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The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence

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The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence

*David S. Weissbrodt** & *Brittany Mitchell***

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ABSTRACT

For nearly twenty-five years, the United Nations Working Group on Arbitrary Detention has provided a well-respected jurisprudence on fundamental human rights, such as: freedom of expression and religion; limits on administrative detention; restrictions on discrimination in detention; and violations of the right to fair trial. The Working Group has amassed a unique collection of legal principles applicable to individuals detained by the United States, including asylum seekers, immigrants, and refugees. The decisions of the Working Group have also applied to non-state actors.

I. OVERVIEW OF THE WORKING GROUP

A. History of the Working Group

In 1991, the United Nations Commission on Human Rights created the Working Group on Arbitrary Detention.¹ As the Working Group nears its twenty-fifth anniversary, and with the need to address arbitrary detention never more important than it is right now, this article examines the Working Group's procedures and jurisprudence from the past twenty-four years.

In 2006, the United Nations General Assembly created the Human Rights Council to replace the Human Rights Commission, and the Human Rights Council assumed all mandates of the Commission in its decision 1/102 in November 2006.² The Working Group is one of forty-one thematic special procedures with a mandate to advise the Human Rights Council on specific issue areas.³

The Working Group mandate reflects the Commission's concerns—first explicitly addressed in 1986—regarding worldwide instances of detention

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1. Office of High Commissioner for Human Rights, *History—Working Group on Arbitrary Detention*, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/History.aspx>. The Working Group on Arbitrary Detention was established by Resolution 1991/42 of the Commission on Human Rights. *Id.*; see also C.H.R. Res. 1991/42, U.N. Doc. E/CN.4/1991/22, at 105 (1991). The mandate of the Working Group was clarified and extended by resolution 1997/50. Commission on Human Rights Res. 1997/50, Question of Arbitrary Detention, ESCOR Supp. (No. 3) at 164, U.N. Doc. E/CN.4/1997/50 (1997). For a historical account, see Reed Brody, *Current Development: The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT'L L. 709 (1991).
 2. *History—Working Group on Arbitrary Detention*, *supra* note 1. The Working Group on Arbitrary Detention's mandate was then extended for three years by Human Rights Council Resolution 6/4 in 2007 and for another three years in 2010 by resolution 15/18. *Id.*
 3. Office of High Commissioner for Human Rights, *Special Procedures of the Human Rights Council*, available at <http://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx>.

without legal basis.⁴ These examples include continued detention after serving the term of one's sentence, detention based upon the exercise of fundamental rights such as freedom of expression, and violations of the right to a fair trial.⁵

Because detention itself does not necessarily violate human rights, the Working Group must distinguish lawful exercise of the police power, properly adjudicated in accord with both domestic law and other relevant international standards, from detention so lacking in lawful basis that it must be considered arbitrary.⁶ This inquiry may include asylum and other immigration claims,⁷ extended quarantines,⁸ and detentions related to national security and anti-terrorism.⁹ In considering such cases, the Working Group is guided not only by national law, but also by the Universal Declaration of Human Rights ("Universal Declaration"), the International Covenant on Civil and Political Rights ("Covenant"), and other relevant international instruments.¹⁰

The Working Group consists of five individual members who are appointed by the Human Rights Council in equitable geographical distribution from the following regions: Africa, Asia, Eastern Europe, Western Europe and Other Countries, and South America and Caribbean.¹¹ As of September 2015, the members were from South Korea, Mexico, Benin, Australia, and

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4. Office of High Commissioner for Human Rights, *Fact Sheet No. 26, The Working Group on Arbitrary Detention*, § II, available at <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> [hereinafter *Fact Sheet No. 26*].
 5. *Id.* § III.
 6. *Id.* § IV(B).
 7. See, e.g., Mohamed Bousloub v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 34, ¶ 5 (1999). See also U.N. ESCOR, 54th Sess., Provision Agenda Item 8, U.N. Doc. E/CN.4/1998/44 (1997); M. Gavan Montague, *Should Aliens be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 *FORDHAM L. REV.* 1439 (2001); Eve B. Burton & David B. Goldstein, *Vietnamese Women and Children Refugees in Hong Kong: An Argument Against Arbitrary Detention*, 4 *DUKE J. COMP. & INT'L L.* 71 (2003).
 8. Creola Johnson, *Quarantining HIV-Infected Haitians: United States' Violations of International Law at Guantanamo Bay*, 37 *HOW. L. J.* 305 (1994); Carlos Scott López, *Prolonged Administrative Detention of Illegal Arrivals in Australia: The Untenable HIV/AIDS Justification*, 4 *WASH. U. GLOBAL STUD. L. REV.* 263 (2005).
 9. See, e.g., Mourad Benchellali v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2004/3/Add.1, at 33, 34, ¶ 9 (2003). For a pre-9/11 view, see John Quigley, *Israel's Forty-Five Year Emergency: Are there Time Limits to Derogations from Human Rights Obligations?*, 15 *MICH. J. INT'L L.* 491 (1994). See also Jules Lobel, *Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency*, 25 *T. JEFFERSON L. REV.* 389 (2003).
 10. *Fact Sheet No. 26*, *supra* note 4, § IV(B); see also Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71, art. 9 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16), U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976 [hereinafter ICCPR].
 11. *Id.* § III.

Ukraine.¹² The High Commissioner specifically entrusts these individuals with three tasks:

1. Investigation of individual complaints of arbitrary detention;
2. Field missions upon invitation of specific national governments;¹³ and
3. Annual Reports to the Human Rights Council.¹⁴

B. Working Group Competence

While acting broadly within its mandate, the Working Group is subject to three important restrictions. First, it is concerned with the fact of arbitrary detention itself, as distinct from its aggravating circumstances. Information about summary execution, forced disappearance, torture, or other claims are therefore outside its purview and are referred to other appropriate United Nations human rights bodies.¹⁵ Nonetheless, where the facts surrounding the detention intertwine with other human rights violations such as torture, those circumstances contribute to the overall evidentiary picture and the Working Group routinely issues opinions in cases where both torture and arbitrary detention are involved.¹⁶ Second, reports regarding arbitrary detention must be made against a state government. The Working Group lacks competence to consider actions taken by an illegal paramilitary group.¹⁷

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12. Chairperson-Rapporteur Mr. Seong-Phil Hong, Republic of Korea (appointed 2014); First Vice-Chair Mr. José Guevara, Mexico (2014); Second Vice-Chair Mr. Sètondji Adjovi, Benin (2014); Ms. Leigh Toomey, Australia (2015); and Mr. Vladimir Tochilovsky, Ukraine (2010). *The Working Group on Arbitrary Detention—Members*, OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Members.aspx>.
 13. The Working Group does not appear to be beyond making pointed requests for such invitations. See, e.g., 2005 Annual Report at 13, ¶ 31.
 14. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § II, ¶ 6 (2011).
 15. Such as the Human Rights Committee, Special Rapporteur on Torture, the Working Group on Enforced or Involuntary Disappearances, and the Committee on the Rights of the Child. See, e.g., Manuel Flores et al. v. Philippines, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2003/8/Add.1 at 79, ¶ 11 (2002) (referring a case involving minor detainees).
 16. See, e.g., Rodolfo Montiel Flores and Teodoro Cabrera García v. Mexico, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1 at 85, ¶¶ 4–7 (2001); The Working Group may even both issue an opinion and refer the case to the Special Rapporteur. Paw Oo Tun v. Myanmar, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1 at 63, ¶ 14(ii) (2001); The Working Group also issued at least one opinion in a case that also involved the Special Rapporteur of the Commission on Human Rights. Father Hillary Boma Awul v. Sudan, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 18, ¶ 21 (1999) (citing the Rapporteur's report as E/CN.4/1999/38/Add.1 (1999)).
 17. Olga Rodas v. Colombia, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 7, ¶ 5 (1999). The detainees in *Rodas* were released before an opinion could be issued; nonetheless, the Working Group referred the case to the

Third, the Working Group's competence does not formally extend to armed conflicts covered by the Geneva Conventions.¹⁸ The Working Group, however, is clearly concerned with counterterrorism-related detentions. As discussed in more detail below, the Working Group has investigated allegations of arbitrary detention leveled against governments engaged in armed conflict with alleged terrorist organizations and other types of armed conflict.¹⁹ The fact that the detention may also involve the application of international humanitarian law does not shield a government from its obligations under international human rights law, nor does it preclude the Working Group from investigating a government's actions from the perspective of its mandate to determine whether the detention is arbitrary.²⁰ The Working Group will, therefore, consider reported violations of governments in armed conflict.²¹

The Working Group does *not* require the exhaustion of local remedies, but its purpose is not to replace national courts.²² While the Working Group evaluates the facts and evidence in a particular case as part of its investigative role, making findings of fact in the judicial sense is outside its remit.²³

United Nations Commission on Human Rights, and also requested that the government of Colombia commence an investigation. *Id.* ¶¶ 6–7. The mere involvement of non-state actors does not, however, absolve an accused government of its responsibility to enforce the law. Volodymyr Timchenko v. Nigeria, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 24, ¶ 18(b) (1999).

18. *Fact Sheet No. 26, supra* note 4, Annex IV, § III(A), ¶ 14. The International Committee of the Red Cross is the historical guarantor of the rights to prisoners of war ("POWs"). When POW status is denied, however, Red Cross action does not preclude an investigation by the Working Group. *See, e.g.,* Mourad Benchellali v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 34–35, ¶¶ 6–7, 11–12 (2003).
19. *See, e.g., infra* Part III(4).
20. In a thematic consideration in its 2010 annual report, the Working Group relied on both the Human Rights Committee's finding in its General Comment No. 31 and the International Court of Justice's rulings in its Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and its binding judgment in the case of Democratic Republic of Congo v. Uganda that human rights law continues to apply to situations of armed conflict except for those rights found to be legitimately derogated by Article 4 of the ICCPR. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/16/47, § III(A), ¶¶ 37–42 (2010).
21. *Id.* ¶ 51.
22. "Similarly, the Working Group does not require local remedies to be exhausted in order for a communication to be declared admissible." *Fact Sheet No. 26, supra* note 4, § V(A). This position is explicitly confirmed, as against a government argument to the contrary, in the "*Sledgehammer*" cases (Turkey) *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/WGAD/2013/6, ¶ 69 (2013) (noting that "the Working Group would not be able to fulfil its mandate to consider cases of violations of the right of the accused to be tried within a reasonable time or to be released.")
23. Yang Jianli v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 28, ¶ 17 (2003). This position may be somewhat contravened in actual practice. *See, e.g.,* the apparently fact-rich analysis of Jan Borek v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1 at 16, ¶¶ 11–20 (2000).

The Working Group nonetheless explicitly asserts its competence to apply international standards, whether in pending cases²⁴ or after a national court has rendered final judgment.²⁵ The Working Group may even, at its discretion, issue an opinion after the release of the person(s) concerned.²⁶

C. The Working Group's Jurisdiction over Non-Parties to the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights establishes the fundamental legal grounds on which the Working Group relies for jurisdiction over parties to the Covenant. Nonetheless, the failure of specific countries to adopt the Covenant does not by itself defeat the Working Group's ability to exert jurisdiction over non-parties on other grounds. In 2012, the Working Group published its Deliberation No. 9 considering the standing of arbitrary deprivation of liberty under customary international law.²⁷ The Group first noted that arbitrary detention is prohibited in all major international and regional human rights mechanisms. Several United Nations resolutions refer to this prohibition and the International Court of Justice relies on it to find violations of international law.²⁸ Additionally, the Working Group found that arbitrary detention and arrest are prohibited in the domestic laws of many countries that are not parties to the International Covenant on Civil and Political Rights, such as China and Saudi Arabia.²⁹

The prohibition on arbitrary deprivation of liberty and the right to challenge detention before a court are also non-derogable rights under customary international law.³⁰ Any state defenses regarding necessary or proportionate

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24. Yang Jianli v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 28, ¶ 17 (2003).
 25. Abassi Madani and Ali Benhadj v. Algeria, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2003/8/Add.1 at 33, 35 ¶¶ 8–10, 22–23 (2001).
 26. *Fact Sheet No. 26*, *supra* note 4, § IV(A); *See, e.g.*, Fateh Jamus and Issam Dimashqi v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 104, ¶ 13 (2000). "Closed" cases are also subject to review under the Optional Protocol to the ICCPR, *opened for signature* 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16) at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (*entered into force* 23 Mar. 1976). As of December 2013 there were 167 state parties to the ICCPR, and 115 states parties to the (first) Optional Protocol. United Nations Treaty Collection, Chapter IV: Human Rights, *available at* <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>; *See also* Guy S. Goodwin-Gill, *Refugees and Responsibility in the Twenty-First Century: Lesson from the South Pacific*, 12 PAC. RIM L. & POL'Y J. 23, 38–39 (2003).
 27. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. No. A/HRC/22/44, ¶¶ 37–85 (24 Dec. 2012).
 28. *Id.* ¶¶ 42–44.
 29. *Id.* ¶ 46.
 30. *Id.* ¶ 47.

measures are factored into the consideration of whether deprivation of liberty in any given circumstance is considered arbitrary.³¹ Therefore, the deprivation of an individual's liberty may still be considered arbitrary under customary international law if the necessity claimed by the state does not outweigh the unjust, illegal, or unpredictable nature of the detention.³²

In relation to the term "arbitrary," the Working Group determined that it should be interpreted under customary international law to include not only detention considered against the law but also "elements of inappropriateness, injustice, lack of predictability, and due process of law."³³ The word "detention" should be interpreted broadly to include "house arrest; re-education through labour; prolonged periods of curfew; detention of migrants and asylum seekers; protective custody; detention for rehabilitation or treatment; detention in transit areas; border control check points, etc."³⁴ Furthermore, arbitrary detention under customary international law includes prolonged pretrial detention and detention without access to a lawyer or other necessary tools for an effective legal defense.³⁵

D. The Working Group and the United States

The Working Group is the "only body in the international human rights system entrusted . . . with a specific mandate to receive and examine cases of arbitrary deprivation of liberty."³⁶ As discussed above, the Working Group relies primarily on the Universal Declaration and the Civil and Political Covenant in determining whether a situation amounts to arbitrary detention, although it will also consider other treaties and principles of customary international law.³⁷ As the United States was an original signatory to the Universal Declaration and is a state party to the Civil and Political Covenant, it has a clear international obligation to comply with the prohibition of arbitrary detention.

While the United States is a party to or signatory of many international human rights standards, it has not ratified any of the optional protocols of treaties that would enable treaty bodies to review individual or collective complaints against the US government.³⁸ Therefore, the procedures of the Working Group provide one of only a few potential outlets for individuals

31. *Id.* ¶ 48.

32. *Id.* ¶¶ 47–50.

33. *Id.* ¶ 61.

34. *Id.* ¶ 82.

35. *Id.* ¶¶ 84–85.

36. Report of the Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/22/44, ¶¶ 37–85 (24 Dec. 2012).

37. See *supra* Part I(A); see also *infra* Part IV(F)(1).

38. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 *YALE J. INT'L L.* 389, 410 (2009).

whose rights have been violated by the United States government to bring complaints.³⁹ Unfortunately, the United States has typically only taken opinions issued by individual complaint mechanisms as advisory and optional.⁴⁰ Over the past fifteen years, there have been over twenty Working Group opinions regarding the actions of the United States that resulted in a conclusion of arbitrary detention. Although many of the individuals considered arbitrarily detained in the United States have been released, such releases are not typically carried out directly following the Working Group's decision or with any reference to the Working Group's concerns.⁴¹

II. WORKING GROUP PROCEDURES

A. Advisory Procedures

The Working Group undertakes three forms of advisory procedure: annual reports, field missions, and deliberations. These functions are distinct from the adversarial procedure of investigation, which concerns individual complaints of arbitrary detention.

1. Annual Reports

The Working Group submits Annual Reports to the Human Rights Council.⁴² Annual Reports include a summary of other Working Group activities, such as field missions, deliberations, and investigations, as well as statistical summaries of the year's cases.⁴³

39. The only two other mechanisms for individual complaints to which the United States is a party are the Inter-American Commission on Human Rights and "precautionary measure or early warning/urgent action procedures recognized by the [Inter-American] Commission and U.N. human rights treaty bodies." *Id.*

40. See *infra*, Part III(4); Melish, *supra* note 38; *Medellin v. Texas*, 552 U.S. 491, 508 (2008) (ruling that decisions by the International Court of Justice were not binding in the United States, but rather suggestions for future actions).

41. See, e.g., *infra* note 108. Occasionally, individuals being held are not released until there is a change in the executive administration, such as the case of Mr. Ali Saleh Kahlah Al-Marri, whose detention the Working Group found arbitrary in 2006, although his case reached the Supreme Court before the new Obama administration transferred him from military to federal custody. See *Mr. Ali Saleh Kahlah Al-Marri v. United States of America, Working Group on Arbitrary Detention*, Opinion No. 43/2006, U.N. Doc. A/HRC/7/4/Add.1 at 29 (2007); Lyle Denniston, *Al-Marri Detention Case Ended*, SCOTUSBLOG (6 Mar. 2009), available at <http://www.scotusblog.com/2009/03/al-marri-overruled/>.

42. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § II, ¶ 6 (2010).

43. *Fact Sheet No. 26*, *supra* note 4, § VI.

2. Field Missions

The Working Group undertakes approximately one to three field missions each year.⁴⁴ In 2011, for example, the Working Group visited Georgia and Germany,⁴⁵ and in 2012 the Working Group visited El Salvador.⁴⁶ Field missions encompass a wide range of detention-related issues. The 2009 Senegal mission, for example, yielded a series of recommendations, including: separating adult female detainees from minors; establishing the prison catering budget based on the actual number of inmates (rather than the theoretical capacity of the prison); using a legal assistance fund to increase the number of defense lawyers in remote regions of the country; and establishing improved procedures for gathering and maintaining information on detainees, including a single register for each detention site.⁴⁷

3. Deliberations

The Working Group also pursues a more general advisory role via deliberations. Deliberations are designed to establish a position of principles, formulated around potentially problematic practices.⁴⁸ Similar to the general comments used by treaty bodies to assist states in interpreting treaties, deliberations provide guidance on general issues.⁴⁹ Deliberation topics include: restricted or house arrest;⁵⁰ rehabilitation through labor;⁵¹ guarantees concerning detention of immigrants and asylum-seekers;⁵² issues related to psychiatric detention;⁵³ and deprivation of liberty linked to/resulting from the use of the Internet.⁵⁴ Findings expressed in specific deliberations will be discussed further in Part IV.

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44. Field missions are also referred to as “country visits” or “country missions.” *Fact Sheet No. 26, supra* note 4, § V(D).
 45. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/19/57 at 1 (2011).
 46. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/22/44 at 1 (2011).
 47. *Report of the Working Group on Arbitrary Detention: Mission to Senegal*, U.N. Doc. A/HRC/13/30/Add.3 at 16–17.
 48. *Fact Sheet No. 26, supra* note 4, § V(B). A full compilation of Working Group deliberations is available on the Office of the High Commissioner of Human Rights website. See <http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>.
 49. *Id.*; see also, e.g., Comm. on the Rts. of the Child, *General Comment No. 9, CRC/C/GC/9* (2006).
 50. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1993/24 (1993).
 51. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1993/24 (1993).
 52. U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4, Annex, § II (1999).
 53. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6, ¶ 47 (2004).
 54. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2006/7, ¶ 32 (2005).

B. Categories of Arbitrary Detention

The Working Group investigates claims of arbitrary detention according to several categories:⁵⁵

1. *Deprivation of Liberty without Legal Justification*

When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him).⁵⁶

2. *Deprivation of Liberty Resulting from the Exercise of Universal Human Rights.*

When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights (Articles 7, 13–14, 18–21) or the International Covenant on Civil and Political Rights (Articles 12, 18–19, 21–22, and 25–27).⁵⁷

3. *Grave Violations of the Right to Fair Trial*

When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out 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.⁵⁸

4. *Prolonged Administrative Custody*

When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.⁵⁹

5. *Deprivation of Liberty as a Violation of International Anti-Discrimination Standards.*

When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin;

55. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, U.N. Doc. A/HRC/16/47, Annex, § III, ¶ 8 (2010).

56. *Id.* For recent Working Group jurisprudence on this category, see *infra* part IV(A).

57. *Id.* For recent Working Group jurisprudence on this category, see *infra* part IV(B).

58. *Id.* For recent Working Group jurisprudence on this category, see *infra* part IV(C).

59. *Id.* For recent Working Group jurisprudence on this category, see *infra* part IV(D).

language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights.⁶⁰

C. Investigations

The Working Group's most powerful tool in addressing the problem of arbitrary detention is the investigation into individual complaints. An investigation proceeds by four distinct steps: (1) a source brings a claim; (2) the accused government has an opportunity to reply; (3) the source may respond; and (4) an opinion may be issued.

1. Stage One: Bringing a Matter to the Working Group

A source may bring a report of arbitrary detention before the Working Group by communicating with its Geneva Office, ideally using the Model Questionnaire available through the Working Group's Secretariat.⁶¹ The source must sign the report, but need not be the actual person detained; a member of the detainee's family or other representative may file on the detainee's behalf.⁶² Practical information such as the Working Group's mailing, facsimile, or email address appears on the Working Group's website.⁶³

As a procedural matter, the source may be an individual, an NGO, or, in certain circumstances, a government or inter-governmental agency.⁶⁴ The source is not revealed to the accused government; all identifying details are kept strictly confidential.⁶⁵ The Working Group may also initiate its own investigations when its attention is drawn to sufficiently substantiated reports.⁶⁶

60. *Id.* For recent Working Group jurisprudence on this category, see *infra* part IV(E).

61. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, U.N. Doc. A/HRC/16/47, Annex, § III, ¶ 8 (2011).

62. *Fact Sheet No. 26*, *supra* note 4, Annex IV, § III A, ¶ 12. This action is analogous to a next friend action, for example in *habeas corpus* proceedings. Generally, an unrelated source must have evidence of authorization, but the absence of such evidence need not be fatal if, under the circumstances, it is not readily available. *Id.* Annex V, n.10.

63. *Contact*, OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Contact.aspx>. The address is Working Group on Arbitrary Detention, c/o Office of the UN High Commissioner for Human Rights, United Nations Office at Geneva, 8–14, avenue de la Paix, 1211 Geneva 10, Switzerland; facsimile: +41 22 9179006; e-mail: wgad@ohchr.org.

64. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § IV(A), ¶ 12 (2010).

65. *Fact Sheet No. 26*, *supra* note 4, § V(A), ¶ 5; Annex § V, n. 10. While the issue is not formally addressed by the working group, it is nonetheless obvious that the circumstances of a particular detention may tend to identify the source, whether the Working Group does so or not.

66. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § IV(A), ¶ 13 (2010).

2. Stage Two: Opportunity to Refute

In Stage Two, the accused government is provided an opportunity to refute the report. The source remains confidential and the government has sixty days to respond, although it may request an extension of up to one month if necessary.⁶⁷ The response may address both the facts of the detention and the relevant law on which it was based, as well as any of the government's own investigations into the case.⁶⁸

3. Stage Three: Comments on the Response

In Stage Three, the source is allowed an opportunity to comment on the government's response. If there is no response, the Working Group may proceed directly to issue an Opinion.⁶⁹

4. Stage Four: The Opinion

In issuing an opinion, the Working Group may find that the case is one of arbitrary detention, it may keep the case open for further information (from either the government or the source), or it may determine that the detention is not arbitrary.⁷⁰ In the event that the person in question is released before the Working Group completes its investigation, it may either file the case or, at its discretion, issue an opinion.⁷¹ Opinions are provided to the accused government first, then (two weeks later) to the source, and ultimately published by the UN.⁷²

67. *Id.* § IV(B), ¶¶ 15–16.

68. *Fact Sheet No. 26*, *supra* note 4, § V A, ¶ 4.

69. *Id.*, § V(A), ¶ 7.

70. *Id.*, § V(A), ¶ 8. Cases that remain pending for further information are filed under ¶ 17(c) of the methods of work. *See, e.g.*, Francisco José Cortés Aguilar et al. v. Bolivia, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6/Add.1 at 55, ¶ 22 (2004). Cases in which neither the source nor government provide sufficient information on which to form an opinion are filed provisionally under ¶ 17(d). *See, e.g.*, Andrei Ivantoc v. Republic of Moldova, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2005/6/Add.1 at 44, ¶ 17 (2004). Cases which do not constitute arbitrary detention are filed under ¶ 17(b). *See, e.g.*, Azihar Salim v. Madagascar, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2005/6/Add.1 at 52, ¶ 15 (2004).

71. Compare Leonilo de la Cruz v. Philippines, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1 at 20, ¶ 4 (1998) (filed under ¶ 14(a) of the methods of work); Vladimir Nikolic and Xhevat Podvorica v. Yugoslavia, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1 at 49, ¶ 5 (2001) (filed under ¶ 17(a) of the methods of work) to Fateh Jamus and Issam Dimashqi v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2001/14/Add.1 at 104, ¶¶ 10–12 (2000) (opinion issued).

72. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § IV(C), ¶ 18 (2011).

D. The Urgent Action

At its discretion, or if a source raises sufficiently reliable information that continuation of the reported deprivation poses a serious threat to the individual's health—both physical and psychological—or life, the Working Group may pursue an urgent action.⁷³ In such cases, the most rapid means of communication is used to contact the Foreign Minister (or equivalent) of the accused government, requesting “measures to ensure that the detained person's rights to life and physical and mental integrity are respected.”⁷⁴ An urgent action is an independent and purely humanitarian undertaking, and is not always followed by an opinion. To the extent that an opinion is later issued, it should not be prejudiced by the fact that an urgent action took place.⁷⁵ In recent years, the Working Group has typically issued around one hundred urgent actions annually.⁷⁶

III. WORKING GROUP JURISPRUDENCE⁷⁷

The Working Group has developed an important body of opinions over the past twenty-four years. Taken together, the Working Group's opinions

73. *Id.* § V, ¶ 22.

74. *Fact Sheet No. 26*, *supra* note 4, § V(C).

75. *Report of the Working Group on Arbitrary Detention—Revised Methods of Work of the Working Group*, A/HRC/16/47, Annex, § V, ¶ 23 (2010).

76. *See, e.g., Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/16/47, § II(A)(6), ¶ 23 (2012); *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/19/57, § II(A), ¶ 18, tab. 2 (2011). The response rate to urgent actions was about 43 percent in 2003, and only 33 percent in 2004. Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2005/6 at 13, ¶ 32 (2004). Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2006/7 at 13, ¶ 27 (2005). In 2011, however, the Working Group submitted 108 urgent appeals to 45 different governments, referencing 1,629 different individuals. Only twenty-one individuals were released in response to these appeals. Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/19/57 at § II(A), ¶ 26, tab. 2 (2011).

77. Both scholarship and legal advocacy require extensive research, and the problem of arbitrary detention is no exception. In either activity, the University of Minnesota Human Rights Library is an invaluable resource. The Minnesota Human Rights Library provides online service in nine languages (English, French, Russian, Spanish, Arabic, Chinese, Swedish, Korean, and Japanese), and in standard online, pda, and mobile phone format, at <http://www1.umn.edu/humanrts/>. There is a mirror site in Tunisia. In addition to Working Group Opinions, the Library includes extensive refugee and asylum law resources, treaties and other United Nations documents, and substantial K-12 education resources. The Library also provides a search engine for international case law, including records from the Commission on Human Rights, the Committee against Torture, the Committee on the Elimination of all Forms of Racial Discrimination, the Committee on the Elimination of all Forms of Discrimination against Women, and some six hundred Working Group opinions dating from 1998 to present. As with other Library resources, the University of Minnesota Human Rights Library offers free access to this material for anyone, from essentially anywhere in the world.

articulate how international human rights standards should be applied in the context of government detention of individuals. As such, the Group's written body of work has contributed substantively to the international debate over the very difficult question of when detention by the state violates international norms.

International instruments are not definitive regarding the question of when detention is arbitrary. The Universal Declaration only states that "no one shall be subjected to arbitrary arrest, detention or exile," and the Civil and Political Covenant only slightly expands on this definition.⁷⁸ In considering whether a given instance qualifies as arbitrary detention, the Working Group first consults the Universal Declaration and the Covenant,⁷⁹ but will also consider General Assembly Resolution 43/173 on the principles for protecting detained or imprisoned individuals⁸⁰ and other UN resolutions and international standards.⁸¹ This section contains an overview of the jurisprudence of the Working Group, organized based on the Working Group's five legal categories of arbitrary detention: (1) Deprivation of liberty without legal justification; (2) Deprivation of liberty resulting from the exercise of universal human rights; (3) Deprivation of liberty resulting from violations of the right to fair trial; (4) Prolonged administrative custody of asylum seekers, immigrants, or refugees; and (5) Deprivation of liberty as a violation of international anti-discrimination standards.

A. Category I: Deprivation of Liberty without Legal Justification

The Working Group's first consideration is whether an individual's detention lacks legal justification. Situations that fall into Category I include individuals who have never been presented with legal justification, detainees whose legal justification has expired, or those persons who are incorrectly detained for their own benefit (*i.e.*, protective custody).

78. UDHR, *supra* note 10, at 71, art. 9; *see also* ICCPR, *supra* note 10, at 52, art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.") *Id.*

79. The Working Group will particularly look to Articles 7, 9–11, 13–14, 18–21 in the UDHR and Articles 9, 12, 14, 18–19, 21–22, 25–27 in the ICCPR. *See Fact Sheet No. 26, supra* note 4, Annex I.

80. *See id.* Annex II.

81. *See International Standards—Working Group on Arbitrary Detention*, OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/History.aspx>.

1. Deprivation of Liberty Following Arrest Without Warrant or Formal Charges Constitutes Arbitrary Detention

Individuals should not be detained without being informed of the reasons for arrest or charges against them. For example, agents of the Internal Security Services in Libya arrested Dr. Mohamed Hassan Aboussedra in January 1989, without informing him of the charges against him or showing him a formal arrest warrant.⁸² Dr. Aboussedra did not appear in court until 2004.⁸³ The Working Group found his detention during that fifteen-year period to be arbitrary for lack of legal justification.⁸⁴

An individual has a right to know the charges against him in a language that he or she understands. In *Elöd Tóásó v. Bolivia* (2011), the Working Group found that Elöd Tóásó's rights had been violated when the Bolivian government failed to inform him without delay in his own language (Hungarian) of the charges of which he was accused.⁸⁵

Detention in violation of domestic law is similarly unjustified.⁸⁶ The Working Group does however acknowledge the customary rule that arrest *in flagrante delicto* may be made without warrant.⁸⁷

Finally, detention must be based on "specific acts justifying . . . arrest."⁸⁸ A person may not be detained due to the alleged threat he or she poses or a supposed risk that the individual *may* commit an offense in the future.⁸⁹

2. Continued Detention after Court-Ordered Release or Dismissal of Charges is Manifestly Arbitrary

In May 2004, the High Administrative Court in Egypt issued an order for Tarek Abdelmoujoud Al Zumer's release, but the Ministry of Interior kept Mr. Al Zumer in custody.⁹⁰ Detention based on an administrative order despite

82. Dr. Mohamed Hassan Aboussedra v. Libyan Arab Jamahiriya, *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/10/21/Add.1 at 5 (2009).

83. *Id.* ¶ 5.

84. *Id.* at 6, ¶¶ 10–11.

85. Elöd Tóásó v. Bolivia, *Working Group on Arbitrary Detention*, Opinion No. 63/2011, U.N. Doc. A/HRC/WGAD/2011/63, ¶ 42 (2011). In this instance, the Hungarian consulate had even offered to assist in communicating with Mr. Tóásó. *Id.*

86. Ernest Bennett et al v. Haiti, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 112, ¶ 6 (2000). Ernest Bennett, seventy-three-year-old ex-father-in-law of former Haitian President Jean-Claude Duvalier, was arrested for embezzling government funds. *Id.* Under Haitian law, individuals aged sixty-five or older cannot be detained except in cases of violent crime, making Bennett's detention arbitrary whether the charges against him were valid or not. *Id.*

87. *See Report on the Working Group on Arbitrary Detention on its visit to Brazil*, U.N. Doc. A/HRC/27/48/Add.3 at ¶ 39 (30 June 2014). Ernest Bennett et al. v. Haiti, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 112 (2000).

88. Iván Fernández Depestre v. Cuba, *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/WGAD/2014/9 at 4, ¶ 24 (2014).

89. *Id.*

90. Tarek Abdelmoujoud Al Zumer v. Egypt, *Working Group on Arbitrary Detention*, Opinion No. 3/2011, U.N. Doc. A/HRC/WGAD/2011/3, ¶¶ 5–7 (2011).

a court order for a detainee's release is an arbitrary deprivation of liberty.⁹¹ Similarly, detention due to a failure to execute a court-ordered release is manifestly arbitrary, for lack of legal justification.⁹² Detention is similarly arbitrary if it continues after a court-ordered dismissal of charges against the detainee; such detention cannot be justified by rearrest for the same offense, even if new charges are filed.⁹³ In the event of detention without warrant, charge, or trial, government acknowledgement of the detention is not necessary for it to be found arbitrary.⁹⁴

3. *Detention after Completion of Sentence or Amnesty is Arbitrary*

Detention is arbitrary if it extends beyond the term of a commuted sentence.⁹⁵ In 2006, Hassine Bettaibi was sentenced in the United Arab Emirates to six months in prison for issuing a bad check.⁹⁶ He was arrested in Algiers on April 14, 2011, and extradited to the United Arab Emirates on July 28, 2011.⁹⁷ Despite having completed his six-month sentence by October 15, 2011, Mr. Bettaibi remained in detention when the Working Group adopted an opinion on his case (November 21, 2012).⁹⁸ Mr. Bettaibi's detention after October 15, 2011, was considered arbitrary because it was "clearly impossible to

91. Mahmoud Abdelsamed Kassem v. Egypt, *Working Group on Arbitrary Detention*, Opinion No. 7/2011, U.N. Doc. A/HRC/WGAD/2011/7, ¶¶ 16–17 (2011) ("The Working Group reiterates its opinion that, in such cases, no legal basis can be invoked to justify the detention, least of all an administrative order issued to circumvent a judicial decision ordering the release.").

92. Bennett v. Haiti, U.N. Doc. E/CN.4/2001/14/Add.1 at 112, ¶ 43. Port-Au-Prince Chief Prosecutor Jean-Auguste Brutus failed to sign and execute a court-ordered release, issued upon a judicial finding of insufficient evidence. *Id.* Failure to release Bennett also violated Haiti's 1987 Constitution. *Id.* The Working Group stated that "the detention of Ernest Bennett, Antony C.J. Charles and Evans François, who are still in custody despite a release order issued by an examining magistrate, the deprivation of liberty is also arbitrary because it manifestly cannot be justified on any legal basis (Category I)." *Id.* ¶ 44.

93. Sen, Editor-in-Chief of the Nepalese-language weekly Janadesh, was arrested under the Public Security Act after interviewing a presumed leader of the Maoist insurgency. *Id.* ¶ 4. Krishna Sen v. Nepal, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2002/77/Add.1 at 45, (2001). The Supreme Court of Nepal ordered Sen's release, but his release papers were forged, and he was re-arrested on new charges of carrying illegal weapons. *Id.* ¶¶ 5–7. The Working Group found that "[T]he rearrest and detention of a person in violation of a judicial decision—in this case a Supreme Court decision—constitutes a deprivation of liberty that manifestly cannot be justified on any legal basis and is therefore, by definition, of an arbitrary nature." *Id.* ¶ 10(ii).

94. Sen was ultimately transferred into secret detention, presumably at Siraha prison. In addition to finding arbitrary detention under category I, the Working Group also ruled that secret detention is in itself arbitrary under category III, gross violations of the right to fair trial. *Id.* ¶ 10(iii).

95. Hassine Bettaibi v. United Arab Emirates, *Working Group on Arbitrary Detention*, Opinion No. 61/2012, U.N. Doc. A/HRC/WGAD/2012/61 at ¶ 2(a) (2012).

96. *Id.* ¶ 7.

97. *Id.* ¶¶ 4–6.

98. *Id.* ¶ 13.

invoke any legal basis justifying it.”⁹⁹ Detention is also arbitrary if it follows the reinstatement of a previously commuted sentence,¹⁰⁰ or if it continues after an amnesty decree.¹⁰¹ Additionally, detention cannot continue after the end of an individual’s sentence based on a suspicion that the individual might reoffend or for the public’s protection.¹⁰²

4. Detention Without Charge or Arraignment in Competent Court at Guantánamo Bay of Prisoners Arrested in the Afghanistan Intervention but denied Prisoner-of-War status, Constitutes Arbitrary Detention

Mourad Benchellali, Khaled Ben Mustafa, and Nizar Sassi, all French nationals, were arrested along with Hamed Abderrahaman Ahmed, a Spanish citizen, during the United States-led military intervention in Afghanistan in the fall of 2001.¹⁰³ Mr. Benchellali and Mr. Ahmed were reportedly arrested by Pakistani forces in Pakistan, and Mr. Mustafa and Mr. Sassi by US forces in Afghanistan.¹⁰⁴ All four eventually arrived at the US base in Guantánamo Bay, Cuba.¹⁰⁵ They were denied Prisoner-of-War status and detained for more than a year without formal charges or arraignment in a competent court.¹⁰⁶ These four detainees were among the estimated 780 individuals who were held by the United States in Guantánamo Bay as enemy combatants based on their alleged terrorist activities directed at the United States.¹⁰⁷

99. *Id.*

100. James Mawdsley v. Myanmar, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 124, ¶ 14(b) (2000). Mawdsley, a British citizen, was arrested in September 1997, for spray-painting pro-democracy graffiti, and was deported. *Id.* ¶ 6. Mawdsley returned to Myanmar in April 1998, whereupon he was arrested both for playing pro-democracy songs on a tape recorder, and for entering the country illegally. *Id.* ¶ 7. This time Mawdsley received a five-year sentence, but after serving 99 days it was commuted and he was again deported. *Id.* Mawdsley returned to Myanmar again in August 1999, and was again arrested (this time for distributing pro-democracy leaflets). *Id.* Mawdsley was sentenced to five years under § 13(1) of the Immigration Act and seven years under § 17 of the Printing and Publishing Act, and his prior five-year sentence, previously commuted, was reinstated for a total sentence of seventeen years. *Id.* ¶ 11. The reinstatement of a previously commuted sentence was found to constitute arbitrary detention under category I. *Id.* ¶ 14(a).

101. Janie Model v. United Arab Emirates, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6/Add.1 at 42, ¶ 10 (2004). The Working Group found that detention after amnesty was not justified, even in view of a pending civil action, but distinguished from a case in which payment of a fine was a precondition to release, and in which no amnesty had been declared. *Id.* ¶ 7, citing George Atkinson v. United Arab Emirates, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 3 (2002).

102. Mr. A v. New Zealand, *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/WGAD/2015/21, ¶ 23 (2015); see also *supra* part III.A.7.

103. Mourad Benchellali v. United States of America, *supra* note 9, at 33, ¶ 5.

104. *Id.*

105. *Id.*

106. *Id.* at 34, ¶¶ 6–7.

107. *The Guantánamo Docket*, N.Y. TIMES, 17 Nov. 2015, available at <http://projects.nytimes.com/guantanamo/detainees> (Benchellali, Sassi, and Mustafa appear on the list of detainees

The four detainees were visited by the Red Cross and, through that agency, were able to write letters home, but were otherwise cut off from communication, including communication with counsel.¹⁰⁸ In 2003, the Working Group found their detention to be arbitrary under Category I, for lack of legal justification.¹⁰⁹ According to documents obtained by the American Civil Liberties Union (ACLU) through a Freedom of Information Act request, the United States Department of State issued a formal written response to the Working Group disputing the Working Group's opinion, asserting that the matter was outside the competence of the Working Group because the four detainees were enemy combatants and, therefore, the conditions of their detention were the subject of the Geneva Conventions and the law of armed conflict.¹¹⁰ Within the following two years, the four detainees were transferred to custody in France and Spain, the countries in which they maintained citizenship.¹¹¹ During that same two-year period, however, over two hundred detainees were transferred out of Guantánamo Bay to other countries and there is no indication that the transfer of these four detainees was necessarily a response to the Working Group's findings.¹¹² Nonetheless, the foundational principles of the Working Group's opinions—that states may not detain individuals, even suspected terrorists, without offering them basic due process rights—have continued to influence the public debate over the treatment of Guantánamo Bay detainees.

As of the publication of this article, most of the detainees have been transferred to other countries, but about a hundred detainees remain in custody at Guantánamo Bay.¹¹³ A public debate continues over whether the alleged dangers posed by the detainees justified the United States holding them for protracted periods without arraignment or charges.¹¹⁴ Through its

in the N.Y. Times "Docket," while the surname Abderrahaman does not appear, possibly because Mr. Abderrahaman was identified by another name or because he was one of the detainees who remained unidentified in the N.Y. Times project).

108. Mourad Benchellali v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2004/3/Add.1 at 33, ¶ 6 (2003).
109. *Id.* at 34–35, ¶¶ 9–12. Hamed Abderrahaman was transferred to Spanish custody in February 2004, Mourad Benchellali and Nizar Sassi were released into French custody in July 2004, and Khalid Ben Mustafa was released to French custody in March 2005. See Mourad Benchellali, *Detainees in Despair*, N.Y. TIMES, 14 June 2006, at A23, available at <http://www.nytimes.com/2006/06/14/opinion/14benchellali.html>; News Release, U.S. Dep't of Def., Transfer of French Detainees Complete, 27 July 2004, available at <https://web.archive.org/web/20041031103938/http://www.defense.gov/releases/2004/nr20040727-1062.html>.
110. *Cable from U.S. Dep't of State to Working Group on Arbitrary Detention* (3 Aug. 2003), released to ACLU 23 Dec. 2004, available at <http://www.thetorturedatabase.org>.
111. *The Guantánamo Docket*, *supra* note 107.
112. National Public Radio, *Q&A About Guantanamo Bay and the Detainees*, 23 June 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4715916>.
113. *The Guantánamo Docket*, *supra* note 107.
114. See, e.g., Margaret Hazuka, *Don't Forget Guantánamo: The Legacy of the "War on Terror," Torture, and Indefinite Detention*, HARV. C.R.-C.L. L. REV. (2014); Gabrielle Banks, *Guantánamo Bay Legal Issues Stubbornly Persist*, PITTSBURGH POST-GAZETTE, 10 June 2013.

investigative procedures, the Working Group reached a definitive answer to that question at least with respect to four of the detainees, concluding that their detention violated international law.¹¹⁵ It remains to be seen what impact the Working Group's opinion will have on the debate over prolonged detention as a counterterrorism strategy generally, and the degree to which states may continue to suspend the due process rights of the accused when suspected terrorists are involved. In any event, the Working Group's determination, now in the public domain, may inform decisions on such matters in the future.

5. Civil Claims are Insufficient Justification for Arbitrary Detention

Detention solely because of an alleged civil debt, without warrant, charges, trial, or other access to legal process, is arbitrary for lack of legal justification.¹¹⁶ The same is true in the case of ship-board detention based on a maritime claim.¹¹⁷

6. Participation of Non-State Actors does Not Absolve a Government of Responsibility for Tolerating an Illegal Situation

In *Timchenko et al. v. Nigeria* (1999), the detention was carried out by both military personnel and private commercial agents of an oil company, Lonestar Nigeria.¹¹⁸ The Working Group ruled that the participation of non-state actors did not absolve the Nigerian Government of responsibility for knowingly tolerating an illegal situation, and for failure to carry out the court-ordered release of the remaining detainees.¹¹⁹ *Timchenko* must, however, be distinguished from *Olga Rodas et al. v. Colombia* (1999), in which hostage-taking by an illegal paramilitary group fell outside the Working Group's competence.¹²⁰

115. Mourad Benchellali v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2004/3/Add.1 at 33, 35, ¶ 12 (2003).

116. Jaweed Al-Ghussein v. Palestinian Authority, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2003/8/Add.1 at 46, ¶¶ 13–14 (2001). See also ICCPR, *supra* note 10, at 56, art. 11.

117. Volodymyr Timchenko et al. v. Nigeria, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 24 (1999). The Dubai Valour was seized in Sapele, Nigeria, in August 1997, on a disputed civil claim of US \$17 million. *Id.* ¶¶ 6–7. Despite a release order issued by the Nigerian Federal High Court in Lagos, some crew members were detained for more than two years. *Id.* ¶¶ 8–9.

118. *Id.* ¶¶ 7–10.

119. *Id.* ¶¶ 18(b).

120. Olga Rodas v. Colombia, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 7, ¶ 5 (1999).

7. *Purported Justifications of Protective Custody, Psychiatric Detention, and Rehabilitation do not Preclude a Finding of Arbitrary Detention*

Nobel Peace Prize Laureate Daw Aung San Suu Kyi was arrested without formal charges on 31 May 2003, allegedly as a threat to Myanmar state security.¹²¹ Ms. Suu Kyi was held against her will in a military guesthouse without access to counsel or family for over a year.¹²² Despite the government's claim that Ms. Suu Kyi was being held in protective custody, for her own safety, following allegedly unlawful and violent actions of her supporters, the Working Group nonetheless found her detention arbitrary under category I.¹²³

Similarly, involuntary commitment to a psychiatric hospital without legal provisions governing institutionalization amounts to arbitrary detention.¹²⁴ In 2009, two former members of the Sri Lankan Liberation Tigers of Tamil Eelam were categorized as "surrendeers" under Sri Lanka's Emergency Regulation No. 22 and placed in a rehabilitation center.¹²⁵ The individuals were later transferred to a detention center, then a prison, spending over two years in detention.¹²⁶ Throughout that period, neither individual was ever formally charged.¹²⁷ The Working Group found that indefinite detention in a rehabilitation center without judicial oversight or review is arbitrary detention.¹²⁸

121. Daw Aung San Suu Kyi v. Myanmar, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6/Add.1 at 47, ¶¶ 5–6 (2004).

122. *Id.* ¶ 6.

123. *Id.* ¶¶ 9, 15–16. The Working Group had found Suu Kyi's detention to be arbitrary, in 2002, but had issued the opinion after what ultimately proved to be a temporary release. Aung San Suu Kyi v. Myanmar, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4.2003/8/Add.1 at 50, ¶ 19 (2002).

124. Wang Wanxing v. China, *Working Group on Arbitrary Detention*, Opinion No. 7/2003, U.N. Doc. E/CN.4/2004/3/Add.1 at 39 (2003). Wang Wanxing was involuntarily committed to a psychiatric hospital after attempting to unfurl a banner in commemoration of the 1989 events in Tiananmen Square. *Id.* ¶¶ 6, 10–12. To the extent that Wanxing's psychiatric institutionalization was against his will and carried out on closed premises which he was not allowed to leave, it constituted detention. *Id.* ¶¶ 13–15. The Working Group found this detention to be arbitrary because the hospital in question was run by the Public Security Bureau, there was no legal provisions governing Wanxing's institutionalization, and he was prohibited from contacting the press or pro-democracy advocates while on leave. *Id.* ¶¶ 13–15.

125. Pathmanathan Balasingam, et al. v. Sri Lanka, *Working Group on Arbitrary Detention*, Opinion No. 26/2012, U.N. Doc. A/HRC/WGAD/2012/26, ¶ 27 (2012).

126. *Id.*

127. *Id.*

128. *Id.* ¶ 29. The Working Group noted that detention used for "educational purposes" still qualifies as detention and requires the right to effective remedy and due process guarantees in the EDHR and ICCPR. *Id.* ¶ 26. According to the Working Group, any restriction on liberty requires a proportionality review to consider whether measures taken were legal, "suitable, necessary and proportionate." *Id.*

8. *Non bis in Idem*

The principle of *non bis in idem* (i.e., double jeopardy)¹²⁹ is illustrated by *Mohammed Salim v. Pakistan*.¹³⁰ Mr. Salim was arrested in June 1998, for alleged involvement in the murder of three Pakistani police officers.¹³¹ Mr. Salim was tried by a military court in Karachi and sentenced to death.¹³² His conviction was overturned in January 1999, due to lack of evidence, and in February 1999, the Supreme Court of Pakistan abolished the military court system that tried him, voiding all of its convictions.¹³³ Nonetheless, Mr. Salim was rearrested in May 1999, and charged with the same offense.¹³⁴ The Working Group ruled Mr. Salim's detention arbitrary because there is no legal justification for violating the principle of *non bis in idem*.¹³⁵ In a Peruvian case, shoemaker/bricklayer Marco Antonio Sánchez Narváez was charged with terrorism, but he was eventually acquitted for lack of evidence.¹³⁶ He was then retried in a military court for treason.¹³⁷ In 2000, the Working Group found the military retrial violated the principle of *non bis in idem* and "automatically conferred an arbitrary character" to Mr. Narváez's detention.¹³⁸

B. Category II: Deprivation of Liberty Resulting from the Exercise of Human Rights

The Working Group has stated in numerous opinions that detention for the exercise of human rights is arbitrary, even if the detention is justified by domestic laws.¹³⁹ The Working Group considers detention arbitrary if it was

129. Literally, "Not twice for the same thing." *Non bis in idem*, BLACK'S LAW DICTIONARY (8th ed. 2004).

130. Mohammed Salim v. Pakistan, *Working Group on Arbitrary Detention*, Opinion No. 6/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 64, ¶ 8 (2000).

131. *Id.* ¶ 5.

132. *Id.*

133. *Id.* ¶¶ 5–7.

134. *Id.* ¶ 7.

135. The Working Group noted that *non bis in idem* is both a general principle of law, and is found in Article XIII of the Constitution of Pakistan. *Id.* ¶ 8. The Working Group also found that Salim, who was fourteen years old at the time of his arrest, had been detained in violation of the Beijing Rules (the United Nations Standard Minimum Rules for the Administration of Juvenile Justice). Mohammed Salim v. Pakistan, *Working Group on Arbitrary Detention*, Opinion No. 6/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 64, ¶¶ 5, 9 (2000).

136. Marco Sánchez Narváez v. Peru, *Working Group on Arbitrary Detention*, Opinion No. 27/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 131, ¶¶ 5–8 (2000).

137. *Id.* ¶ 9.

138. *Id.* ¶¶ 14–16.

139. See, e.g., Nabeel Abdulrasool Rajab v. Bahrain, *Working Group on Arbitrary Detention*, Opinion No. 12/2013, U.N. Doc. A/HRC/WGAD/2013/12 at 9, ¶ 39 (2013); Le Cong

for an individual's exercise of his or her right to freedom of religion; freedom of opinion and expression; freedom of peaceful assembly and association; freedom of involvement in public affairs; or freedom of movement.¹⁴⁰ Any domestic legal restrictions on guaranteed freedoms are "subject to a strict proportionality requirement."¹⁴¹ A country cannot simply make "a vague and general reference to the interests of national security or public order, without being properly explained and documented."¹⁴² The broad nature of a criminal law could "result in penalties being imposed . . . on persons who have merely exercised their legitimate right to freedom of opinion or expression."¹⁴³

1. Freedom of Religion Incorporates the Right to Freedom of Association and the Peaceful Advocacy for Religious Freedom

Freedom of religion extends to the right to freedom of assembly with other members of that religion and the right to peacefully protest for religious rights.¹⁴⁴ According to the Working Group, this right should be upheld against accusations that a religion (for example, Falun Gong in China) constitutes an evil cult organization that spreads superstition, deception, and heresy, as well as unsubstantiated allegations of killings¹⁴⁵ and claims that the religion posed a threat to national security.¹⁴⁶ The Working Group has determined

Dinh v. Vietnam, *Working Group on Arbitrary Detention*, Opinion No. 27/2012, U.N. Doc. A/HRC/WGAD/2012/27, ¶ 37 (2012); Yusmani Rafael Álvarez Esmori v. Cuba, *Working Group on Arbitrary Detention*, Opinion No. 23/2012, U.N. Doc. A/HRC/WGAD/2012/23 at 3, ¶ 13 (2012).

140. See UDHR, *supra* note 10, at 71, arts. 7, 10, 13–14, 18–19, 21; ICCPR, *supra* note 10, at 52, arts. 12, 18–19, 21–22, 25–27.

141. Gulmira Imin v. China, *Working Group on Arbitrary Detention*, Opinion No. 29/2012, U.N. Doc. A/HRC/WGAD/2012/29, ¶ 27 (2012).

142. *Id.* (quoting *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2006/7, ¶ 43 (2006)).

143. Le Cong Dinh v. Vietnam, *Working Group on Arbitrary Detention*, Opinion No. 27/2012, U.N. Doc. A/HRC/WGAD/2012/27, ¶ 38 (2012); see also Gulmira Imin v. China, *Working Group on Arbitrary Detention*, Opinion No. 29/2012, U.N. Doc. A/HRC/WGAD/2012/29, ¶ 18 (2012). In 2009, Gulmira Imin's Uyghur-language website disseminated a video of clashes at a toy factory in China that resulted in the death of two Uyghur employees. *Id.* Ms. Imin was charged with "organizing the illegal trouble-making activities and intentionally caused serious vandalism crime" and was sentenced to life imprisonment. *Id.* ¶ 19. The Working Group found that the Chinese government failed to "show in a sufficiently specific and individualized manner the precise nature of the threat posed by Ms. Imin, and the necessity and proportionality of her detention and subsequent." *Id.* ¶ 33.

144. Li Chang v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1, at 25, ¶¶ 6–7 (2000); see also Ma Chunling v. China, *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/WGAD/2014/4, at 3–4, ¶¶ 18–24 (2014).

145. Li Chang v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1, at 25, ¶ 6 (2000).

146. Yuhui Zhang v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1, at 22, ¶¶ 5–6 (2000).

that detention on charges of disrupting social order and illegal demonstrations were similarly arbitrary in the absence of evidence that the specific practices in question were violent.¹⁴⁷ The right to peaceful religious advocacy also extends to distributing a letter critical of government policies,¹⁴⁸ handing out pamphlets,¹⁴⁹ and non-violent demonstrations for the right to attend university while adhering to the Islamic dress code.¹⁵⁰

2. Freedom of the Press and Expression is Guaranteed against Arbitrary Detention

The rights to freedom of expression and freedom of the press include not only the right to publish or broadcast, but also the right to be interviewed.¹⁵¹ The right to freedom of expression includes the right to publish interviews with members of an armed opposition group without openly endorsing its activities.¹⁵² It also incorporates non-traditional media such as music,¹⁵³ dance,¹⁵⁴ audio-visual expression,¹⁵⁵ and activities beyond actual publication such as preparations to launch a journal supporting literary freedom.¹⁵⁶

Additionally, these freedoms extend to expressions and publications that may oppose official government policy.¹⁵⁷ In 2012, the Working Group found that Thailand's *lèse majesté* laws suppress the national dialogue and

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147. Chen Gang v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1, at 43–44, ¶¶ 26–29 (2003); Li Ling and Pei Jilin v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6/Add.1 at 8, ¶¶ 9, 16 (2003).
 148. Thadeus Nguyen Van Ly v. Viet Nam, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2005/6/Add.1, at 4, ¶¶ 7, 20 (2003).
 149. Tran Van Luong v. Viet Nam, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1, at 62, ¶¶ 5–7, 14 (1999).
 150. Hüda Kaya v. Turkey, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1, at 108, ¶¶ 5, 16 (2000).
 151. For instance, on the Voice of America. Abbas Amir-Entezam v. Islamic Republic of Iran, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2002/77/Add.1, at 34, ¶ 5 (2000).
 152. Moti Biyya et al. v. Ethiopia, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1, at 75, ¶¶ 5–8, 11 (1999).
 153. Pierre Roger (alias Lapiro) Lambo Sandjo (alias Mbanga) v. Cameroon, *Working Group on Arbitrary Detention*, Opinion No. 32/2011, U.N. Doc. A/HRC/WGAD/2011/32, ¶¶ 25–26 (2011). The Working Group ruled that Mr. Lapiro de Mbanga's song criticizing the government, "Constipated Constitution," was "simply a political statement," and therefore his subsequent detention for inciting riots was arbitrary. *Id.*
 154. Ngawang Choephel v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1 at 78, 79, ¶ 8 (1999).
 155. Maksat Kakabaev v. Turkmenistan, *Working Group on Arbitrary Detention*, Opinion No. 5/2013, U.N. Doc. A/HRC/WGAD/2013/5, at 7, ¶ 45 (2013) (finding that the detention of two singers for appearing on foreign media violated their right to freedom of expression).
 156. Xue Deyun and Xiong Jinren v. China, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1, at 26, ¶¶ 5–9 (1999).
 157. Somyot Prueksakasemsuk v. Thailand, *Working Group on Arbitrary Detention*, Opinion No. 35/2012, U.N. Doc. A/HRC/WGAD/2012/35, ¶ 24 (2012).

violate the right to freedom of opinion and expression.¹⁵⁸ The Working Group has found similar laws that classify any criticisms of public officials as defamation to also violate an individual's right to freedom of expression, noting that "the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in public or political domain."¹⁵⁹

3. Security-Related Restrictions on the Right to Freedom of Expression Must Be Specifically Provided in Domestic Legislation, Absolutely Necessary in a Democratic Society, and Justified by the Need to Protect a Legitimate National Security Interest

Huang Qi v. China (2004) concerns a website, "Tianwang Web," which published articles on the 1989 demonstrations in Tiananmen Square.¹⁶⁰ The Chinese government shut down the site, operated by Mr. Qi, but it reappeared with articles on the Falun Gong. Mr. Qi denied responsibility for relaunching the site, but was charged with attempts to undermine the socialist system of China and sentenced to five years in prison.¹⁶¹ The Working Group required that any such restriction on freedom of expression be specifically defined in domestic legislation, be absolutely necessary in a democratic society, and be justified by the need to protect a legitimate national security interest.¹⁶² Mr. Qi's detention was considered arbitrary because the Chinese government failed to explain adequately how the threat caused by Mr. Qi's publications could have been so serious as to justify detention for the peaceful exercise of his right to freedom of expression.¹⁶³

Similarly, in 2010, Agnès Uwimana Nkusi, an editor of a bi-weekly independent newspaper in Rwanda, was arrested for publishing stories that criticized the Rwandan president and his government.¹⁶⁴ Ms. Uwimana was convicted of several charges, including endangering national security and

158. *Id.* ¶ 20. Lèse majesté laws are laws which penalize the expression or publication of criticisms of the king or royal family. *Id.*

159. Agnès Uwimana Nkusi v. Rwanda, *Working Group on Arbitrary Detention*, Opinion No. 25/2012, U.N. Doc. A/HRC/WGAD/2012/25, ¶ 58 (2012).

160. Huang Qi v. China, *Working Group on Arbitrary Detention*, Opinion No. 15/2004, U.N. Doc. E/CN.4/2005/6/Add.1 at 60, ¶ 7 (2004).

161. Proceedings were held *in camera*, in the Chengdu Intermediate Court of Sichuan. *Id.* ¶ 9–11. Huang Qi also reported that he was beaten, but the Chinese government denied beating Huang Qi. *Id.*

162. *Id.* ¶ 14. The Working Group also found the detention arbitrary if the text of relevant penal legislation was not provided. Syamak Pourzand v. Islamic Republic of Iran, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 45–46, ¶¶ 7–9 (2003).

163. Huang Qi v. China, *Working Group on Arbitrary Detention*, Opinion No. 15/2004, U.N. Doc. E/CN.4/2005/6/Add.1 at 60, ¶ 14. Huang Qi was released from prison in June 2005, but is now confined to his parents' home, three hours from his wife and children in Chengdu.

164. Agnès Uwimana Nkusi v. Rwanda, *Working Group on Arbitrary Detention*, Opinion No. 25/2012, U.N. Doc. A/HRC/WGAD/2012/25, ¶¶ 3, 11 (2012).

denying genocide.¹⁶⁵ In examining the Rwandan penal code's definition of "endangering national security," the Working Group stressed that any restrictions to an individual's fundamental freedoms may not be overbroad.¹⁶⁶ The Working Group concluded that the content of the articles in question qualified as opinions and not as expressions intended to undermine the national security of Rwanda.¹⁶⁷

Freedom of expression can be abused if exercised in a violent manner; when advocating national, racial, or religious hatred; or when inciting others to commit serious crimes such as genocide.¹⁶⁸ Conversely, membership in a society that does not advocate violence; war; national, racial, or religious hatred; or other practices prohibited under the Civil and Political Covenant, cannot justify detention.¹⁶⁹

4. Freedom of Religion and Freedom of Political Opinion are Protected against Arbitrary Detention with Release Conditioned on Renunciation

Detention may not be used to coerce renunciation of one's religion. In *Pa Tood et al. v. Lao People's Democratic Republic* (2000), at least twenty-five Laotian Christian evangelists were arrested in the Savannakhet, Champassak, and Attapoeu provinces. The Laotian authorities offered them freedom if they signed a declaration renouncing Christianity.¹⁷⁰ The Working Group found that the government's actions constituted a violation of the rights to freedom of expression and freedom of thought, conscience, and religion under Articles 9, 10, 18, and 19 of the Universal Declaration.¹⁷¹ The prohibition against detention conditioned on renunciation is extended to political opinion in *Shahadeh et al. v. Syrian Arab Republic* (2004).¹⁷² Similarly, release from arbitrary detention may not be conditioned on one's promising not to register a new political party.¹⁷³

165. *Id.* ¶ 9.

166. *Id.* ¶ 57.

167. *Id.*

168. *Jigme Gyatso v. China*, *Working Group on Arbitrary Detention*, Opinion No 8/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 67, ¶¶ 5–7, 15, 17 (2000).

169. *Id.* ¶ 16.

170. *Pa Tood v. Lao People's Democratic Republic*, *Working Group on Arbitrary Detention*, Opinion No. 26/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 127, ¶¶ 5–7 (2000). The detainees' families were also driven from their village on the grounds that believers in Jesus were not allowed to settle there. *Id.* ¶ 8.

171. *Id.* ¶ 12. This finding was not defeated by the government's counter-allegations of illegal contact with foreigners, and failure to follow the rules of the government and the Communist Party. *Id.* ¶ 11.

172. *Mohammad Shahadeh v. Syrian Arab Republic*, *Working Group on Arbitrary Detention*, Opinion No. 6/2004, U.N. Doc. E/CN.4/2005/6/Add.1, at 39, ¶¶ 7, 12 (2004).

173. Unless the party has the aim or practice of engaging in propaganda for war or non-peaceful assembly. *Wang Youcai v. China*, *Working Group on Arbitrary Detention*, Opinion No. 21/1999, U.N. Doc. E/CN.4/2000/4/Add.1, at 85, 86, 88, ¶¶ 6, 18–19 (2003).

5. *Freedom of Expression and Association Incorporates the Right to Peacefully Advocate for other Human Rights*

Freedom of expression as guaranteed under the Universal Declaration, Articles 18 and 19, extends to peaceful advocacy for other rights, such as freedom of speech, freedom of the press, and freedom of religion.¹⁷⁴ Peaceful advocacy includes the right to perform academic research on minority groups,¹⁷⁵ the right to proclaim a hunger strike,¹⁷⁶ and the right to advocate for individual victims of human rights abuses.¹⁷⁷ It is a violation of international human rights standards to characterize specific allegations of human rights abuses as state secrets for which disclosure would make one criminally liable.¹⁷⁸

Freedom of association incorporates the right to associate with other peaceful advocates, including human rights defenders, journalists, writers, leaders of opposition political movements, dissident social leaders, and trade union leaders.¹⁷⁹ Peaceful advocacy of economic rights, such as workers' rights, is also protected.¹⁸⁰

The Working Group applies a higher standard of review to the detention of individuals considered to be human rights defenders.¹⁸¹ For example, in 2012, the Working Group undertook an intense review following Ethiopia's detention of Eskinder Nega, a known publicist, blogger, and human rights worker.¹⁸² The Working Group's analysis found that Ethiopia's definitions of

174. Liu Xiaobo v. China, *Working Group on Arbitrary Detention*, Opinion No. 17/1999, U.N. Doc. E/CN.4/2000/4/Add.1, at 72, ¶¶ 5, 9 (1999).

175. Tohti Tunyaz v. China, *Working Group on Arbitrary Detention*, Opinion No. 7/2001, U.N. Doc. E/CN.4/2002/77/Add.1, at 50, ¶¶ 16–19, 23 (2000). Taunyaz was charged both with disclosing state secrets and with collecting materials for the purpose of publishing a book aimed at ethnic separation. *Id.* ¶ 11.

176. Khemais Ksila v. Tunisia, *Working Group on Arbitrary Detention*, Opinion No. 5/1999, U.N. Doc. E/CN.4/2000/4/Add.1, at 37, 38, 39, ¶¶ 10, 16 (2000).

177. Li Hai v. China, *Working Group on Arbitrary Detention*, Opinion No. 19/1999, U.N. Doc. E/CN.4/2000/4/Add.1, at 78, 80, ¶¶ 5–7, 13 (1999). Freedom of expression also protects peaceful advocacy for individuals accused of terrorist attacks. Makhbuba Kasymova v. Uzbekistan, *Working Group on Arbitrary Detention*, Opinion No. 32/2000, U.N. Doc. E/CN.4/2002/77/Add.1, at 10, ¶¶ 5–6, 10 (1999).

178. Rebiya Kadeer v. China, *Working Group on Arbitrary Detention*, Opinion No. 30/2000, U.N. Doc. E/CN.4/2002/77/Add.1 at 5, ¶ 10 (2000).

179. Nelson Aguiar Ramírez v. Cuba, *Working Group on Arbitrary Detention*, Opinion No. 9/2003, U.N. Doc. E/CN.4/2004/3/Add.1 at 47, 52, 54–56, ¶¶ 6, 14–16, 26 (2003). The case involved seventy-nine members of the Varela Project, which the Cuban government characterized as conceived, funded, and directed by the United States. *Id.* ¶ 15; see also Leonardo Miguel Bruzón Ávila v. Cuba, *Working Group on Arbitrary Detention*, Opinion No. 17/2003, U.N. Doc. E/CN.4/2004/3/Add.1, at 87, ¶ 7 (2003).

180. Yao Fuxin v. China, *Working Group on Arbitrary Detention*, Opinion No. 15/2002, U.N. Doc. E/CN.4/2004/3/Add.1, at 3, ¶¶ 5–7 (2003); Liu Xianbin and Li Bifeng v. China, *Working Group on Arbitrary Detention*, Opinion No. 12/2003, U.N. Doc. E/CN.4/2004/3/Add.1 at 67, ¶¶ 5–8, 10–11, 23 (2003).

181. Eskinder Nega v. Ethiopia, *Working Group on Arbitrary Detention*, Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62, ¶ 39 (2012).

182. *Id.*

criminal offenses were overly broad and that detaining Mr. Nega constituted arbitrary detention.¹⁸³

6. Detention for Pro-Democracy Views or Participation in a Peaceful Independence Movement is Arbitrary

Liu Xianbin, a leading member of the China Democratic Party, was sentenced to thirteen years imprisonment in 1999 for “incitement to subvert State power.”¹⁸⁴ Following his release in 2008, Mr. Xianbin continued his activism and published articles on human rights and democracy.¹⁸⁵ In 2010, Mr. Xianbin was arrested again for the same offense as before and was later found guilty of the charges.¹⁸⁶ The Working Group found Mr. Xianbin’s detention arbitrary because it was based solely upon the peaceful exercise of his right to freedom of opinion and expression.¹⁸⁷ In a 2004 case concerning Georgia, the Working Group found that detention intended to intimidate an election monitor is similarly arbitrary.¹⁸⁸

In *Filep Jacob Semuel Karma v. Indonesia* (2011), Mr. Karma was arrested for participating in a symbolic ceremony related to the Papuan independence movement.¹⁸⁹ The Working Group found that Mr. Karma’s detention, based solely on his participation in a peaceful flag raising ceremony, was arbitrary.¹⁹⁰ In 2000, the Working Group similarly found that China engaged in arbitrary detention of peaceful protestors demonstrating for Tibetan independence.¹⁹¹ The Working Group noted that defining peaceful protests as an offense in itself contravened Articles 19 and 20 of the Universal Declaration.¹⁹²

183. *Id.* ¶ 40.

184. Liu Xianbin v. China, *Working Group on Arbitrary Detention*, Opinion No. 23/2011, U.N. Doc. A/HRC/WGAD/2011/23, ¶ 4 (2011). The Working Group found Liu Xianbin’s 1999 detention arbitrary. *Id.*; see also Liu Xianbin and Li Bifeng v. China, *Working Group on Arbitrary Detention*, Opinion No. 12/2003, U.N. Doc. E/CN.4/2004/3/Add.1, at 67, ¶¶ 5–8, 10–11, 23 (2003).

185. *Id.* ¶ 5.

186. *Id.* ¶¶ 6–7.

187. *Id.* ¶¶ 24–26.

188. Giorgi Mshvenieradz v. Georgia, *Working Group on Arbitrary Detention*, Opinion No. 2/2004, U.N. Doc. E/CN.4/2005/6/Add.1, at 28, ¶¶ 9–10 (2004).

189. Filep Jacob Semuel Karma v. Indonesia, *Working Group on Arbitrary Detention*, Opinion No. 48/2011, U.N. Doc. A/HRC/WGAD/2011/48, ¶ 5 (2011).

190. *Id.* ¶ 24. The Indonesian government did not respond to these allegations.

191. Ngawang Sandrol v. China, *Working Group on Arbitrary Detention*, Opinion No. 28/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 134, ¶¶ 13–17 (2000).

192. *Id.* ¶ 15. The Working Group also found arbitrary detention in response to raising the Tibetan flag and shouting slogans. Phuntsok Legmon and Namdrol v. China, *Working Group on Arbitrary Detention*, Opinion No. 19/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 99, ¶¶ 8–9 (2000).

7. *Detention for Violation of Politically Imposed Travel Restrictions is Arbitrary*

In *U Tun Win et al. v. Myanmar* (1999), a number of National League for Democracy office holders were detained during the night of 25 June 1998, and only released after pledging not to leave their respective municipalities.¹⁹³ The Working Group found the actions of the Myanmar government constituted a restriction of liberty and that any detention based upon violation of that restriction was arbitrary.¹⁹⁴

8. *Re-Education through Labor is Arbitrary Detention if Ordered in Response to Peaceful Exercise of Fundamental Freedoms*

The Working Group addressed the issue of re-education through labor in *Zhou Guoqiang v. China* (1998).¹⁹⁵ Mr. Guoqiang was sentenced to three years of re-education for disturbing the public order after selling t-shirts with antigovernment slogans.¹⁹⁶ The Working Group found that Mr. Guoqiang's deprivation of freedom constituted arbitrary detention, violating his right to nonviolent expression.¹⁹⁷

C. Category III: Deprivation of Liberty Resulting From Violations of the Right to Fair Trial

Even when an underlying basis for an individual's detention exists and that basis does not violate international standards, the Working Group may still find the detention arbitrary based on a violation of the individual's right to fair trial. According to Article 9, Paragraphs 3 and 4, of the Civil and Political Covenant, 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 a right to have a court decide "without delay on the lawfulness of his detention."¹⁹⁸ Article 14 of the Covenant also provides that an individual has the right to a "fair and public hearing by a competent, independent and impartial tribunal

193. U Tun Win et al. Myanmar, *Working Group on Arbitrary Detention*, Opinion No. 3/1999, U.N. Doc. E/CN.4/2000/4/Add.1 at 32 (1999).

194. *Id.* ¶ 11.

195. Zhou Guoqiang v. China, *Working Group on Arbitrary Detention*, Opinion No. 30/1998, U.N. Doc. E/CN.4/2000/4/Add.1, at 21 (1998).

196. *Id.* ¶ 5.

197. *Id.* ¶¶ 9–11. Because re-education was applied to "minor" offenders who were not required to be formally prosecuted, the Working Group also found the practice arbitrary under category III, gross violation of the right to fair trial. *Id.* ¶ 9, citing the Working Group's China visit report, U.N. Doc. E/CN.4/1998/44/Add.2.

198. ICCPR, *supra* note 10, at 52, art. 9(3–4).

established by the law,” as well as the right to a presumption of innocence until proven guilty and other minimum due process guarantees.¹⁹⁹

Detention may be considered arbitrary even if the individual was not “‘convicted as a result’ of the violations of his rights.”²⁰⁰ In considering violations of an individual’s right to fair trial, the Working Group determines whether the violations were of “such gravity as to give the deprivation of liberty an arbitrary character.”²⁰¹

1. Irregular Detention Locations

When an individual is apprehended, he or she need not be held in an official detention center to be considered detained for the purposes of the Working Group’s mandate. In the opinions discussed below, the Working Group has concluded that deprivation of freedom is considered detention even in irregular locations.

a. Secret Detention is in itself a Violation of the Right to Fair Trial, but Brief Periods of Incommunicado Detention may be Lawfully Authorized in Exceptional Circumstances such as Terrorism and Conspiracy

In *Zhou Yung Jun v. China* (2011), the Working Group held that secret detention is “irreconcilably in violation of international human rights law, including during states of emergency and armed conflict.”²⁰² Under *Mikel Egibar Mitxelena v. Spain* (1999), however, brief periods of up to three days of incommunicado detention may be authorized under exceptional circumstances, as specified in lawful regulation, when considered indispensable by a judicial or other authority in order to maintain security and good order.²⁰³

199. *Id.* art. 14 (1–3). Article 14 (3) 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 defence 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.” *Id.*

200. Dmitri Pavlov v. Azerbaijan, Working Group on Arbitrary Detention, Opinion No. 22/2011, U.N. Doc. A/HRC/WGAD/2011/22, ¶ 45 (2011).

201. *Id.*

202. Zhou Yung Jun v. China, Working Group on Arbitrary Detention, Opinion No. 29/2011, U.N. Doc. A/HRC/WGAD/2011/29, at 5, ¶ 30 (2011).

203. Mikel Egibar Mitxelena v. Spain, Working Group on Arbitrary Detention, Opinion No. 26/1999, U.N. Doc. E/CN.4/2001/14/Add.1 at 9, ¶ 10 (1999) (citing the ICCPR, art. 9, ¶ 3, the Working Group found a 72-hour time period to be within the bounds of what can be considered “prompt”). In case involving extremely serious terrorism-related charges, a forty-eight-hour extension of this period, under judicial control and with medical supervision to avoid torture, was not considered to constitute arbitrary detention. *Id.* ¶ 9.

b. House Arrest Constitutes a Qualified Deprivation of Liberty if in Closed and Locked Premises which Cannot be Left Without Authorization

A formal prison environment is not necessary for a finding of arbitrary detention.²⁰⁴ House arrest may constitute a sufficient deprivation of liberty, but only if the person concerned is placed in closed premises that cannot be left without authorization.²⁰⁵ The Working Group has ruled that it will determine on a case by case basis whether the characteristics of a given instance of house arrest amount to a form of detention.²⁰⁶ For example, in 2007, after Myanmar's authorities prevented opposition leader Aung San Suu Kyi from leaving her home in Rangoon and having any contact with the outside world, the Working Group determined the situation to be house arrest.²⁰⁷ The Working Group also determined that house arrest was taking place when Chinese security agents prevented people from entering the home of Liu Xia, the wife of democracy advocate Liu Xiaobo. The Chinese authorities only allowed her to leave the house for short escorted trips; they also cut off her access to telephones and the Internet.²⁰⁸

c. Administrative Detention that is Penal Because of its Purpose, Character, or Severity is Deprivation of Liberty Requiring Guarantees of a Fair Trial

The Working Group considers any detention that is criminal in nature, even if it is classified as administrative under domestic law, as requiring the international guarantees of a right to fair trial.²⁰⁹ In November 2003, Pakistan deported thirteen students to Malaysia, where they were immediately detained as a threat to national security under Sections 73(1) and 73(8) of the

204. Jaweed Al-Ghusein v. Palestinian Authority, Opinion No. 31/2001, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2003/8/Add.1 at 44 (2001).

205. Thich Huyen Quang v. Viet Nam, *Working Group on Arbitrary Detention*, Opinion No. 4/2001, U.N. Doc. E/CN.4/2002/77/Add.1, at 43, ¶¶ 8–10 (2001).

206. *Report of the Working Group on Arbitrary Detention*, Deliberation No. 1, U.N. Doc. E/CN.4/1993/24, at 9, ¶ 20 (1993).

207. Ms. Aung San Suu Kyi v. Myanmar, *Working Group on Arbitrary Detention*, Opinion No. 2/2007, U.N. Doc. A/HRC/7/4/Add.1 at 56 (2007).

208. Liu Xia v. China, *Working Group on Arbitrary Detention*, Opinion No. 16/2011, U.N. Doc. A/HRC/WGAD/2011/16 at 2, ¶ 7 (2011). The Working Group references a 1996 ruling by the International Criminal Tribunal for the former Yugoslavia, in which the court determined that house arrest constituted detention under international law and was subject to the same guarantees as detention in a prison facility. *Id.* ¶ 16 (citing ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, 3 Apr. 1996, ¶¶ 19–24).

209. Umar Farooq Shaikh v. India, *Working Group on Arbitrary Detention*, Opinion No. 45/2012, U.N. Doc. A/HRC/WGAD/2012/45 at 3, ¶ 15 (2012).

Internal Security Act of 1960.²¹⁰ The Act allows detention for up to sixty days without trial, extendible by the Home Minister indefinitely.²¹¹ The Working Group found such administrative detention, despite being in conformity with domestic law, to constitute a serious contravention of international norms guaranteeing the right to fair trial.²¹² In a 2002 case involving the United States, the Working Group similarly found the prolonged fourteen month administrative detention of an alleged “material witness” arbitrary.²¹³ In *’Abla Sa’adat et al. v. Israel* (2004), the Working Group issued a finding of arbitrary detention despite Israel’s express derogations from its Civil and Political Covenant responsibilities under a prolonged “state of emergency.”²¹⁴

2. Unnecessary Detention During the Judicial Process

As a general rule, a person awaiting trial should not be held in custody, although release can be subject to conditions, such as bail, to guarantee appearance at trial.²¹⁵ The Working Group provided that one instance in which pretrial detention may be allowed is “in the case of international crimes or, in national legal systems, of extremely grave crimes.”²¹⁶ The Working Group, however, supports the standard of the European Court of Human Rights, which indicates that the severity of the crime is only relevant when the facts of the case demonstrate that the release of the detainee threatens public order. Furthermore, a detention only remains legitimate if the individual

210. The students were accused of being groomed for leadership in the Jemaah Islamiyah. *Muhammad Radzi bin Abdul Razak v. Malaysia*, Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2005/6/Add.1, at 49, ¶ 6 (2004).

211. *Id.*

212. *Id.* ¶ 12.

213. Ayub Ali Khan and Azmath Jaweed v. United States of America, *Working Group on Arbitrary Detention*, Opinion No. 21/2002, U.N. Doc. E/CN.4/2004/3/Add.1, at 20, 21–22, ¶¶ 14–17 (2002); Mahmoud Mubarak Ahmad v. Egypt, *Working Group on Arbitrary Detention*, Opinion No. 15/1999, U.N. Doc. E/CN.4/2000/4/Add.1 at 68, 69, ¶¶ 9–10 (1999). See also Özgür v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, Opinion No. 33/2000, U.N. Doc. E/CN.4/2002/77/Add.1, at 13, ¶ 12 (2000) (finding Category III violation for detention without warrant, charge, or trial).

214. *’Abla Sa’adat et al. v. Israel*, *Working Group on Arbitrary Detention*, Opinion No. 3/2004, U.N. Doc. E/CN.4/2005/6/Add.1, at 30, ¶¶ 31, 34–35 (2004). The United Nations Human Rights Committee found Israel’s “sweeping measures” to extend beyond what would be permissible even under the Covenant, art. 4, ¶ 1. *Id.*, citing U.N. Doc. CCPR/CO/78/ISR, ¶ 12; see also ICCPR, *supra* ICCPR, note 10, at 52, art. 9(1) (“In time of public emergency which threatens the life of the nation . . . the States Parties to the present ICCPR may take measures derogating from their obligations.”).

215. Azharul Islam v. Bangladesh, *Working Group on Arbitrary Detention*, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/66, ¶ 47 (2012). See also U.N. Human Rights Committee, *General Comment No. 8: Right to Liberty and Security of Persons*, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.7 (30 June 1982) [hereinafter HRC GC 8] (stating that “pretrial detention should be an exception”).

216. *Report of the Working Group on Arbitrary Detention, Legal analysis of allegations against the International Criminal Tribunal for the Former Yugoslavia*, Deliberation No. 6 U.N. Doc. E/CN.4/2001/14, ¶ 23 (2000).

continues to be a threat to public order.²¹⁷ The prosecution has the burden of convincing the court not to release the individual on bail.²¹⁸

Since detention while awaiting trial should be the exception rather than the rule, any individual deprived of her liberty should “promptly” be brought before a judicial authority.²¹⁹ “Promptly” should be considered to mean within the first few days following detention.²²⁰ In *Santhathevan Ganesharatnam v. Sri Lanka* (2013), the Working Group found that Mr. Ganesharatnam’s pretrial detention of thirty months far exceeded the acceptable reasonable time period.²²¹ Additionally, the Working Group noted that Sri Lanka’s laws, which allowed up to eighteen months detention without charge, represented a *prima facie* case of arbitrary detention. The Working Group warned Sri Lankan authorities that all officials are responsible for preventing arbitrary detention and that gross violations of an individual’s right to a fair trial could amount to a crime against humanity.²²² In the case of armed insurrection, however, pretrial detention of sixteen months after charges had been filed did not necessarily constitute arbitrary detention.²²³

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217. Azharul Islam v. Bangladesh, *Working Group on Arbitrary Detention*, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/66, ¶ 49 (2012) (quoting European Court of Human Rights, *Tomasi v. France*, App. No. 12850/87, Judgment of 27 Aug. 1992, ¶ 91, (1992)).
218. Azharul Islam v. Bangladesh, *Working Group on Arbitrary Detention*, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/66, ¶ 50 (2012). Bangladesh’s pre-trial detention of Messrs. Islam, Azam, and Ali—who were all charged with violating Bangladesh’s International Crimes (Tribunal) Act 1973—amounted to arbitrary detention. *Id.* ¶ 54. The Working Group came to this conclusion because the prosecution did not meet its burden of justifying an exception to the rule. *Id.* ¶¶ 53–54. The Working Group rejected the comparison of the Bangladeshi domestic international war crimes tribunal to international criminal tribunals—where the burden is to the accused to show why he or she qualifies for pre-trial release—because, unlike international tribunals, the Bangladeshi tribunal had the power to execute arrest warrants and to rearrests the individual if needed. *Id.* ¶ 51.
219. Crispin Mumango v. Burundi, *Working Group on Arbitrary Detention*, Opinion No. 66/2012, U.N. Doc. A/HRC/WGAD/2012/18, ¶ 13 (2012).
220. *Id.*
221. Santhathevan Ganesharatnam v. Sri Lanka, *Working Group on Arbitrary Detention*, Opinion No. 9/2013, U.N. Doc. A/HRC/WGAD/2013/9, ¶¶ 25–28 (2013).
222. *Id.* ¶¶ 34–40. See also Gunasundaram Jayasundaram v. Sri Lanka, *Working Group on Arbitrary Detention*, Opinion No. 38/2012, U.N. Doc. A/HRC/WGAD/2012/38 ¶ 33 (2012); Pathmanathan Balasingam et al. v. Sri Lanka, *Working Group on Arbitrary Detention*, Opinion No. 26/2012, U.N. Doc. A/HRC/WGAD/2012/26 ¶ 25 (2012); Jegasothy Thamotharampillai et al. v. Sri Lanka, *Working Group on Arbitrary Detention*, Opinion No. 49/2011, U.N. Doc. A/HRC/WGAD/2011/49 (2011).
223. The Working Group indicated that the period of detention between charge and trial might be unreasonable, but did not find arbitrary detention. Mohammed Abdillahi God v. Djibouti, *Working Group on Arbitrary Detention*, Opinion No. 14/2002, U.N. Doc. E/CN.4/2003/8/Add.1 at 98–99, ¶¶ 8, 17–18 (2002). A one-year detention without formal charges was found arbitrary in a case involving freedom of political expression on the web, under category II and category III. Di Liu v. China, *Working Group on Arbitrary Detention*, Opinion No. 25/2003, U.N. Doc. E/CN.4/2005/6/Add.1 at 23, ¶¶ 5–9 (2003).

3. *The Right to Legal Counsel is Guaranteed*

The Working Group consistently affirms the right to counsel.²²⁴ Access to counsel includes the right to communicate with a lawyer promptly following arrest.²²⁵ Additionally, individuals should be able to communicate confidentially with their lawyers.²²⁶ In Turkey's prosecution of the alleged plotters of a military coup in 2010—the so-called “Sledgehammer” cases—the government placed microphones throughout the courtroom, enabling its agents to listen to the private conversations between defendants and their attorneys.²²⁷

The right to counsel also includes freedom of choice of counsel.²²⁸ The right to access counsel can be violated if attorneys are discouraged by government authorities from representing a specific individual. In Belarus, the first attorney representing Andrei Sannikov (a detained opposition politician and civil rights activist) was disbarred after publically raising concerns regarding the treatment of his client.²²⁹ The Working Group found that this act violated Mr. Sannikov's right to effective legal assistance.²³⁰

It may be a grave violation of the right to a fair trial to deny defense counsel access to relevant documents or to bar defense counsel from effectively representing clients in closed hearings.²³¹ For a finding of arbitrary detention, however, the right to counsel must be actively denied; failure of a defendant to request counsel is not grounds for a claim of arbitrary

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224. See, e.g., *Naji Azziz Harb v. Syrian Arab Republic*, *Working Group on Arbitrary Detention*, Opinion No. 20/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 101, ¶ 10 (2000); *Mohammad Shahadeh et al. v. Syrian Arab Republic*, *Working Group on Arbitrary Detention*, Opinion No. 6/2004, U.N. Doc. E/CN.4/2005/6/Add.1 at 39, ¶ 10 (2004); See also *U Pa Pa Lay v. Myanmar*, *Working Group on Arbitrary Detention*, Opinion No. 38/2000, U.N. Doc. E/CN.4/2002/77/Add.1 at 32, ¶ 9 (2000).
225. *Gaybullo Jalilov v. Uzbekistan*, *Working Group on Arbitrary Detention*, Opinion No. 4/2013, U.N. Doc. A/HRC/WGAD/2013/4, ¶ 62. Mr. Jalilov was not allowed to meet with his lawyer until over two months after his arrest. *Id.* ¶ 78. See also Opinions adopted by the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/10/21/Add.1, Opinion No. 14/2008 (Uzbekistan) at 137, ¶ 40 (2008).
226. “Sledgehammer” cases (Turkey), *Working Group on Arbitrary Detention*, Opinion No. 6/2013, U.N. Doc. A/HRC/WGAD/2013/6, ¶ 77 (2013).
227. *Id.* ¶ 77. The “Sledgehammer” cases in Turkey were the arrest and trial of 365 individuals accused of involvement in the alleged “‘Sledgehammer’ Coup Plot.” *Id.* ¶ 6. The Working Group also found the right to confidential communication with an attorney was violated when public officials were present at all meetings between the individual and his attorney. *Jason Zachary Puracal v. Nicaragua*, *Working Group on Arbitrary Detention*, Opinion No. 10/2012, U.N. Doc. A/HRC/WGAD/2012/10, ¶¶ 28–30 (2012).
228. *Jaramani Najib Youcef v. Syrian Arab Republic*, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3/Add.1 at 64, ¶ 13 (2000); *José Alexander v. Indonesia*, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2000/4/Add.1 at 58, 61, ¶ 18 (1999).
229. *Andrei Sannikov v. Belarus*, *Working Group on Arbitrary Detention*, Opinion No. 14/2012, U.N. Doc. A/HRC/WGAD/2012/14 at 3, ¶ 10 (2012).
230. *Id.* at 6, ¶ 38.
231. *Id.* at 3, 6, ¶¶ 12–14, 38–39.

detention.²³² In the case of foreign detainees, the right of access to consular services is similarly guaranteed.²³³

4. *Improper Admittance or Handling of Evidence During Trial*

Once a trial has begun, an individual's right to a fair trial may be violated if evidence presented against him or her is improperly admitted. Such improper evidence could have been obtained in violation of international standards or have been improperly handled. The right to a fair trial can also be violated if inappropriate emphasis is placed on specific evidence, for example, or by the application of an incorrect burden of proof.

a. *Detention on the Basis of Evidence Extracted under Torture or Coerced by Threat of Force is Arbitrary*

Admitting statements as evidence that were obtained through torture or other ill treatment "renders the proceedings as a whole unfair."²³⁴ In *Ilhom Ismailovich Ismonov v. Tajikistan* (2013), Tajik authorities found that there had been an improper delay during which Mr. Ismonov did not have an opportunity to appear in front of a judicial officer for over a week after his arrest, and the investigating officers were disciplined for this mistake.²³⁵ This mistake, however, "deprived [Mr. Ismonov] of important safeguards against torture and ill-treatment and of consultation with legal counsel."²³⁶ Since the court recognized this mistake, it erred by allowing a confession of "partial guilt" obtained during that period to be admitted and heavily relied upon by the prosecution in the proceedings against Mr. Ismonov.²³⁷ In a 2001 case concerning Uzbekistan, the Working Group found that a confession obtained in order to stop the torture of a family member is similarly sufficient for a finding of arbitrary detention.²³⁸

232. Mikel Egibar Mitxelena v. Spain, *Working Group on Arbitrary Detention*, Opinion No. 26/1999, U.N. Doc. E/CN.4/2001/14/Add.1 at 9, ¶¶ 11–13 (1999).

233. James Mawdsley v. Myanmar, *Working Group on Arbitrary Detention*, Opinion No. 25/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 124, ¶ 10 (2000), citing the Vienna Convention on Consular Relations, 596 U.N.T.S. 261, (*entered into force* 19 Mar. 1967).

234. Abdallah Hamoud Al-Twijri v. Iraq, *Working Group on Arbitrary Detention*, Opinion No. 43/2012, U.N. Doc. A/HRC/WGAD/2012/43, ¶ 51 (2012).

235. Ilhom Ismailovich Ismonov v. Tajikistan, *Working Group on Arbitrary Detention*, Opinion No. 11/2013, U.N. Doc. A/HRC/WGAD/2013/11 at 4, ¶ 57 (2013).

236. *Id.* ¶ 58.

237. *Id.* ¶¶ 58–59. See also Mohamed Hajib v. Morocco, *Working Group on Arbitrary Detention*, Opinion No. 40/2012, U.N. Doc. A/HRC/WGAD/2012/40, ¶¶ 36–48 (finding that Mr. Hajib was "arrested, charged, judged and convicted on the basis of the confessions obtained under torture" and that Morocco's judicial system's over emphasis on confessions encouraged such practices).

238. Munavar and Ismail Hasanov v. Uzbekistan, *Working Group on Arbitrary Detention*, Opinion No. 1/2001, U.N. Doc. E/CN.4/2002/77/Add.1 at 36, ¶¶ 5, 8 (2001).

Individuals also have a “right not to be compelled to testify against oneself or to confess guilt”; confessions extracted through torture may not be the sole basis for an individual’s detention.²³⁹ Additionally, confessions must be made in the presence of legal counsel, especially confession made in police custody, or they are not admissible as evidence in criminal proceedings.²⁴⁰

b. Imprisonment for Incitement to Criminal Activity by Authorities Amounts to Arbitrary Detention

In 2013, the Working Group issued an opinion concerning the case of Denis Matveyev, the head of a civil society organization working to combat corruption in Russia. Mr. Matveyev was asked on three separate occasions to purchase a small quantity of heroin on behalf of supposed drug addicts, who were actually undercover police officers.²⁴¹ Mr. Matveyev gained no personal benefit from these transactions, but was aware of the withdrawal symptoms associated with heroin use and therefore used the entirety of the money given to him to obtain the drugs from the contact who he was instructed to approach.²⁴² The Working Group relied on European Court of Human Rights rulings on similar Russian cases and concluded that Russia had violated Mr. Matveyev’s right to fair trial by basing his conviction on actions of the authorities that “did not confine themselves to investigating [the defendant’s] alleged criminal activity in a passive manner, but rather incited the commission of the offence.”²⁴³

c. Unequal Application of Standards and Evidentiary Burdens Amounts to a Violation of the Right to a Fair Trial

In 2012, the Working Group determined that the judicial authorities in Mexico disregarded the principle of presumption of innocence in the trial of Sánchez Ramírez.²⁴⁴ The trial judge disregarded the many discrepancies in the testimony of the police and government officers while simultaneously

239. *Tagi al-Maidan v. Bahrain, Working Group on Arbitrary Detention, Opinion No. 1/2014, U.N. Doc. A/HRC/WGAD/2014/1, ¶ 18 (2014).*

240. *Id.* ¶ 22. (“The right not to be compelled to testify against oneself or to confess guilt and access to counsel and legal aid are not only measures intended for the protection of the interests of the individual, but also measures in the interest of society as a whole of the trust in and the effectiveness of the judicial process and of the reliability of evidence.”)

241. *Denis Matveyev v. Russia, Working Group on Arbitrary Detention, Opinion No. 8/2013, U.N. Doc. A/HRC/WGAD/2013/8, ¶¶ 6–12 (2013).*

242. *Id.* ¶¶ 14–15.

243. *Id.* ¶¶ 68–70 (citing European Court of Human Rights, *Khudobin v. Russia*, App. No. 59696/00, Judgment of 26 Oct. 2006, ¶ 133; European Court of Human Rights, *Vanyan v. Russia*, App. No. 53203/99, Judgment of 15 Dec. 2005, ¶ 49).

244. *Hugo Sánchez Ramírez v. Mexico, Working Group on Arbitrary Detention, Opinion No. 33/2012, U.N. Doc. A/HRC/WGAD/2012/33, ¶ 18 (2012).*

ignoring the defendant's statements, which were consistent at all times.²⁴⁵ The Working Group found that the trial judge's actions illustrated "unequal application of standards and criteria to the parties."²⁴⁶

5. *Improper Trial Procedures and Court Settings May Constitute a Violation of the Right to Fair Trial*

a. *Non-public Trial Can Be a Violation of the Minimal Norms for a Fair Trial*

In *Muhammad Kaboudvand v. Iran* (2012), Mr. Kaboudvand, the founder of a democracy and human rights organization, was arrested and tried in a closed trial.²⁴⁷ The judges claimed the trial was closed in order to protect public morals.²⁴⁸ The Working Group considered this justification unrelated to Mr. Kaboudvand's case and found that the process of a closed trial violated Mr. Kaboudvand's right to a fair trial.²⁴⁹ This determination contrasts with *Igor Sutyagin v. Russian Federation* (2001), in which a closed-door trial on the charge of disseminating nuclear secrets was not in itself sufficient to give rise to a claim of arbitrary detention.²⁵⁰

b. *The Right to Fair Trial Includes the Right to be Present at One's Trial and to Provide a Full Defense*

In *Abassi Madani and Ali Benhadj v. Algeria* (2001), the Working Group held that international instruments, including the Civil and Political Covenant, guaranteed the right to be present at one's trial.²⁵¹ In the case of an accused minor, this right extends to the minor's family as well.²⁵² Additionally, in *Liu Xiaobo v. China* (2011), Mr. Xiaobo was only provided with fourteen minutes to present his defense, despite the complexity of the charges against him.²⁵³ The Working Group identified this lack of time as a "breach of fairness,"

245. *Id.*

246. *Id.* ¶ 39.

247. *Muhammad Kaboudvand v. Iran*, *Working Group on Arbitrary Detention*, Opinion No. 48/2012, U.N. Doc. A/HRC/WGAD/2012/48 ¶¶ 3–7 (2012).

248. *Id.* ¶ 7.

249. *Id.* ¶ 21.

250. *Igor Sutyagin v. Russian Federation*, *Working Group on Arbitrary Detention*, Opinion No. 14/2001, U.N. Doc. E/CN.4/2002/77/Add.1, at 70, ¶¶ 7, 16 (2001).

251. *Abassi Madani and Ali Benhadj v. Algeria*, *supra* note 25, at 36, ¶ 24 (iii); *see also* ICCPR, *supra* note 10, at 52, art. 14(3)(d) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality. . . . To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.").

252. *Maung Chan Thar Kyaw v. Myanmar*, *Working Group on Arbitrary Detention*, Opinion No. 16/2004, U.N. Doc. E/CN.4/2005/6/Add.1, at 64, ¶ 11 (2004).

253. *Liu Xiaobo v. China*, *Working Group on Arbitrary Detention*, Opinion No. 15/2011, U.N. Doc. A/HRC/WGAD/2011/15, at 4, ¶ 23 (2011).

and therefore found that Mr. Xiaobo was arbitrarily deprived of his liberty due to violation of his right to a fair trial.²⁵⁴

c. Trial by a Tribunal that is Not Competent, Independent, and Impartial, Constitutes a Grave Violation of the Right to Fair Trial

The right to fair trial requires a competent, independent, and impartial tribunal.²⁵⁵ Infringement on the presumption of innocence constitutes doubt of impartiality and thus violates the guarantee.²⁵⁶ For example, when Raúl Leonardo Linares Amundaray was tried in Venezuela for killing a home intruder for self-defense, the judge hearing the case was a “personal friend of the father of the deceased.”²⁵⁷ In 2012, the Working Group found that this connection violated Mr. Linares Amundaray’s right to an independent and impartial judge.²⁵⁸

The Working Group has also found that a violation of an individual’s right to a competent, independent, and impartial tribunal occurs when a civilian is inappropriately tried before a military tribunal. In *Hana Yahya Shalabi v. Israel* (2012), the Working Group found that Ms. Shalabi had been denied her right to fair trial by being tried in a military court which “lack[ed] transparency and adversarial procedure.”²⁵⁹

d. Faceless Courts Constitute a Violation of the Right to Fair Trial

Lori Berenson, a US citizen, was arrested in Peru during an armed clash with members of the Tupac Amaru Revolutionary Movement, and then convicted of treason by a “faceless” military court.²⁶⁰ In a 1998 opinion, the Working Group found that faceless courts, particularly military courts—the decisions of which cannot be challenged and which hand down judgments following secret hearings with minimal defense guarantees—constitute a serious violation of the rules of due process.²⁶¹ Trial before faceless judges, whether

254. *Id.*

255. Former Captain Mustapha Adib v. Morocco, *Working Group on Arbitrary Detention*, Opinion No. 27/2001, U.N. Doc. E/CN.4/2003/8/Add.1 at 27, 30, ¶ 20 (2001), citing ICCPR, *supra* note 10, at 52, art. 14(1).

256. Former Captain Mustapha Adib v. Morocco, *supra* note 255, at 29, ¶ 19.

257. Raúl Linares Amundaray v. Bolivarian Republic of Venezuela, *Working Group on Arbitrary Detention*, Opinion No. 28/2012, U.N. Doc. A/HRC/WGAD/2012/28, at 4, ¶ 26 (2012).

258. *Id.*

259. Hana Yahya Shalabi v. Israel, *Working Group on Arbitrary Detention*, Opinion No. 20/2012, U.N. Doc. A/HRC/WGAD/2012/20, ¶ 26 (2012); see also 12 individuals v. Egypt, *Working Group on Arbitrary Detention*, Opinion No. 10/2014, U.N. Doc. A/HRC/WGAD/2014/10, ¶¶ 15–24 (2014).

260. Lori Berenson v. Peru, *Working Group on Arbitrary Detention*, Decision No. 26/1998, U.N. Doc. E/CN.4/2000/4/Add.1 at 12, 16, ¶ 6 (1998).

261. *Id.* at 13, ¶¶ 6–7.

military or civilian, without any guarantee of independence or impartiality, infringes upon due process and confers an arbitrary character to the detention of the accused.²⁶²

6. *The Rights to Prompt Trial and Appeal are Guaranteed*

Prolonged detention without trial violates international norms guaranteeing the right to a fair trial.²⁶³ The right to appeal one's sentence, furthermore,²⁶⁴ is guaranteed even against a sentence declared final.²⁶⁵

7. *Retroactive Application of Criminal Legislation Constitutes a Violation of the Right to Fair Trial*

Eleuterio Zárate Luján was detained under Peruvian Decree Law 25,659 of 13 August 1992, in connection with a terrorist attack committed before the law became effective.²⁶⁶ The Working Group found this retroactive application of this law constituted a flagrant violation of Article 15 of the Civil and Political Covenant, as well as Article 11, Paragraph 2 of the Universal Declaration.²⁶⁷ Mr. Luján's detention was thus deemed arbitrary.²⁶⁸

D. Category IV: Prolonged Administrative Custody of Asylum Seekers, Immigrants, or Refugees

The Commission on Human Rights first requested the Working Group to consider the situation of immigrants and asylum seekers being held in ad-

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262. Edilberto Aguilar Mercedes v. Peru, *Working Group on Arbitrary Detention*, Opinion No. 29/2000, U.N. Doc. E/CN.4/2002/77/Add.1 at 3, ¶¶ 9–10 (2000). Peru's practice of faceless trials was reformed in Oct. 1997. Carlos Florentino Molero Coca v. Peru, *Working Group on Arbitrary Detention*, Opinion No. 24/1998, U.N. Doc. E/CN.4/2000/4/Add.1, at 8, ¶ 6 (1998).
263. The detainees in question were held without trial for ten years. Fateh Jamus and Issam Dimashqi v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, Opinion No. 21/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 104, ¶ 15 (2000). Note that shorter detentions without warrant, charge, or trial were held arbitrary under category I. See *supra* § III(A)(1).
264. Naji Azziz Harb v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, Opinion No. 20/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 101, ¶ 10 (2000); Mohammad Shahadeh et al. v. Syrian Arab Republic, *Working Group on Arbitrary Detention*, Opinion No. 6/2004, U.N. Doc. E/CN.4/2005/6/Add.1, at 39, ¶ 10 (2004).
265. U Pa Lay v. Myanmar, *Working Group on Arbitrary Detention*, Opinion No. 38/2000, U.N. Doc. E/CN.4/2002/77/Add.1, at 32, ¶ 9 (2000).
266. Eleuterio Zárate Luján v. Peru, *Working Group on Arbitrary Detention*, Opinion No. 11/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 75, ¶¶ 5, 11–12, 14 (2000).
267. *Id.* ¶ 11. The practice can also be characterized as a violation of the prohibition against *ex post facto* laws (especially criminal laws). U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1.
268. Luján v. Peru, *Working Group on Arbitrary Detention*, Opinion No. 11/2000, U.N. Doc. E/CN.4/2001/14/Add.1 at 75, ¶ 11.

ministrative detention in 1997.²⁶⁹ The Working Group has since concluded that holding an undocumented immigrant or asylum seeker in administrative custody for excessive periods of time, without justifying the need for detention and without proper facilities, is an arbitrary detention.²⁷⁰

1. Denial of Asylum does not in itself Give Rise to a Claim of Arbitrary Detention, if the Subsequent Detention is not Open-Ended and is Subject to Periodic Review

The proper denial of asylum does not by itself give rise to a claim of arbitrary detention.²⁷¹ Subsequent detention should not, however, be open-ended and should be subject to periodic review.²⁷² In order to avoid arbitrarily detaining an undocumented immigrant, governmental authorities must promptly bring the individual before an authority, whether judicial or other.²⁷³ The individual must receive a decision regarding his or her custody based on criteria established in legitimately created laws and detention must not be for an unlimited or excessive period of time.²⁷⁴ The detention must also be in a facility that separates undocumented immigrants from individuals detained under the State's criminal laws. Alternatives to detention must be used where possible.²⁷⁵ Finally, the individual must receive an explanation of any custodial measures, including the process for applying for judicial remedy, in a language that he or she understands.²⁷⁶ Additionally, governments should only use detention as a last resort for attempting to establish the identities and nationalities of asylum seekers and undocumented im-

269. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. No. A/HRC/7/4, ¶ 41 (10 Jan. 2008).

270. *Id.*

271. The person in question was denied asylum, then arrested several years later for overstaying his visa. *William Agyegyam v. United Kingdom of Great Britain and Northern Ireland*, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1, at 15, ¶¶ 5, 7–9 (1999).

272. Typically, the period in question is that between denial of asylum and subsequent deportation. *Pedro Katunda Kambangu v. Lithuania*, *Working Group on Arbitrary Detention*, Opinion No. 24/2000, U.N. Doc. E/CN.4/2001/14/Add.1, at 119, ¶ 9–13, 21 (1999). In this event, Kambangu's detention was not found arbitrary. *Id.* ¶ 23. However, the Working Group did find that the four and a half year detention of a Somali citizen, who was liable for removal which was delayed due to security concerns in his country of origin, was arbitrary due to excessive length. *Mustafa Abdi v. United Kingdom*, *Working Group on Arbitrary Detention*, Opinion No. 45/2006, U.N. Doc. A/HRC/7/4/Add.1, at 40, ¶¶ 17, 31 (2006).

273. *Mustafa Abdi v. United Kingdom*, *Working Group on Arbitrary Detention*, Opinion No. 45/2006, U.N. Doc. A/HRC/7/4/Add. 1, 40, ¶ 27 (2006).

274. *Id.* ¶¶ 27–32.

275. *Id.*

276. *Id.* In addition to these criteria, the Working Group also noted that “[w]here the chances of removal within a reasonable period are remote, a Government's obligation to seek alternatives to detention becomes pressing.” *Id.* ¶ 25.

migrants.²⁷⁷ Furthermore, expulsion should only be conducted in a humane manner and with full respect for international norms and the individual's human dignity.²⁷⁸

2. States Should Not Criminalize Irregular Migrants

Raúl García was held in detention in Barbados for three years past the completion of his twenty-year sentence for drug related charges.²⁷⁹ Mr. García remained in detention awaiting deportation, however Cuba, his country of birth, refused to accept him.²⁸⁰ In 2013, the Working Group noted that if Mr. García was classified as stateless, then he could not be deported and expelled.²⁸¹ Furthermore, the Working Group determined that if his deportation could not be achieved within a reasonable period, he must be released unless he poses a national security or public order threat.²⁸² The Working Group concluded that migrants in an "irregular situation must not be regarded as criminals."²⁸³

a. Harsh and Disproportionate Immigration Bond or Denial of Parole may Constitute Arbitrary Detention

Mohammed Bousloub, an Algerian citizen, was convicted of petty theft in the United States and sentenced to four months of imprisonment.²⁸⁴ Bousloub was to be deported at the end of his term, but Algeria failed to allow his repatriation and thus he remained in US custody detained for failure to post bond in the amount of \$20,000 (USD).²⁸⁵ In 1999, the Working Group found the bond to be both harsh and disproportionate, in view of the means and status of the accused, which itself rendered his detention arbitrary.²⁸⁶

Bousloub must be compared with *Severino Puentes Sosa v. United States of America* (1999) and *César Manuel Guzmán Cruz v. United States*

277. *Id.* ¶ 25.

278. Referring to the European Court of Human Rights' jurisprudence, the Working Group found that detention is only justified when deportation proceedings are in progress. *Zaza Yambala v. Switzerland*, *Working Group on Arbitrary Detention*, Opinion No. 4/2011, U.N. Doc. A/HRC/WGAD/2011/4, ¶ 17 (2011). For Mr. Yambala, the Working Group found that two years had been sufficient time for Switzerland to expel him and that the subsequent expulsion of Mr. Yambala was unlikely, therefore Mr. Yambala should be released from detention. *Id.* ¶ 26.

279. Raúl García v. Barbados, *Working Group on Arbitrary Detention*, Opinion No. 2/2013, U.N. Doc. A/HRC/WGAD/2013/2, ¶ 21 (2013).

280. *Id.* ¶ 25.

281. *Id.* ¶ 23.

282. *Id.* ¶ 25.

283. *Id.* ¶ 22.

284. Mohamed Bousloub v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1, at 34, ¶ 5 (1999).

285. *Id.* ¶¶ 11, 19.

286. The fact that Bousloub could have appealed the bond was not sufficient to defeat the finding of arbitrary detention. *Id.* ¶¶ 19–20.

of America (1999).²⁸⁷ Like Bousloub, Sosa and Cruz completed criminal sentences but could not be repatriated because their home country refused to accept them.²⁸⁸ Cruz, although convicted of second-degree murder, was found arbitrarily detained because the government did not sufficiently justify its denial of parole after his sentence was completed.²⁸⁹ Sosa, on the other hand, was not found to be arbitrarily detained because he had the benefit of regular, fair, and impartial parole hearings. He also had a serious criminal record as a result of his repeated parole violations.²⁹⁰ When denial of parole appears to have no justification, it may constitute arbitrary detention even if it occurs before the end of a detainee's criminal sentence.²⁹¹

b. If Prolonged Administrative Detention is due to the Legitimate Exercise of Recourses and Appeals, it is not Arbitrary

Thai officials arrested Vatcharee Pronsivakulchai in 2000 and extradited her to the United States for alleged drug crimes.²⁹² Once in the United States, Ms. Pronsivakulchai agreed to work with the US Drug Enforcement Agency and the charges against her were dropped.²⁹³ She then remained in administrative detention awaiting her return to Thailand according to the extradition agreement between the United States and Thailand.²⁹⁴ Ms. Pronsivakulchai applied for asylum in the United States and subsequently appealed the negative decision twice.²⁹⁵ In its opinion, the Working Group reaffirmed the general principle that asylum seekers should not be detained, but found that, in Ms. Pronsivakulchai's case, her detention was based on her pending extradition to face drug charges in Thailand. Furthermore, the

287. Severino Puentes Sosa v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 28 (1999); César Manuel Guzmán Cruz v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2001/14/Add.1 at 38 (1999). Note the distinction from Humberto Alvarez Machaín v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/1994/27, 135 (1993), which is the case associated with Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

288. Sosa v. United States, U.N. Doc. E/CN.4/2001/14/Add.1 at 28, ¶ 11; César Manuel Guzmán Cruz v. United States, U.N. Doc. E/CN.4/2001/14/Add.1 at 38, ¶ 18; see also Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

289. Cruz v. United States, U.N. Doc. E/CN.4/2001/14/Add.1, at 38, ¶ 18–19.

290. Sosa v. United States, U.N. Doc. E/CN.4/2001/14/Add.1, at 28, ¶ 25.

291. Jan Borek v. United States of America, *Working Group on Arbitrary Detention*, Opinion No. 34/2000, U.N. Doc. E/CN.4/2002/77/Add.1, at 16, ¶¶ 18–24 (2000). Note also that *Borek* does not appear to rest upon the detainees' immigrant status. *Id.*

292. Vatcharee Pronsivakulchai v. United States of America, *Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/10/21/Add.1, at 68, ¶¶ 26–27 (2009).

293. *Id.*

294. *Id.*

295. *Id.* ¶¶ 7–8. See also Pronsivakulchai v. Gonzales, 461 F.3d 903 (7th Cir. 2006); Pronsivakulchai v. Holder, 646 F.3d 1019 (7th Cir. 2011).

length of the detention was due to her “legitimate exercise of all possible recourses and appeals.”²⁹⁶

E. CATEGORY V: DEPRIVATION OF LIBERTY AS A VIOLATION OF INTERNATIONAL ANTI-DISCRIMINATION STANDARDS

International law prohibits discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁹⁷ Therefore, if deprivation of liberty is due to reasons of discrimination on any of these grounds, then it amounts to arbitrary detention.

1. Religious Discrimination Cannot be Justified as Combating Terrorism

Detention for terrorism cannot be used as a pretense for religious persecution.²⁹⁸ Gaybullo Jalilov, an Uzbek human rights activist whose work focused on the persecution of independent Muslims, was arrested for and convicted of religious extremism, including “terrorism, incitement of ethnic, racial or religious hatred. . . [and] direction of or participation in a religious extremist, separatist, fundamentalist or other banned organization.”²⁹⁹ In 2013, the Working Group found that the Uzbek government had not provided evidence of a link between Mr. Jalilov and any extremist organization or a call to violence.³⁰⁰ Therefore, Mr. Jalilov was deemed arbitrarily detained for being a practicing Muslim and for criticizing the Uzbek government’s treatment of Muslims.³⁰¹

2. Detention on Account of Sexual Orientation is Arbitrary

In May 2001, Egyptian officials arrested approximately fifty men during a raid on the Queen Boat discotheque, moored on the Nile River in Cairo.³⁰² The government denied that the men were detained on account of their sexual orientation, but charged them instead with immoral behavior and contempt of religion.³⁰³ The Working Group found that all but two of the men were prosecuted for homosexuality.³⁰⁴ The Working Group then found that

296. Vatcharee Pronsivakulchai v. United States of America, *supra* note 292, ¶¶ 25, 28–29.

297. ICCPR, *supra* note 10, at 52, art. 26; *see also* UDHR, *supra* note 10, at 71, art. 2, 7.

298. Gaybullo Jalilov v. Uzbekistan, *Working Group on Arbitrary Detention*, Opinion No. 4/2013, U.N. Doc. A/HRC/WGAD/2013/4, ¶¶ 69–76 (2013).

299. *Id.* ¶¶ 4–14.

300. *Id.* ¶ 73.

301. *Id.* ¶ 74.

302. Yasser Mohamed Salah v. Egypt, *Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2003/8/Add.1, at 69, ¶ 5 (2002).

303. *Id.* ¶¶ 5–8.

304. *Id.* at 71 ¶ 25.

Article 26 of the Civil and Political Covenant applied to sexual orientation as well as biological sex (in agreement with other United Nations human rights bodies) and that detention on account of homosexuality was therefore arbitrary under both the Covenant (Article 2, Paragraphs 1 and 26) and the Universal Declaration (Article 2, Paragraph 1).³⁰⁵

IV. CONCLUSION

Over the past two decades, the Working Group has addressed a broad range of issues related to arbitrary detention. Through its investigation of individual complaints, as well as its deliberations and reports addressing broad trends, the Working Group has interpreted existing international standards, applicable to government detention of individuals, with increasing precision.

Furthermore, while the Working Group's proceedings are not intended to approach the formality and rigor of a court of law, it can fairly be said that the Working Group's objectivity and incrementalism have built credibility in the international human rights community. Recent Working Group opinions, especially in high profile cases, have received public attention and international media coverage as persuasive indicators that the detentions under discussion were of questionable legal validity.³⁰⁶ NGOs and other organizations have used the Working Group's involvement in specific cases to put pressure on governments and to draw public attention to the plight of individuals they seek to free from detention.³⁰⁷

Additionally, the Working Group has managed to maintain its relevance by responding with flexibility to changes in the global geopolitical environment. For example, as discussed above, the global increase in refugees and irregular immigrants held in prolonged administrative custody led the Working Group to create a new category of arbitrary detention to require that such individuals are offered meaningful redress. Similarly, the Working Group concluded that the detention of individuals as a result of their sexual

305. *Id.* at 72–73 ¶¶ 27–28. Note that the Working Group did not classify arbitrary detention on account of sexual orientation under any of the three categories.

306. See, e.g., Oliver Holmes, *UN Group Condemns Malaysia's "Arbitrary" Detention of Anwar Ibrahim*, *THE GUARDIAN* (2 Nov. 2015), available at <http://www.theguardian.com/world/2015/nov/02> (reporting WGAD Opinion that opposition leader, Anwar Ibrahim, was arbitrarily detained and tortured).

307. Joby Warrick, *Washington Post Petitions U.N. to Help Free Journalist Held in Iran*, *WASH. POST*, 22 Jul 2015, available at <http://www.washingtonpost.com/world> (reporting petition to WGAD seeking release of Washington Post journalist, Jason Rezaian, detained by Iran); Edward Wong, *U.N. Rights Group Calls on China to Release Lawyer*, *N.Y. TIMES*, 28 Mar. 2011, available at <http://www.nytimes.com/2011/03/29/world/asia/29china.html> (reporting WGAD Opinion that prominent Chinese human rights lawyer, Gao Zhisheng, was arbitrarily detained and noted that the story was brought to the attention of the press through a public statement issued by China Human Rights Defenders).

orientation or membership in other protected classes merits a separate category of arbitrary detention to address such discrimination.

As the Working Group continues to address the proper conditions, procedures, and justifications for deprivation of liberty, hopefully state actors will feel obliged to respond in a more engaged manner to the Working Group's opinions. Furthermore, the authors hope that NGOs and public and private institutions will more effectively utilize the Working Group's resources to bring attention to the problem of arbitrary detention, as well as to protect individuals whose rights have been violated. If the Working Group continues to gain acceptance as an authoritative international arbiter of the legality of detention by states, it may be able to make an even greater contribution to the global effort to eliminate arbitrary detention.

APPENDIX ONE: MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION³⁰⁸

[A separate questionnaire must be completed for each case of alleged arbitrary arrest or detention. As far as possible, all details requested should be given. Nonetheless, failure to do so will not be necessarily result in the inadmissibility of the communication.]

I. IDENTITY

- 1. Family name:
- 2. First name:
- 3. Sex: (Male) (Female)
- 4. Birth date or age (at the time of detention):
- 5. Nationality/Nationalities:.....
- 6. (a) Identity document (if any):
- (b) Issued by:
- (c) On (date):
- (d) No.:
- 7. Profession and/or activity (if believed to be relevant to the arrest/detention):
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.....
- 8. Address of usual residence:
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.....

308. *Model Questionnaire to be Completed by Persons Alleging Arbitrary Arrest of Detention*, OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, available at http://www.ohchr.org/Documents/Issues/Detention/WGADQuestionnaire_en.pdf.

ARREST

[For the purpose of this questionnaire, "arrest" refers to the initial act of apprehending a person. "Detention" means and includes detention before, during and after trial. In some cases, only section II, or section III may be applicable. Nonetheless, whenever possible, both sections should be filled in. III.]

1. Date of arrest:.....

2. Place of arrest (as detailed as possible):

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.....
.....
.....

3. Forces who carried out the arrest or are believed to have carried it out:

.....
.....
.....

4. Did they show a warrant or other decision by a public authority?

(Yes) (No).....

5. Authority who issued the warrant or decision:

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.....
.....

6. Relevant legislation applied (if known):

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DETENTION

[For the purpose of this questionnaire, “arrest” refers to the initial act of apprehending a person. “Detention” means and includes detention before, during and after trial. In some cases, only section II, or section III may be applicable. Nonetheless, whenever possible, both sections should be filled in.]

1. Date of detention:

2. Duration of detention (if not known, probable duration):

.....

3. Forces holding the detainee under custody:

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.....
.....

4. Places of detention (indicate any transfer and present place of detention):

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.....

5. Authorities that ordered the detention:

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.....

6. Reasons for the detention imputed by the authorities:

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7. Relevant legislation applied (if known):

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IV. Describe the circumstances of the arrest and/or the detention and indicate precise reasons why you consider the arrest or detention to be arbitrary.

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V. Indicate internal steps, including domestic remedies, taken especially with the legal and administrative authorities, particularly for the purpose of establishing the detention and, as appropriate, their results or the reasons why such steps or remedies were ineffective or why they were not taken.

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VI. Full name and address of the person(s) submitting the information (telephone and fax number, if possible).**

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.....

Date: Signature:

**If a case is submitted to the Working Group by anyone other than the victim or his family, such person or organization should indicate authorization by the victim or his family to act on their behalf. If, however, the authorization is not readily available, the Working Group reserves the right to proceed without the authorization. All details concerning the person(s) submitting the information to the Working Group, and any authorization provided by the victim or his family, will be kept confidential.