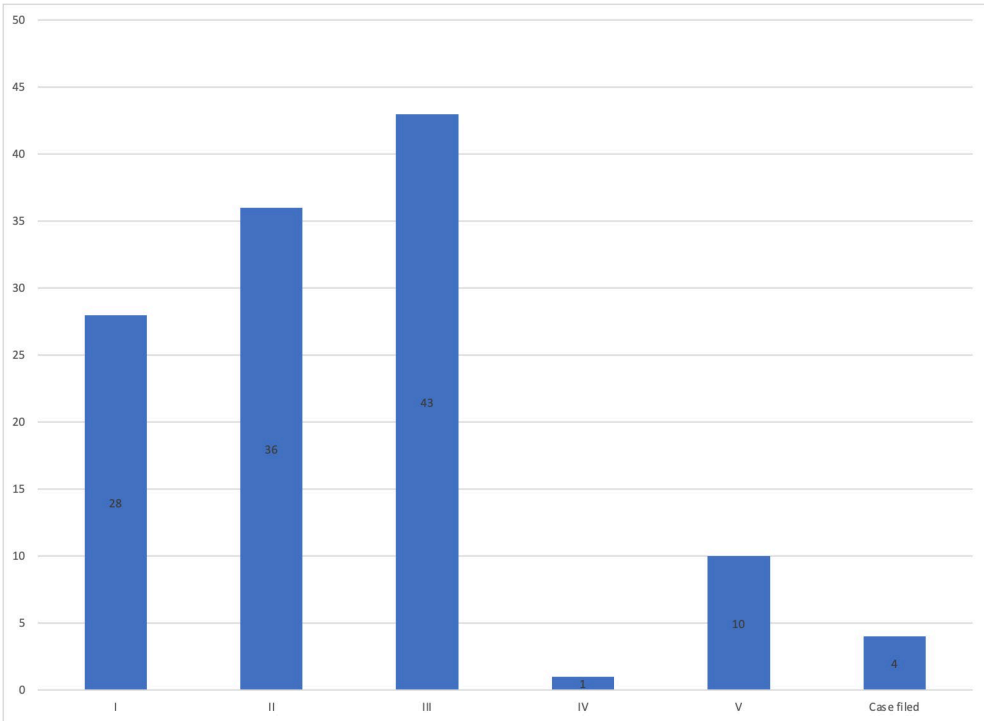
Number of Cases Per Category of Arbitrary Detention Identified by the Working Group

CATEGORIES	I	II	III	IV	V	Case filed
# OF CASES PER CATEGORY (2015)	28	36	43	1	10	4
CASE NUMBERS	1, 2, 4, 9, 10, 14, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37, 41, 44, 45, 46, 47, 50, 51, 55, 56	1, 2, 3, 5, 6, 7, 9, 13, 16, 18, 19, 22, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 38, 39, 40, 42, 43, 44, 47, 49, 50, 52, 55, 56	1, 2, 4, 5, 6, 7, 9, 13, 14, 15, 16, 17, 20, 22, 23, 24, 25, 26, 27, 29, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52, 53, 54, 55, 56	8	2, 7, 18, 19, 21, 24, 29, 30, 33, 42	11, 12, 36, 48

[484] Report of the Working Group on Arbitrary Detention, A/HRC/33/50 (11 July 2016), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/148/84/PDF/G1614884.pdf?OpenElement.

[485] *Id*.

Number of Cases Per Category



Of the four filed cases,[486] the Working Group provided detail in two regarding why the case could not proceed, finding in one that the source had not identified violations falling within the five recognized categories of arbitrariness.[487] In another, it held that there were not "sufficient elements to issue an opinion."[488] Out of all of its opinions, ten cases involved female detainees; 45 involved male detainees; and one case involved both male and female detainees.[489] Five cases involved the detention of minors.

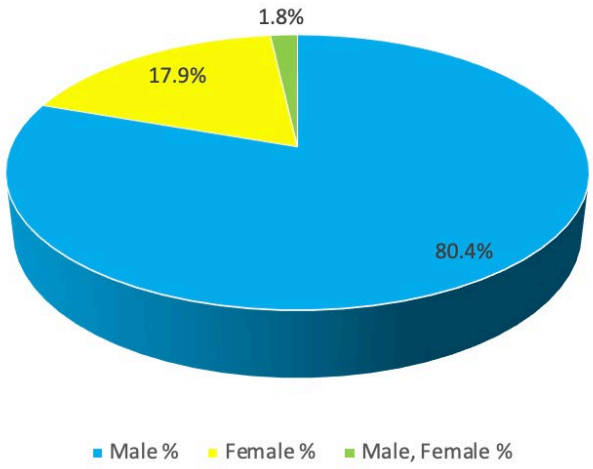
[486] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 11/2015 (Republic of Moldova) U.N. Doc. A/HRC/WGAD/2015/11 (22 July 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 12/2015 (Republic of Moldova) U.N. Doc. A/HRC/WGAD/2015/15 (20 February 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2015 (Spain) U.N. Doc. A/HRC/WGAD/2015/36 (7 December 2015); Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 48/2015 (Serbia) U.N. Doc. A/HRC/WGAD/2015/48 (15 March 2015).

[487] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 12/2015 (Republic of Moldova) U.N. Doc. A/HRC/WGAD/2015/15 (20 February 2015).

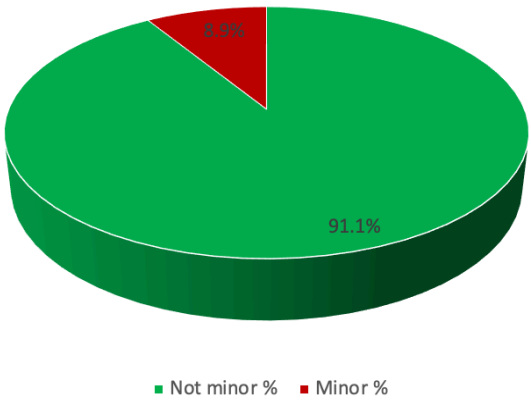
[488] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 48/2015 (Serbia) U.N. Doc. A/HRC/WGAD/2015/48 (15 March 2015).

[489] Report of the Working Group on Arbitrary Detention, A/HRC/33/50 (11 July 2016).

Percent of Reported Gender of Arbitrarily Detained Persons in Each Case



Percentage of Minors to Persons of Majority Age



The Working Group referred 23 of its 56 cases (41%) to another Special Procedure mandate holder or Working Group.[490] States responded in 23 out of 56 opinions (41.0%).[491] The charts below provide data on what categories the Working Group determined were violated in each case and how many cases pertained to violations of multiple categories. For instance, in 2015, it is striking that 12 cases pertained to violations of Categories I, II, and III in combination, whereas only one case that year pertained to a violation of Category IV.

[490] *Id*.

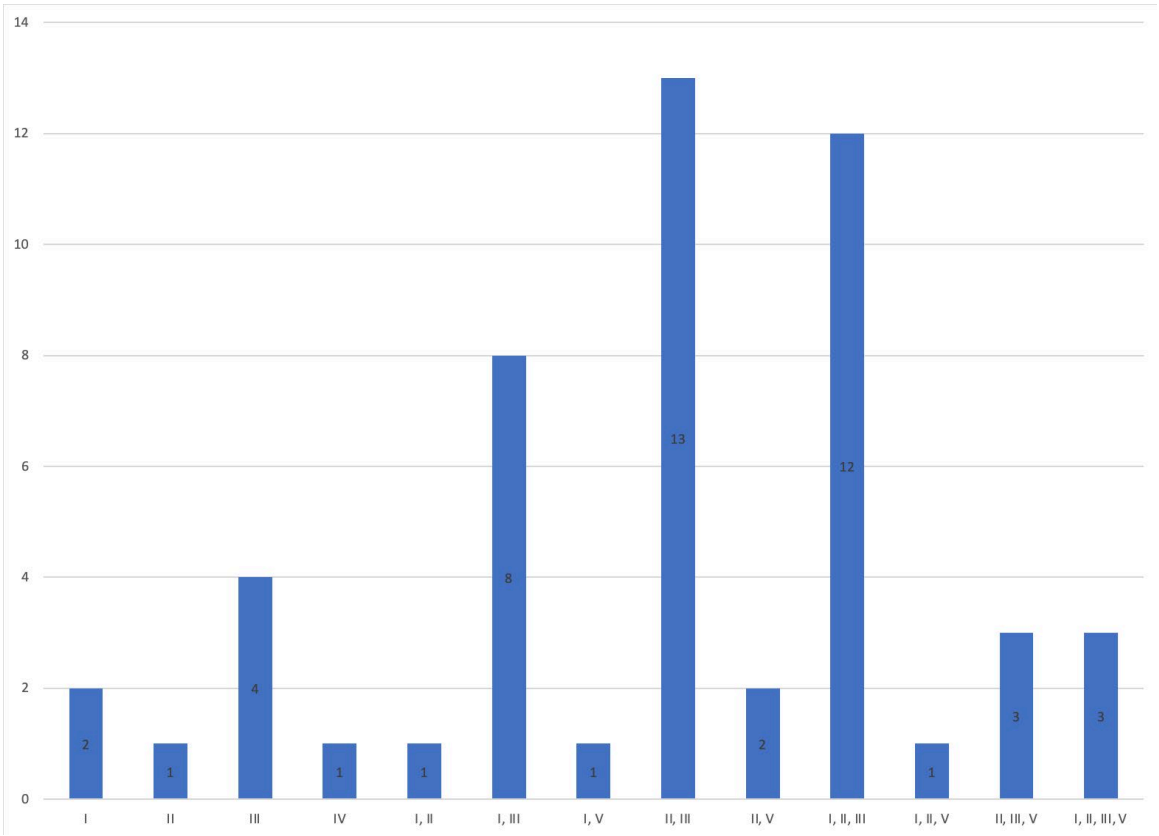
[491] *Id*.

Number of Cases with Combined Categories

CATEGORIES	I	II	III	IV	I, II	I, III	I, V
# OF CASES W/ COMBINED CATEGORIES (2015)	2	1	4	1	1	8	1
CASE NUMBERS	10, 46	3	15, 17, 53, 54	8	28	4, 14, 20, 25, 32, 41, 45, 51	21

CATEGORIES	II, III	II, V	I, II, III	I, II, V	II, III, V	I, II, III, V
# OF CASES W/ COMBINED CATEGORIES (2015)	13	2	12	1	3	3
CASE NUMBERS	5, 6, 13, 16, 22, 23, 34, 38, 39, 40, 43, 49, 52	18, 19	1, 9, 26, 27, 31, 35, 37, 44, 47, 50, 55, 56	30	7, 24, 42	2, 29, 33

Frequency of Combined Cases



8.2 Year 2016 Snapshot

In 2016, the Working Group adopted 61 opinions under its regular procedure concerning the detention of 201 persons in 38 countries.[492] Under its urgent action procedure, it transmitted 74 appeals to 38 Governments concerning 263 individuals.[493] The Working Group found that the detention was arbitrary in 58 of the 61 opinions it issued under its regular procedure. It filed two cases[494] and found detention not arbitrary in one case.[495] In the two cases it filed, the Working Group concluded that it did not have a sufficient amount of information to make a final decision.[496] Accordingly, of the cases in which it reached a determination, the Working Group found the detention arbitrary in 58 of 59 cases, or 98.3% of the time.

Number of Cases by Category of Arbitrary Detention Identified by the Working Group

CATEGORIES	I	II	III	IV	V	Not arbitrary	Case filed
# OF CASES PER CATEGORY (2016)	23	31	50	0	8	1	2
CASE NUMBERS	1, 2, 6, 8, 12, 13, 18, 19, 20, 25, 26, 27, 28, 34, 38, 39, 42, 50, 53, 56, 58, 60, 61	1, 2, 6, 7, 8, 9, 10, 11, 15, 19, 20, 21, 23, 25, 31, 33, 34, 35, 36, 40, 41, 43, 44, 45, 46, 47, 48, 52, 55, 59, 61	1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 36, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61	-	1, 13, 15, 23, 28, 36, 46, 58	32	5, 37

[492] Report of the Working Group on Arbitrary Detention, A/HRC/36/37 (19 July 2017), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/216/49/PDF/G1721649.pdf?OpenElement.

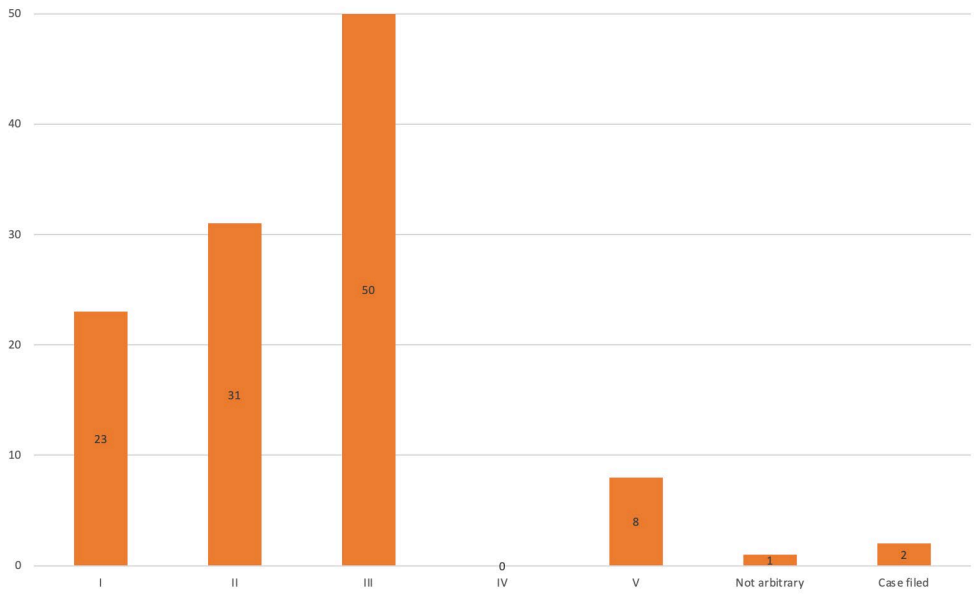
[493] *Id*.

[494] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 05/2016 (Ukraine) U.N. Doc. A/HRC/WGAD/2016/5; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2016 (Ukraine) U.N. Doc. A/HRC/WGAD/2016/36.

[495] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, ¶¶ 20-25, 35-41, 54 Communication No. 32/2016 (New Zealand) U.N. Doc. A/HRC/WGAD/2016/32 (7 October 2016).

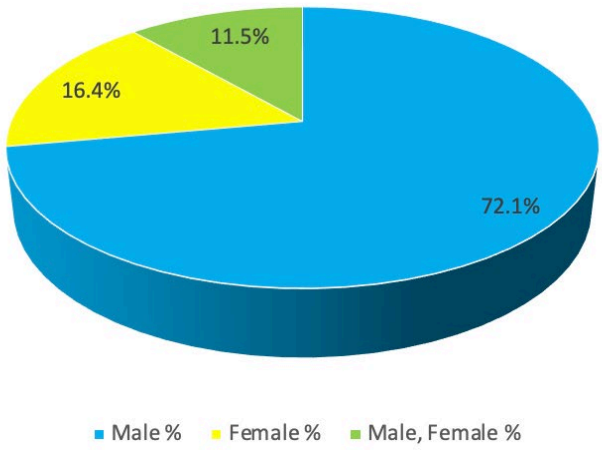
[496] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 05/2016 (Ukraine) U.N. Doc. A/HRC/WGAD/2016/5; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 36/2016 (Ukraine) U.N. Doc. A/HRC/WGAD/2016/36.

Number of Cases Per Category



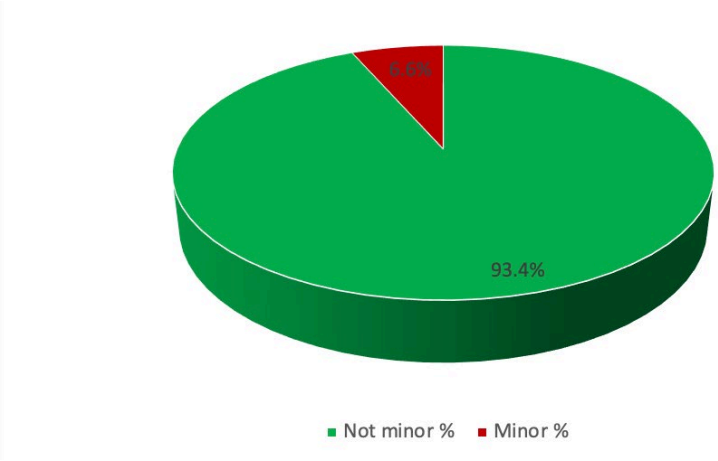
In 2016, 44 of the cases involved the detention of men, ten cases involved women, seven cases involved joint detention of men and women, and four cases pertained to minors.[497]

Reported Gender of Arbitrarily Detained Persons in Each Case



[497] *Supra* note 492.

Percentage of Minors to Persons of Majority Age



The Working Group referred 41 of its 61 cases (67%) to other Special Procedure mandate holders or Working Groups. States responded in 24 out of 61 opinions (39%).[498]

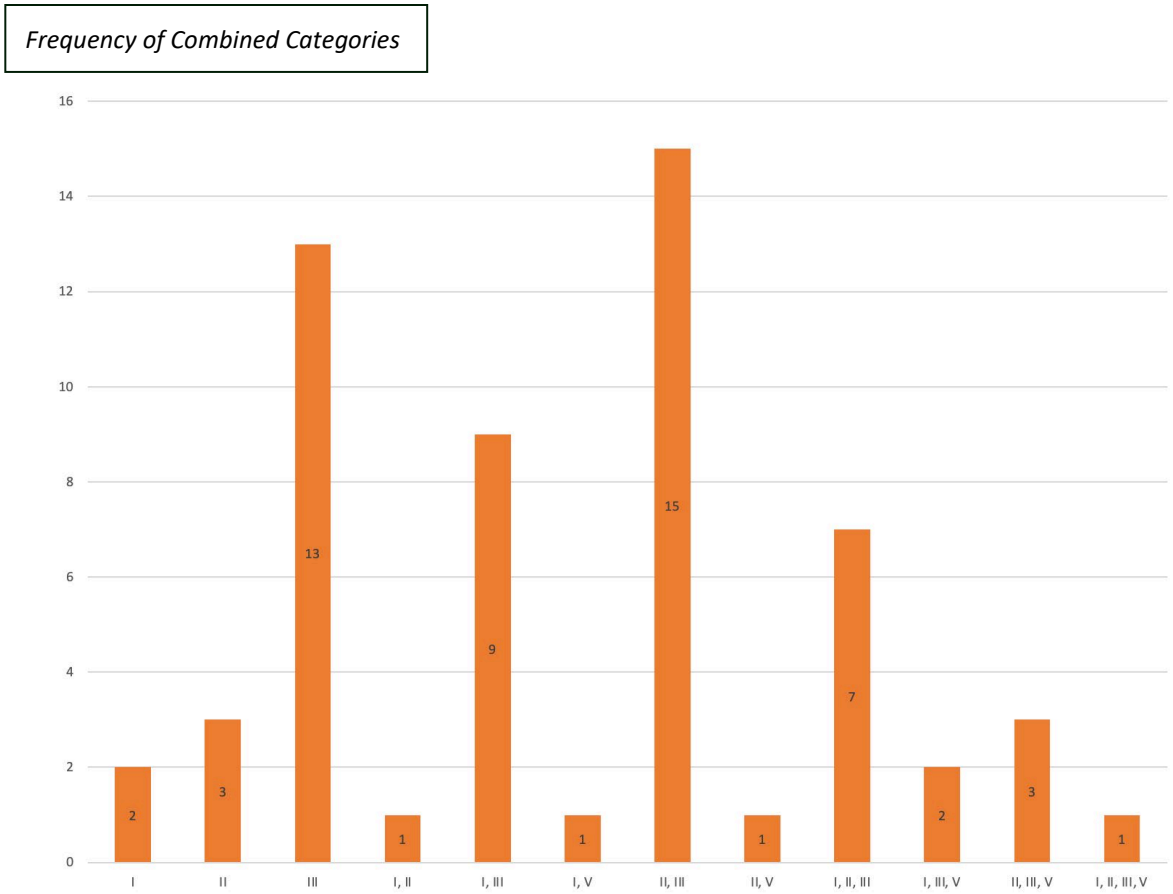
The charts below provide data on what categories the Working Group determined were violated in each case and how many cases pertained to violations of multiple categories. It is notable that in 2016 no cases pertained to Category IV. As in 2015, the majority of the Working Group's opinions pertained to violations of Category III, both alone or in combination with other categories.

Number of Cases with Combined Categories

CATEGORIES	I	II	III	I, II	I, III	I, V
# OF CASES W/ COMBINED CATEGORIES (2016)	2	3	13	1	9	1
CASE NUMBERS	38, 50	33, 35, 41	3, 4, 14, 16, 17, 22, 24, 29, 30, 49, 51, 54, 57	34	12, 18, 26, 27, 39, 42, 53, 56, 60	58

CATEGORIES	II, III	II, V	I, II, III	I, III, V	II, III, V	I, II, III, V
# OF CASES W/ COMBINED CATEGORIES (2016)	15	1	7	2	3	1
CASE NUMBERS	7, 9, 10, 11, 21, 31, 40, 43, 44, 45, 47, 48, 52, 55, 59	23	2, 6, 8, 19, 20, 25, 61	13, 28	15, 36, 46	1

[498] *Id*.



8.3 Year 2017 Snapshot

In 2017, the Working Group adopted 94 opinions concerning the detention of 225 persons in 48 countries under its regular procedure.[499] Under its urgent action procedure, it transmitted 98 urgent appeals to 45 Governments concerning 311 individuals.[500] One case was filed in keeping with its Methods of Work and one case was kept pending without prejudice to the receipt of further information.[501] Two cases were determined not arbitrary deprivations of liberty.[502] The Working Group found detention arbitrary in 90 of 92 cases in which it reached a determination, or 87.8% of the time.

[499] Report of the Working Group on Arbitrary Detention, A/HRC/39/45 (2 July 2018), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/196/69/PDF/G1819669.pdf?OpenElement.

[500] *Id*.

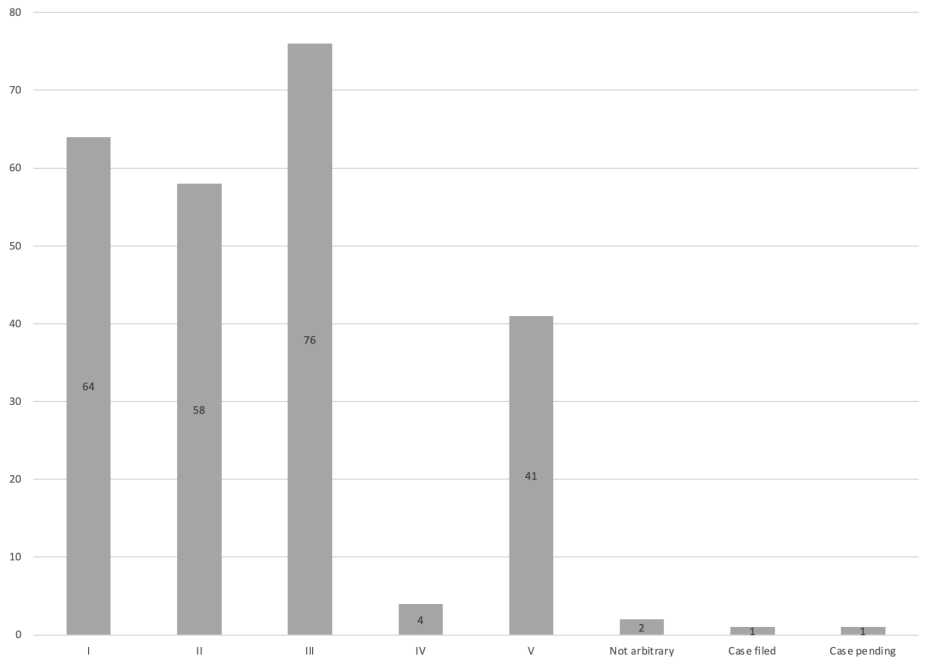
[501] *See*, Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 13/2017 (Republic of Korea) U.N. Doc. A/HRC/WGAD/2017/17 and Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 02/2017 (Bhutan and India) U.N. Doc. A/HRC/WGAD/2017/2.

[502] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 40/2017 (Cameroon) U.N. Doc. A/HRC/WGAD/2017/40; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 73/2017 (Argentina) U.N. Doc. A/HRC/WGAD/2017/73.

Number of Cases Per Category of Arbitrary Detention Identified by the Working Group

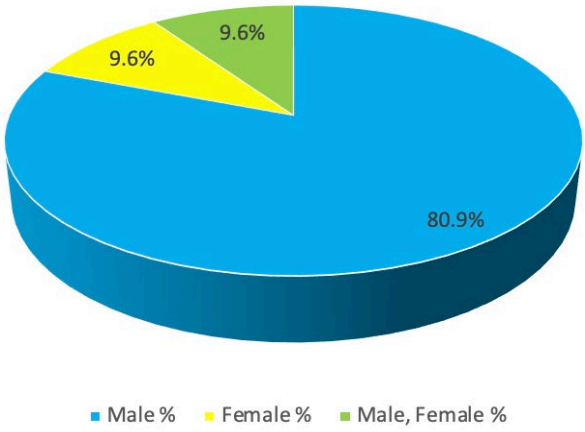
CATEGORIES	I	II	III	IV	V	Not arbitrary	Case filed	Case pending
# OF CASES PER CATEGORY (2017)	64	58	76	4	41	2	1	1
CASE NUMBERS	1, 4, 5, 6, 7, 8, 10, 12, 14, 17, 18, 19, 21, 23, 24, 25, 26, 29, 30, 32, 33, 36, 37, 38, 43, 45, 46, 47, 53, 54, 55, 56, 57, 58, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94	5, 8, 9, 11, 14, 15, 16, 20, 21, 22, 23, 24, 26, 27, 28, 34, 35, 36, 37, 41, 42, 43, 48, 50, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 90, 91, 94	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 66, 69, 70, 74, 75, 76, 77, 78, 79, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94	28, 42, 71, 72	3, 4, 7, 8, 9, 11, 14, 15, 16, 18, 23, 26, 28, 29, 31, 33, 36, 42, 43, 44, 48, 49, 50, 52, 60, 62, 65, 67, 68, 71, 72, 74, 75, 79, 83, 84, 86, 87, 88, 89, 91	40, 73	13	2

Number of Cases Per Category

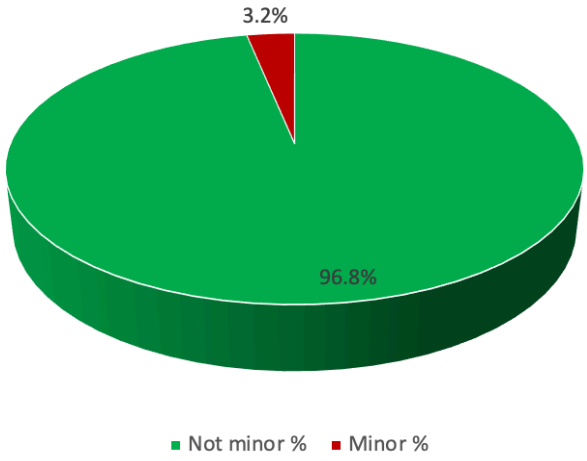


In 2017, 76 detainees were men, nine detainees were women, nine pertained to joint detention of men and women, and three detainees were minors.[503]

Reported Gender of Arbitrarily Detained Persons in Each Case



Percentage of Minors to Persons of Majority Age



In 2017, the Working Group made referrals in 57 cases to other Special Procedure mandate holders or Working Groups in relation to the 94 opinions the Group adopted (61.9%).[504] States responded in 23 out of 94 opinions (24.46%).[505] The charts below provide data on what categories the Working Group determined were violated in each case and how many cases pertained to violations of multiple categories. As

[503] *Supra* note 499.
[504] *Id*.
[505] *Id*.

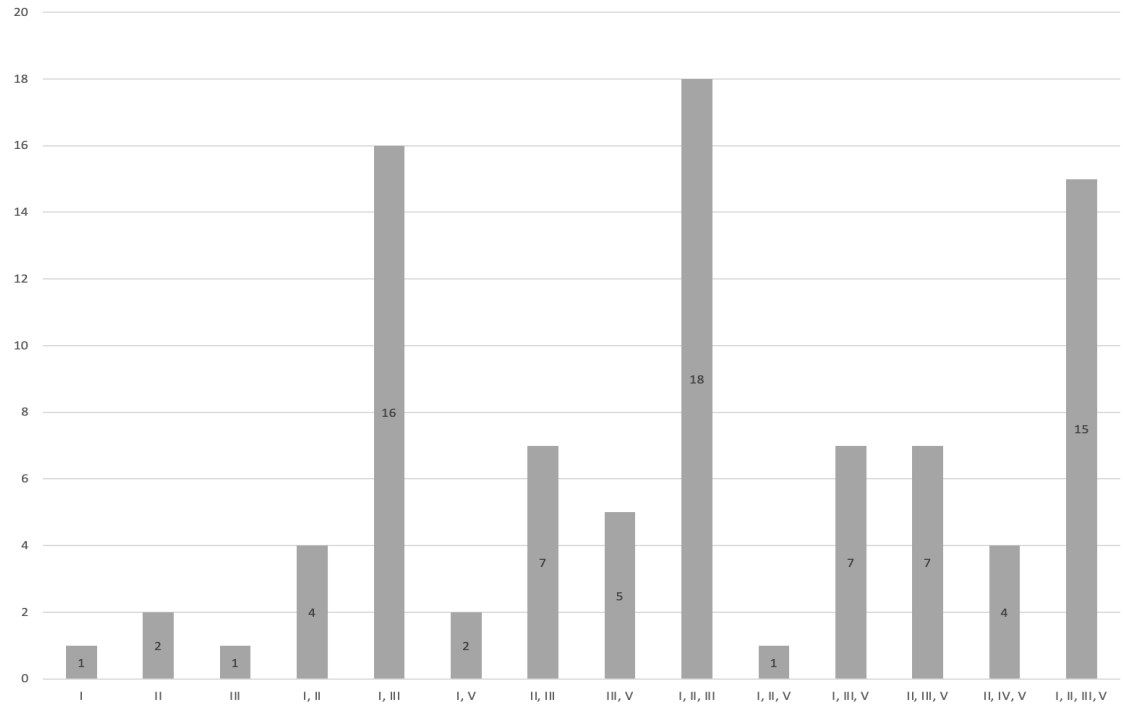
evidenced by the data below, there was a small rise in the number of cases pertaining to Category IV and a significant increase in the number of cases pertaining to Category V. There was also a significant increase in the number of cases pertaining to Category I as compared to 2016. As in 2015 and 2016, the majority of cases pertained to violation of Category III, both alone and in combination with other categories.

Number of Cases with Combined Categories

CATEGORIES	I	II	III	I, II	I, III	I, V	II, III
# OF CASES W/ COMBINED CATEGORIES (2017)	1	2	1	4	16	2	7
CASE NUMBERS	19	20, 22	39	55, 64, 80, 82	1, 6, 10, 12, 17, 25, 30, 32, 38,45, 46, 47, 53, 66, 92, 93	65, 68	27, 34, 35, 41, 51, 59, 77

CATEGORIES	III, V	I, II, III	I, II, V	I, III, V	II, III, V	II, IV, V	I, II, III, V
# OF CASES W/ COMBINED CATEGORIES (2017)	5	18	1	7	7	4	15
CASE NUMBERS	3, 31, 44, 49, 52	5, 21, 24, 37, 54, 56, 57, 58, 61, 63, 69, 70, 76, 78, 81, 85, 90, 94	67	4, 7, 18, 29, 33, 86, 89	9, 11, 15, 16, 48, 50, 62	28, 42, 71, 72	8, 14, 23, 26, 36, 43, 60, 74, 75, 79, 83, 84, 87, 88, 91

Frequency of Combined Categories



8.4 Year 2018 Snapshot

In 2018, the Working Group adopted 90 opinions under its regular procedure concerning the detention of 246 persons in 47 countries.[506] Under its urgent action procedure, it transmitted 75 urgent appeals to 34 Governments concerning 117 identified individuals.[507] One case was kept pending in accordance with its Methods of Work and one case was kept pending without prejudice to the ability of the source and the Government to provide further information that would allow the Working Group to make a determination.[508] Of the 88 cases in which it reached a determination, the Working Group found detention arbitrary in all, or 100% of the time.

Number of Cases Per Category of Arbitrary Detention Identified by the Working Group

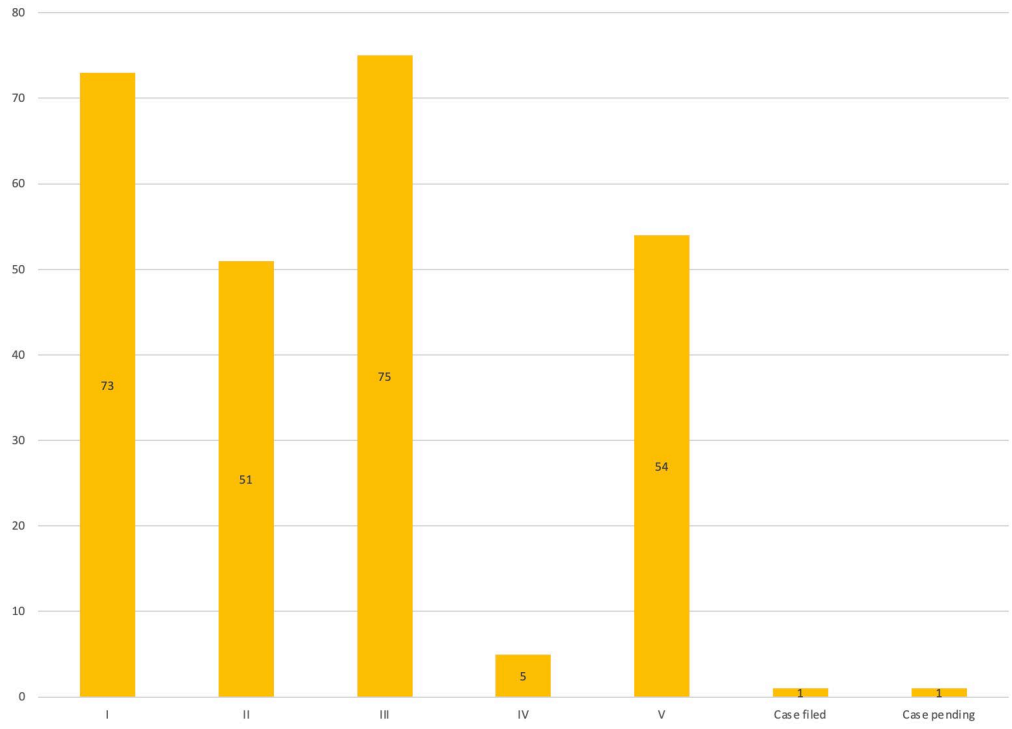
CATEGORIES	I	II	III	IV	V	Case filed	Case pending
# OF CASES PER CATEGORY (2018)	73	51	75	5	54	1	1
CASE NUMBERS	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 23, 25, 26, 27, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90	1, 2, 3, 4, 9, 10, 12, 13, 15, 18, 19, 21, 22, 24, 28, 31, 32, 33, 35, 36, 40, 42, 43, 44, 45, 46, 47, 49, 50, 52, 54, 55, 56, 58, 60, 61, 62, 63, 65, 66, 68, 69, 73, 74, 79, 80, 81, 82, 83, 85, 87	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 16, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 71, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90	20, 21, 50, 72, 74	1, 4, 5, 7, 8, 9, 10, 11, 13, 15, 19, 20, 21, 23, 24, 26, 28, 31, 32, 34, 35, 36, 38, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 54, 55, 58, 60, 61, 63, 64, 69, 70, 73, 75, 78, 82, 83, 84, 86, 87, 88, 89	14	17

[506] Report of the Working Group on Arbitrary Detention, A/HRC/42/39 (16 July 2019), available at: https://www.ohchr.org/Documents/Issues/Detention/A_HRC_42_39.pdf.

[507] Report of the Working Group on Arbitrary Detention, A/HRC/42/39 (16 July 2019).

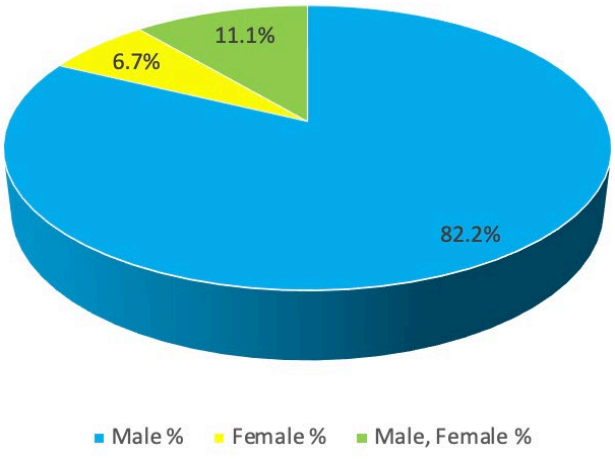
[508] *See* Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 14/2017 (Guatemala) U.N. Doc. A/HRC/WGAD/2018/14; Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 17/2018 (Romania) U.N. Doc. A/HRC/WGAD/2018/17.

Number of Cases Per Category

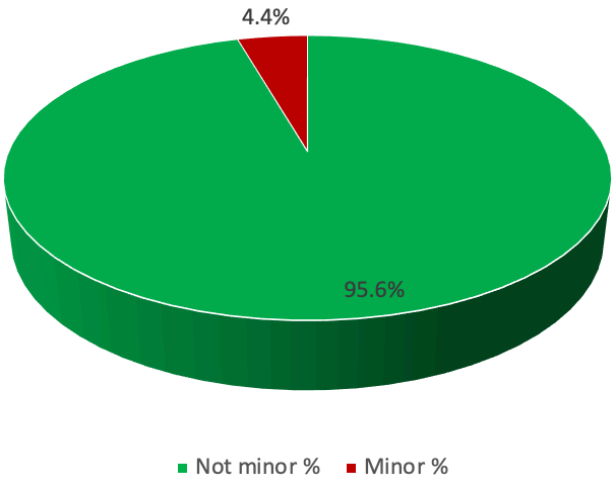


Of the 90 opinions released, 74 concerned male applicants, six concerned female applicants, ten opinions involved male and female joint applicants, and four pertained to minors.

Reported Gender of Arbitrarily Detained Persons in Each Case



Percentage of Minors to Persons of Majority Age



The Working Group referred 65 cases (72.22%) to other Special Procedure mandate holders or Working Groups. State parties responded to 50 communications, or 55.55% of the time.

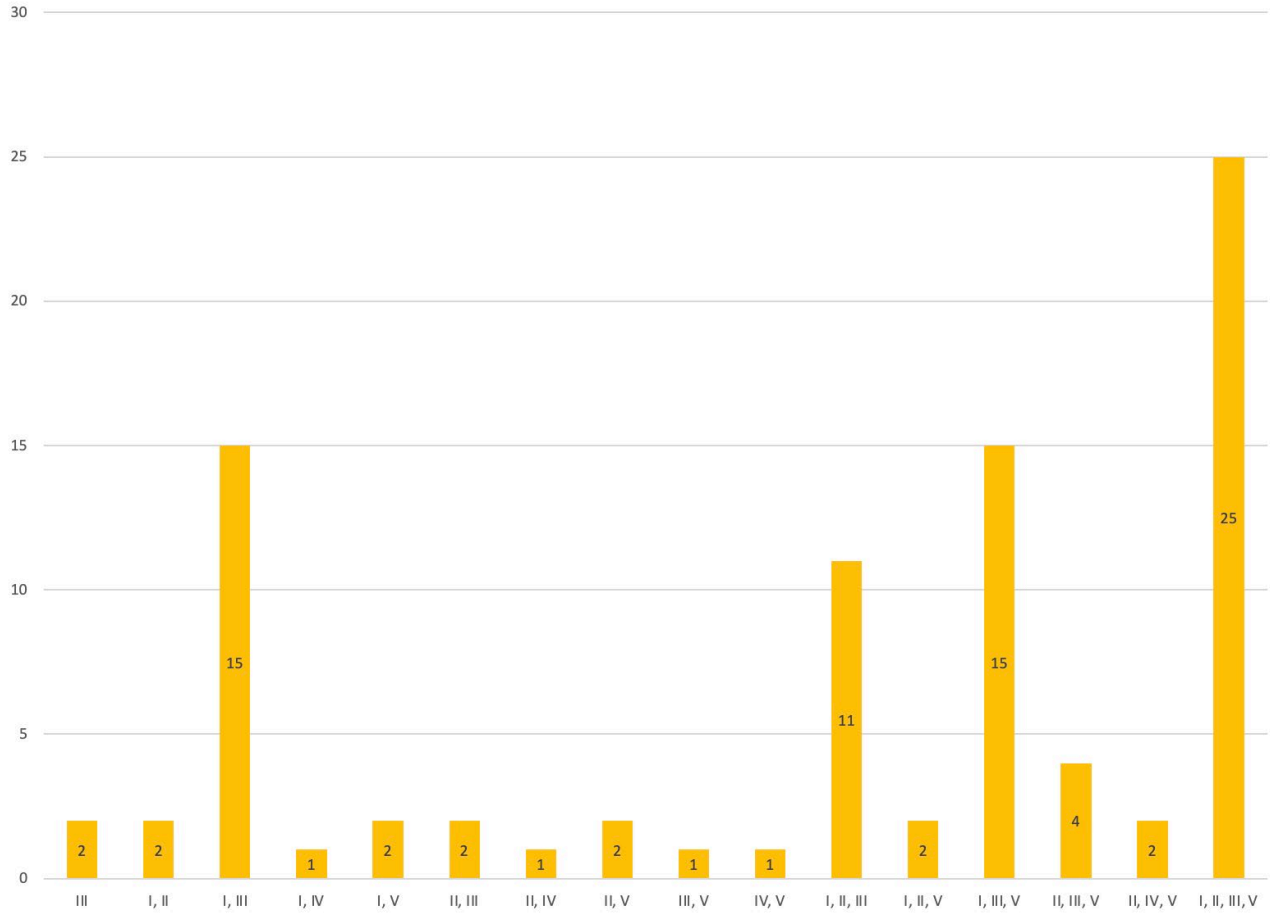
The charts below provide data on what categories the Working Group determined were violated in each case and how many cases pertained to violations of multiple categories. Data from 2018 is fairly similar in the breakdown of cases and categories evidenced in 2017. However, there is a noticeable decrease in the number of opinions pertaining to women in 2018 as compared to 2015, 2016, and to a lesser degree, 2017.

Number of Cases with Combined Categories

CATEGORIES	III	I, II	I, III	I, IV	I, V	II, III	II, IV	II, V
# OF CASES W/ COMBINED CATEGORIES (2018)	2	2	15	1	2	2	1	2
CASE NUMBERS	48, 76	33, 65	6, 16, 25, 27, 29, 30, 37, 39, 53, 57, 59, 67, 71, 77, 90	72	8, 70	18, 22	74	13, 55

CATEGORIES	III, V	IV, V	I, II, III	I, II, V	I, III, V	II, III, V	II, IV, V	I, II, III, V
# OF CASES W/ COMBINED CATEGORIES (2018)	1	1	11	2	15	4	2	25
CASE NUMBERS	64	20	2, 3, 12, 56, 62, 66, 68, 79, 80, 81, 85	40, 69	5, 7, 11, 23, 26, 34, 38, 41, 51, 75, 78, 84, 86, 88, 89	19, 24, 28, 31	21, 50	1, 4, 9, 10, 15, 32, 35, 36, 42, 43, 44, 45, 46, 47, 49, 52, 54, 58, 60, 61, 63, 73, 82, 83, 87

Frequency of Combined Categories



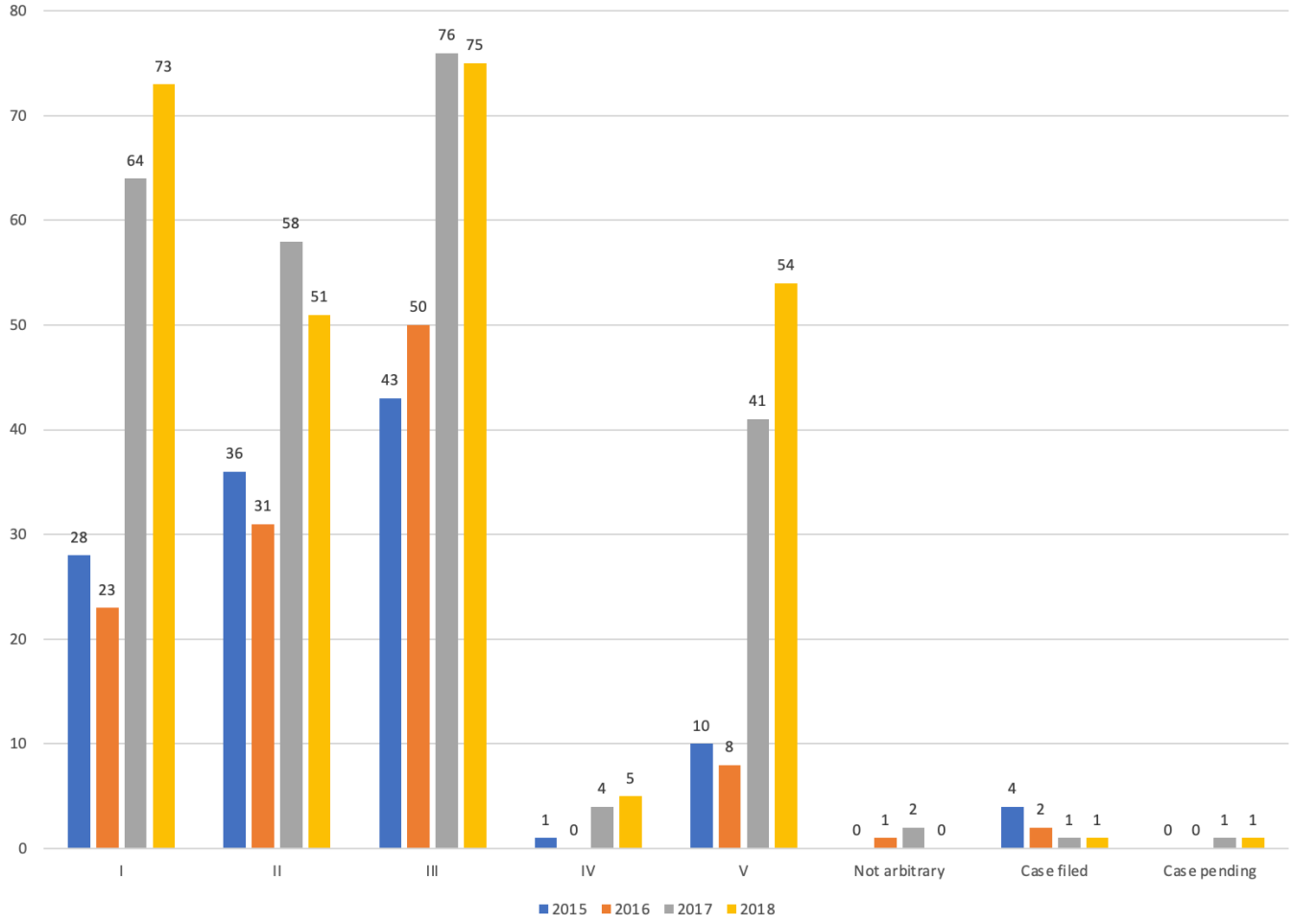
8.5 Comparative Data across Period of Review

This section aims to illustrate longer-term trends observed from 2015-2018. Most notable is the increase in cases pertaining to Category V and the fairly static rate of cases pertaining to Category IV.

Categories of Arbitrary Detention Identified by the Working Group by Case (2015-2018)

CATEGORIES	I	II	III	IV	V	Not arbitrary	Case filed	Case pending
2015	28	36	43	1	10	0	4	0
2016	23	31	50	0	8	1	2	0
2017	64	58	76	4	41	2	1	1
2018	73	51	75	5	54	0	1	1

Number of Cases with Combined Categories (2015-2018)

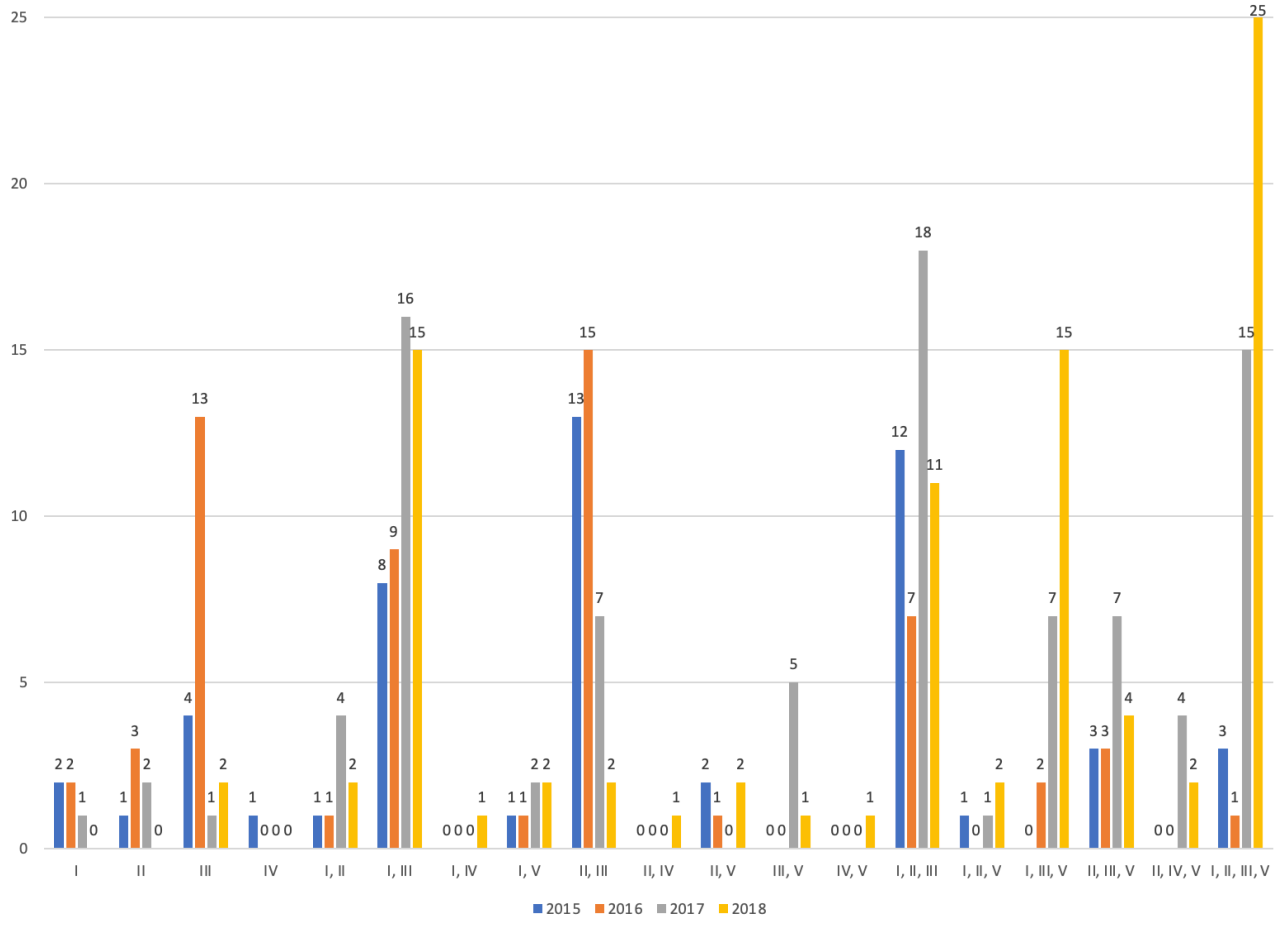


Number of Cases with Combined Categories (2015-2018)

CATEGORIES	I	II	III	IV	I, II	I, III	I, IV	I, V	II, III	II, IV
2015	2	1	4	1	1	8	0	1	13	0
2016	2	3	13	0	1	9	0	1	15	0
2017	1	2	1	0	4	16	0	2	7	0
2018	0	0	2	0	2	15	1	2	2	1

CATEGORIES	II, V	III, V	IV, V	I, II, III	I, II, V	I, III, V	II, III, V	II, IV, V	I, II, III, V
2015	2	0	0	12	1	0	3	0	3
2016	1	0	0	7	0	2	3	0	1
2017	0	5	0	18	1	7	7	4	15
2018	2	1	1	11	2	15	4	2	25

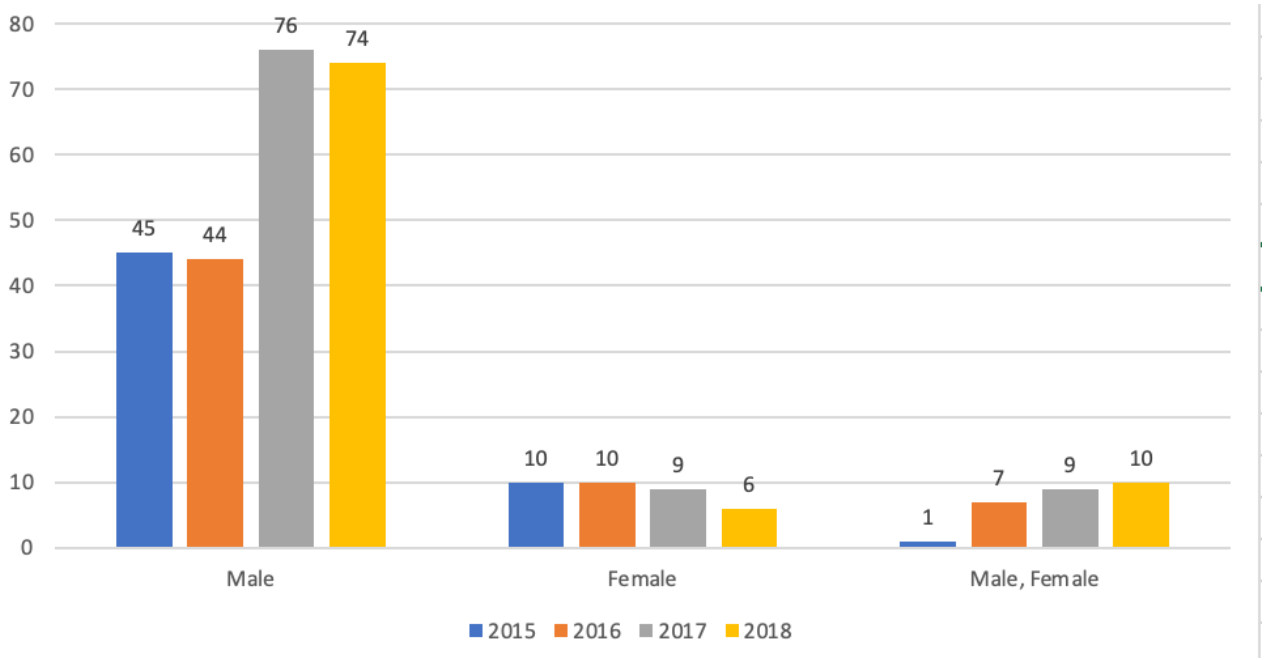
Frequency of Combined Categories (2015-2018)



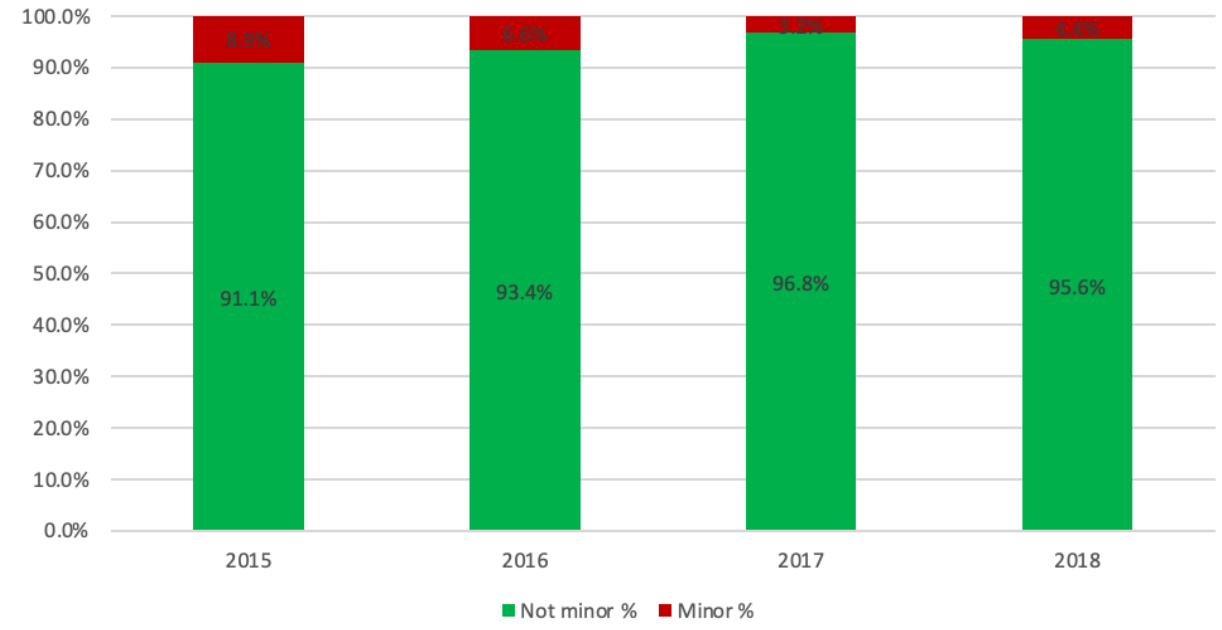
Reported Gender of Arbitrarily Detained Persons in Each Case (2015-2018)

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%

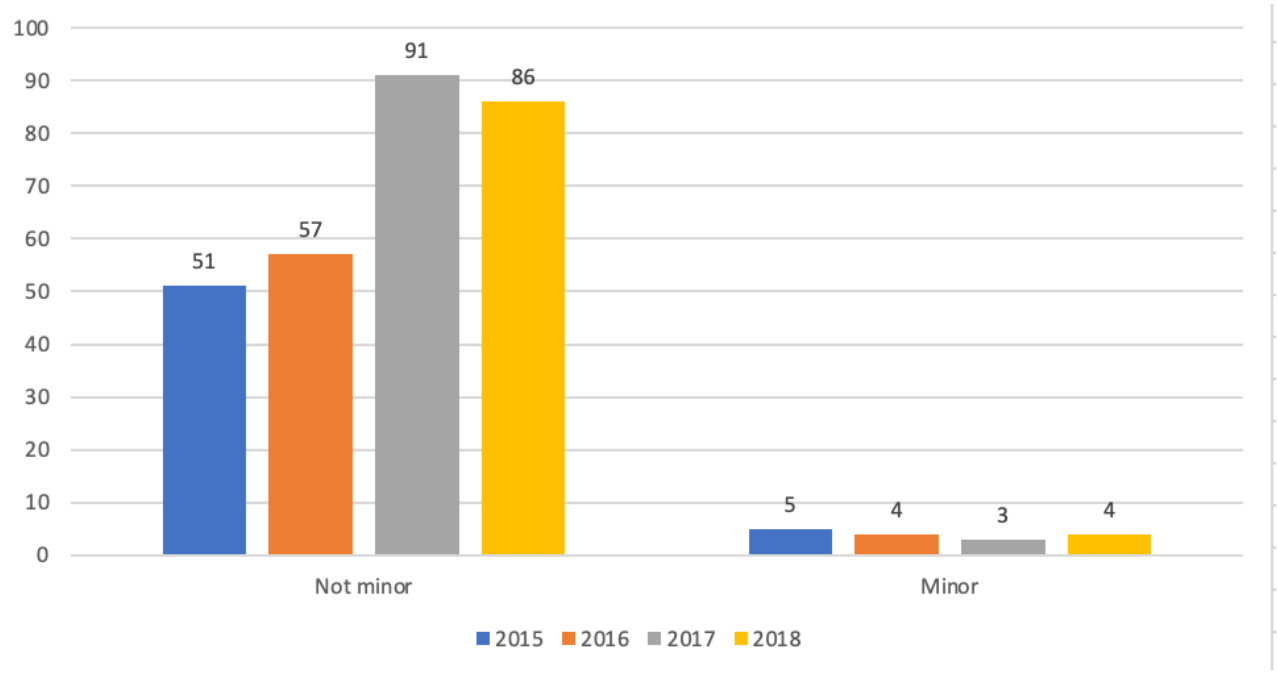
Comparison of Gender Breakdown (2015-2018)



Percentage of Minors to Persons of Majority Age (2015-2018)



Comparison of Minority to Majority (2015-2018)



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