

# PLEASE, SET ME FREE! THE RIGHT TO CHALLENGE AN UNLAWFUL DETENTION: SCRUTINIZING THE PRACTICE OF THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

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## ABSTRACT

*This research scrutinized a total of 350 documents of the United Nations Working Group on Arbitrary Detention (WGAD), whose main mandate concerns the investigation of information and communications from individuals arbitrarily deprived of their liberty by state agents, judicially or administratively, in violation of international human rights standards. This paper furnishes an overview of the problem of arbitrary detention worldwide. In analyzing the general framework of the right to challenge the lawfulness of a detention, this paper analyzed procedural issues, such as fair trial, equality of arms, burden of proof and military justice, as well as material issues, such as the rights of the arrested person, torture and rights of arrested children.*

**KEYWORDS:** Arbitrary Detention, Unlawful Detention, Fair Trial, Rights of the Subject

## I INTRODUCTION

“Mr. Al-Rifa’i was arrested and held incommunicado for more than three months and endured torture and ill-treatment that included restricting his breathing by placing a plastic bag over his head, applying electric shocks to his body parts, including his genitals, and threatening him and his family with rape. Mr. Al-Rifa’i was convicted and sentenced to 15 years’ imprisonment based on his “confession” extracted under torture and testimonies presented in a trial during which his lawyer was not allowed to challenge the accusation against Mr. Al-Rifa’i, to cross-examine the prosecution’s witnesses or to call his own witnesses.”<sup>1</sup>

The right to liberty and to security of the person comprise the backbone of a democratic society. Nevertheless, states’ agents arbitrarily detain a multitude of persons every year, including an alarming number of children. Most of these arbitrarily arrested persons are detained because they have peacefully exercised rights protected by international human rights instruments. They are often detained under multiple and/or wide imprecise offences/charges. Many of them are held incommunicado and in solitary confinement, without the opportunity to challenge the accusations. Police personnel force detainees to confess to crimes they may not be guilty of. The UN Working Group on Arbitrary Detention documents demonstrates that there is a systematic pattern of intolerance of states towards their subjects. When states arbitrarily detain people,

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<sup>1</sup> A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20.

they breach norms of International Law, International Human Rights Law, customary norms, as well as norms of *Jus Cogens* nature. These sources of law provide the state's subjects an effective right under those instruments to promptly challenge the lawfulness/arbitrariness of a detention before a competent judicial authority.

The right to challenge the lawfulness/arbitrariness of a detention is a self-standing international human right. It comprises the right to a fair trial, and the right to equality of arms with all the judicial/procedural guarantees that arise from it, such as presumption of innocence, due process and legal assistance. As a corollary, every person has the right to make claims before a judge to learn about the charges he is being taken to custody and to rebut them in a court.

The objective of this paper is to scrutinize the issue of arbitrary detention from the perspective of the United Nations Working Group on Arbitrary Detention, which was established by Resolution E/CN.4/RES/1991/42 of the United Nations Commission on Human Rights on 5 March 1991.<sup>2</sup> The Working Group main mandate was established as to receive and investigate information and communications from individuals arbitrarily deprived of their liberty by state agents, judicially or administratively, in violation of international human rights standards.

This research scrutinized a total of 350 (three hundred and fifty) documents of Working Group with the objective of understanding the current state of the problem of arbitrary detention, both factually as well as legally.<sup>3</sup> In analyzing the general framework of the right to challenge the lawfulness of a detention, this paper analyzed procedural issues, such as fair trial, equality of arms, burden of proof and military justice, as well as material issues, such as the rights of the arrested person, torture and rights of arrested children. This paper gives an overview of the Working Group's jurisprudence and their interpretations of the international and regional human rights instruments, binding frameworks, soft law, guiding principles, customary International Human Rights Law, International Humanitarian Law and *Jus Cogens* norms.<sup>4</sup>

Two crucial caveats must be made. The first is a material one and the second one is technical. The first refers to the use of the term "arrest" and "detention". The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*<sup>5</sup> indicates that "arrest" refers to the act of apprehending a person and that "detention" refers to the *condition* of a detained person. Despite this, for the exclusive purpose of understanding the current state of the problem of arbitrary detention, this paper considered the terms as interchangeable. It did so because the Working Group itself extensively use these terms as interchangeable in numerous Opinions, Methods of Work, Communications to Governments, Urgent Appeals and Reports.

As for the second caveat, it refers to the citation of Opinions of the Working Group. The full citation of Opinions in the footnotes would turn the reading of this paper impractical due to two reasons: the massive number of cited Opinions and the extensive length of each of these Opinions reference calls.<sup>6</sup> Hence, the Opinions in the footnotes

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<sup>2</sup> Question of arbitrary detention, Commission on Human Rights, U.N. Doc. E/CN.4/RES/1991/42 (March 5, 1991).

<sup>3</sup> See appendices.

<sup>4</sup> See III General Framework.

<sup>5</sup> Body of principles for the protection of all persons under any form of detention or imprisonment, U.N.Comm.H.R., 34th Sess., Resolution, U.N. Doc. E/CN.4/RES/19 (XXXIV) (March 7, 1978).

<sup>6</sup> In this respect, this paper is not AGLC compliant.

contain only: the United Nation Documentation Code, the Opinion number and the year of its publication. For the full citation of all the Opinions, please refer to the appendices.

## II ARBITRARY DETENTION – A SYSTEMATIC PATTERN OF STATES’ INTOLERANCE

Amongst those arbitrarily detained include an alarming number of children. Most of these persons under arbitrary detention face difficult and overly extensive conditions in pre-trial detention.<sup>7</sup> These include ill-treatment with different and painful types of physical and psychological torture, such as suffocations, beatings, electric shocks, sexual molestation, rape and threats to their families.<sup>8</sup> These also include state officers searching their houses and confiscating their personal belongings without cause.<sup>9</sup>

Opinion of the Working Group reveal that many are secretly detained and/or are held incommunicado and in solitary confinement, without the opportunity to challenge the accusations, to cross-examine witnesses and/or to be brought before a judge.<sup>10</sup> Police officers prevent them from having access to their lawyers or to communicating with their families.<sup>11</sup> Police authorities also monitor private telephone calls of those few who are shortly allowed to contact their relatives.<sup>12</sup> Under duress, torture and death threats, police personnel force these arrested persons to confess to crimes they may not be guilty of or may not have committed.<sup>13</sup> Commonly, authorities force “confessions” to create a public spectacle.<sup>14</sup> Some of these prisoners “are rarely released even after they have finished serving their sentence”.<sup>15</sup> Some of them are killed and their whereabouts remain unknown.<sup>16</sup> All of this, demonstrates an ongoing and systematic pattern of intolerance of states officials against the persons under their jurisdiction.<sup>17</sup>

The underlying reasons and motivations for such systemic arbitrariness vary enormously. The common thread, however, is widely documented: Most of the persons are detained because they have peacefully exercising the rights protected by the Universal Declaration of Human Rights<sup>18</sup> (the Universal Declaration; the Declaration)

<sup>7</sup> A/HRC/WGAD/2012/62. Opinion No. 62/2012. ¶ 35; A/HRC/WGAD/2017/83. Opinion No. 83/2017. ¶ 7.

<sup>8</sup> A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 19.b; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20; A/HRC/WGAD/2014/23. Opinion No. 23/2014. ¶ 22; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20; A/HRC/WGAD/2016/47. Opinion No. 47/2016. ¶ 90; A/HRC/WGAD/2017/33. Opinion No. 33/2017. ¶ 4.

<sup>9</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 20; A/HRC/WGAD/2012/53. Opinion No. 53/2012. ¶ 15.  
<sup>10</sup> A/HRC/WGAD/2014/23. Opinion No. 23/2014. ¶ 22; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶¶ 9, 20; A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 23; A/HRC/WGAD/2016/47. Opinion No. 47/2016. ¶ 90; A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17; A/HRC/WGAD/2017/33. Opinion No. 33/2017. ¶ 4.

<sup>11</sup> A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20; A/HRC/WGAD/2015/29. Opinion No. 29/2015. ¶ 9.

<sup>12</sup> A/HRC/WGAD/2017/83. Opinion No. 83/2017. ¶ 7.

<sup>13</sup> A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 19.b; A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 23; A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17.

<sup>14</sup> A/HRC/WGAD/2017/83. Opinion No. 83/2017. ¶ 13.

<sup>15</sup> A/HRC/WGAD/2015/29. Opinion No. 29/2015. ¶ 8.

<sup>16</sup> A/HRC/WGAD/2017/83. Opinion No. 83/2017. ¶ 6.

<sup>17</sup> A/HRC/WGAD/2012/53. Opinion No. 53/2012. ¶ 19; A/HRC/WGAD/2017/9. Opinion No. 9/2017. ¶ 22.

<sup>18</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

the International Covenant on Civil and Political Rights (the Covenant; the ICCPR).<sup>19</sup> Upon a detailed scrutiny of the context of these arbitrary arrests and detentions, it is possible to identify six groups of the most targeted persons in such circumstances: 1) Persons directly involved in the peaceful defense of human rights and specific human rights causes; 2) Persons peacefully exercising their right to freedom of expression; 3) Persons involved in the peaceful transformation of states' structures; 4) Persons involved in the peaceful defense of democracy and political activism; 5) Persons peacefully participating in anti-government demonstrations; and 6) Persons peacefully exercising their right to freedom of religion.

Within the jurisprudence of the United Nations Working Group on Arbitrary Detention, the reasons given by states who carry out arbitrary detention vary substantively. Although some states argue that situations of national security and the combat of terrorist threats usually require a more energetic response, they do not possess a *carte blanche* to arrest and detain persons under these overly broad, vague and imprecise grounds. Persons arrested under vague charges are commonly accused by states' agents of perpetrating conspiracy acts, such as: Promotion of "forceful overthrow by unlawful means of the political regime";<sup>20</sup> Anti-state propaganda by disseminating false news; Dissemination of materials detrimental to public order; Incitement of disobedience of the law; Incitement of hatred against governments; Espionage; Treason; Agitation; Subversion; Incitement of sedition; Intimidation; Criminal calling for unauthorized public demonstrations and gatherings; Participation in peacefully protests of public defense of human rights; Participation in terrorist organizations and in terrorist activities; Offense of apostasy against the official religion of the state; Reprisal for leaving the country. This non-democratic practice constitutes a challenge for ensuring effective implementation of human rights worldwide.

### III GENERAL FRAMEWORK

#### A *The Scope and Definition of the Right to Challenge the Lawfulness/Arbitrariness of Detention*

Respect for the right to liberty and the right of security of the person is the cornerstone of a democratic society. This liberty, however, is not absolute. According to international legal standards, such liberty may be subjected to restrictions.<sup>21</sup> States enjoy a wide margin of discretion in the choice of their penal policies.<sup>22</sup> Nevertheless, by resorting to the use of coercive measures against individuals states are required each and every time to: 1) ensure that the right to liberty of persons is uninterruptedly respected against arbitrariness under the territories of states' jurisdiction and/or effective control, and 2) ensure that the arrest/detention being carried out is lawful, reasonable, necessary

<sup>19</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; A/HRC/WGAD/2012/65. Opinion No. 65/2012. ¶ 34; A/HRC/WGAD/2015/3. Opinion No. 3/2015. ¶ 19 and 21; A/HRC/WGAD/2016/2. Opinion No. 2/2016. ¶ 38; A/HRC/WGAD/2016/7. Opinion No. 7/2016. ¶ 48; A/HRC/WGAD/2017/48. Opinion No. 48/2017. ¶ 6.

<sup>20</sup> A/HRC/WGAD/2014/34. Opinion No. 34/2014. ¶ 26.

<sup>21</sup> A/HRC/WGAD/2018/37. Opinion No. 37/2018. ¶ 37.

<sup>22</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 72.

and proportionate to the aim sought by the states.<sup>23</sup>

The right to challenge the lawfulness of detention “is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment.”<sup>24</sup> This right also contains a judicial remedy to “determine the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty.”<sup>25</sup> This right shall be accessible to every person to challenge the lawfulness of an arrest/detention, including the victim, his or her legal representatives, and their next of kin.<sup>26</sup>

The right to liberty and security of the person, as well as the effective right to challenge the lawfulness/arbitrariness of a detention before a competent judicial authority, are widely recognized in international and regional human rights instruments in a myriad of forms, such as binding frameworks, soft law, guiding principles, customary International Human Rights Law, International Humanitarian Law and/or *Jus Cogens* norms.<sup>27 28</sup> Arbitrary detention manifestly violates all these following legal instruments:<sup>29</sup>

- (1) The United Nations Universal Declaration of Human Rights (1948), Articles 3, 9, and 10;<sup>30</sup>
- (2) The United Nations Convention relating to the Status of Refugees (1951), Article 26;<sup>31</sup>
- (3) The United Nations Standard Minimum Rules for the Treatment of Prisoners (the

<sup>23</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 29; A/HRC/WGAD/2012/54. Opinion No. 54/2012. ¶ 36; A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 15; A/HRC/WGAD/2014/44. Opinion No. 44/2014. ¶ 28; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 41; A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 48; A/HRC/WGAD/2016/48. Opinion No. 48/2016. ¶ 46; Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 72.

<sup>24</sup> *Ibid* ¶ 2; Principle 1.

<sup>25</sup> *Ibid* ¶ 2.

<sup>26</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 10.

<sup>27</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). ¶ 1.

<sup>28</sup> “The right to challenge the lawfulness of detention before court is enshrined in all of the major regional human rights treaties, including the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, the Arab Charter on Human Rights and the European Convention on Human Rights. It is also captured in non-binding regional instruments, such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Guidelines on Conditions of Police Custody and Pretrial Detention in Africa, the American Declaration of the Rights and Duties of Man, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and the ASEAN Human Rights Declaration. Furthermore, it been the subject of interpretation by the African Commission on Human and Peoples’ Rights, the InterAmerican Court of Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights.”: Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 49.

<sup>29</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 55.

<sup>30</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>31</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS. 137.

- Nelson Mandela Rules) (1955), Rule 7;<sup>32</sup>
- (4) The United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 5.d.i;<sup>33</sup>
  - (5) The United Nations International Covenant on Civil and Political Rights (1966), Article 9;<sup>34</sup>
  - (6) The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Articles 6.3, and 6.4;<sup>35</sup>
  - (7) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985), Rules 2, and 12;<sup>36</sup>
  - (8) The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), Principles 2-5;<sup>37</sup>
  - (9) The United Nations Convention on the Rights of the Child (1989), Article 37.b;<sup>38</sup>
  - (10) The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Article 16;<sup>39</sup>
  - (11) The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), Rules 11.b, 12, 14, and 17;<sup>40</sup>
  - (12) The United Nations Convention on the Rights of Persons with Disabilities (2006), Article 14;<sup>41</sup> and
  - (13) The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (2015), Principle 1.<sup>42</sup>

The scope of the term *lawful* “is not only a question of legal definition” at domestic law.<sup>43</sup> It is so because, even when an arrest/detention complies with the domestic legislation – domestic legal definition, it has to equally comply with International

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<sup>32</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016).

<sup>33</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 UNTS 195.

<sup>34</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>35</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

<sup>36</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), U.N.G.A., 96<sup>th</sup> plenary meeting, Resolution, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

<sup>37</sup> Body of principles for the protection of all persons under any form of detention or imprisonment, U.N.Comm.H.R., 34<sup>th</sup> Sess., Resolution, U.N. Doc. E/CN.4/RES/19(XXXIV) (March 7, 1978).

<sup>38</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3.

<sup>39</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N.G.A., 69<sup>th</sup> plenary meeting, Resolution, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

<sup>40</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, U.N.G.A., 68<sup>th</sup> plenary meeting, Resolution, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

<sup>41</sup> Convention on the Rights of Persons with Disabilities, U.N.G.A., 61<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

<sup>42</sup> Human Rights Council. Working Group on Arbitrary Detention, 30<sup>th</sup> Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015).

<sup>43</sup> A/HRC/WGAD/2018/37. Opinion No. 37/2018. ¶ 25; A/HRC/WGAD/2012/54. Opinion No. 54/2012. ¶ 36.

Human Rights Law – international legal definition.<sup>44</sup> The reasons for such compliance are twofold:

*First*, regardless of whether states are monists or dualists in the way they accept – or not – direct application of international law in their domestic legal systems, when they sign and ratify international treaties the obligations arising therein must be performed in objective *good faith*, according to the Vienna Convention on the Law of Treaties (Article 31.1),<sup>45</sup>

*Second*, despite *soft law* instruments of international law lack of a formal legally binding condition, some of them “have passed into the corpus of customary international law, and [are] thus binding upon all states [irrespective of their will].”<sup>46</sup> For example, “several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.”<sup>47</sup>

As Jared M. Genser and Margaret K. Winterkorn-Meikle posit, “securing adherence to international law is a complex and dynamic process.”<sup>48</sup> In the international arena, the use of *soft law* mechanisms concerning the liberty of a person, although not requiring mandatory observance, serve to “encourage broader understanding of arbitrary detention and promote universal standards on this issue,”<sup>49</sup> and to further the “goal of strengthening universal human rights standards.”<sup>50</sup> Importantly, Leigh T. Toomey also points to the fact that the constant use of soft law mechanisms serves to provide further guidance to stakeholders on the interpretation of domestic norms on arrest and detention.<sup>51</sup> David S. Weissbrodt and Brittany Mitchell, indicate that the use of soft instruments by the Working Group have “contributed substantively to the international debate over the very difficult question of when detention by the state violates international norms.”<sup>52</sup>

However, a caveat is crucially important here: “by applying non-binding international norms to criticize and urge invalidation of entrenched domestic laws, the WGAD may be overstepping its bounds.”<sup>53</sup> Jared M. Genser and Margaret K. Winterkorn-Meikle recognizes that “rather than promoting respect for international law, this practice may actually lead countries to see international law as interfering with national sovereignty, especially where the power to detain criminals is at issue.”<sup>54</sup> Nonetheless, human rights

<sup>44</sup> A/HRC/WGAD/2018/35. Opinion No. 35/2018. ¶ 29;

A/HRC/WGAD/2017/56. Opinion No. 56/2017. ¶ 35;

A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 33.

<sup>45</sup> United Nations, Vienna Convention on the Law of Treaties (May 23, 1969) 1155 UNTS 331.

<sup>46</sup> Karin Mickelson, How Universal is the Universal Declaration, 47 U.N.B.L.J. 19 (1998). p. 19.

<sup>47</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

<sup>48</sup> Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 688.

<sup>49</sup> *Ibid* 708.

<sup>50</sup> *Ibid* 716.

<sup>51</sup> Leigh T. Toomey, ‘Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention’ (2018) 50 *Columbia Human Rights Law Review* 185, 270.

<sup>52</sup> David S. Weissbrodt & Brittany Mitchell, ‘The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence’ (2016) 38 *Human Rights Quarterly* 655, 669-670.

<sup>53</sup> Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 703.

<sup>54</sup> Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 703.

norms are considered to be universally binding.

## B *Arbitrary Detention as a Violation Of Customary International Human Rights Law and Jus Cogens Norms*

The prohibition of arbitrary detention is part of customary international law,<sup>55</sup> in that it is reflected in both state practice and *opinio juris* of almost all nations.<sup>56</sup> Several authors<sup>57</sup> as well as the Working Group regards cases of deprivation of liberty as arbitrary under customary international law.<sup>58</sup> Consequently, all states – even states that are not parties to the human rights instruments such as the Covenant<sup>59</sup> – are bound to the obligations within those instruments.<sup>60</sup> The prohibition of arbitrary detention is such a powerful customary norm that in certain circumstances, such as “widespread or systematic imprisonment, or other severe deprivation of liberty,” the conduct of state officials may also constitute a crime against humanity, contrary to the rules of International Criminal Law.<sup>61</sup>

As a peremptory norm of International Law, the right to challenge the lawfulness of detention applies to all circumstances of deprivation of liberty:

The right to challenge the lawfulness of detention applies to all forms of deprivation of liberty, to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes. Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>62</sup>

Furthermore, prohibition of arbitrary detention is also recognized as a *jus cogens*

<sup>55</sup> A/HRC/WGAD/2012/53. Opinion No. 53/2012. ¶ 20; A/HRC/WGAD/2014/3. Opinion No. 3/2014. ¶ 23; A/HRC/WGAD/2014/12. Opinion No. 12/2014. ¶ 19; A/HRC/WGAD/2014/14. Opinion No. 14/2014. ¶ 18; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 41; A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 22; A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 51.

<sup>56</sup> A/HRC/WGAD/2014/14. Opinion No. 14/2014. ¶ 18; A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 22; A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 51.

<sup>57</sup> See, for example: Fiona de Londras, ‘The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists’ (2007) 12 *Journal of Conflict and Security Law* 223, 240; David S. Weissbrodt & Brittany Mitchell, The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence’ (2016) 38 *Human Rights Quarterly* 655, 662.

<sup>58</sup> “This widespread ratification of international treaty law on arbitrary deprivation of liberty, as well as the widespread translation of the prohibition into national laws, constitute a near universal State practice evidencing the customary nature of the arbitrary deprivation of liberty prohibition.” (Human Rights Council, Report of the Working Group on Arbitrary Detention, Chair-Rapporteur: El Hadji Malick Sow, U.N. Doc A/HRC/22/44 (Dec. 24, 2012). ¶ 37).

<sup>59</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>60</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 26.

<sup>61</sup> A/HRC/WGAD/2012/60. Opinion No. 60/2012. ¶ 21; A/HRC/WGAD/2014/22. Opinion No. 22/2014. ¶ 25; A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 33.

<sup>62</sup> A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 33; A/HRC/WGAD/2017/44. Opinion 44/2017. ¶33; A/HRC/WGAD/2018/4. Opinion No. 4/2018. ¶53.



norm – an authoritative, absolute and peremptory norm of international law.<sup>63</sup> The operation of *jus cogens* is informed by Article 53 of the 1969 Vienna Convention on the Law of Treaties.<sup>64</sup> Article 53 stipulates that broad international consensus can, with the passage of time, consolidate some peremptory international norms. Such consolidation produces two effects: the *erga omnes* effect and the non-revocability effect.

The *erga omnes* effect means that those rules of International Law are binding on all states irrespective of whether there is a binding treaty obligations. All states are legally bound to certain norms they did not participate in the formation of (cf *pacta tertiis nec nosunt nec prosunt*).<sup>65</sup> The non-revocability effect means that states (including persistent objectors) do not have the power to revoke *jus cogens* norms. Consequentially, international and domestic legal instruments that conflict with such norms would be void. Prohibition of arbitrary detention is a non-derogable guarantee.<sup>66</sup>

### C Customary States' Responsibilities on Foreign Territory

In *Al-Jedda v United Kingdom*<sup>67</sup> and *Al-Skeini and others v United Kingdom*,<sup>68</sup> the European Court of Human Rights established that states' obligation not to arbitrarily detain persons apply not only within their boundaries, but extra-territorially where they have effective power and control. In fact, this obligation belongs to the domain of customary International Law. This was already recognized, for example, by the Human Rights Committee. In *Sergio Euben Lopez Burgos v Uruguay* and *Lilian Celiberti de Casariego v Uruguay*, the Committee held that "it would be unconscionable to so interpret the responsibility under Article 2 of the International Covenant on Civil and Political Rights (ICCPR)<sup>69</sup> as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its

<sup>63</sup> A/HRC/WGAD/2012/53. Opinion No. 53/2012. ¶ 20; A/HRC/WGAD/2012/60. Opinion No. 60/2012. ¶ 21; A/HRC/WGAD/2014/3. Opinion No. 3/2014. ¶ 23; A/HRC/WGAD/2014/22. Opinion No. 22/2014. ¶ 25; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 66; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 41; A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 22; Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 26.

<sup>64</sup> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."; Vienna Convention on the Law of Treaties (opened for signature 23 May 1969), 1155 UNTS 331, art 53.

<sup>65</sup> A/HRC/WGAD/2017/63. Opinion No. 63/2017, ¶ 51.

<sup>66</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014), ¶ 26.

<sup>67</sup> *Al-Jedda v United Kingdom* (2011). European Court of Human Rights, Grand Chamber, 27021/08. ¶¶ 76-83.

<sup>68</sup> *Al-Skeini and others v United Kingdom* (2011). European Court of Human Rights, Grand Chamber, 55721/07. ¶¶ 132-139.

<sup>69</sup> International Covenant on Civil and Political Rights (opened for signature Dec. 16, 1966), 999 UNTS 171, art 2.

Article 2 of the ICCPR prescribes that states’ responsibilities in promoting and respecting human rights, as well as preventing their violation, extend beyond their territorial boundaries.<sup>71</sup> Without distinction of any kind, every state is entitled to respect the human rights of all the persons under their effective power/control, which includes persons who are located outside the territory of the state.<sup>72</sup> Human rights obligations apply equally, territorially and abroad.<sup>73</sup> Basic Principle 2 of the The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court informs that a comprehensive set of applicable procedures shall be enacted to ensure that this obligation is effectively fulfilled.<sup>74</sup>

It is undoubted that this obligation towards human rights concerns both persons enjoying full liberty as well as individuals held in detention.<sup>75</sup> This means that under Basic Principle 2, every person deprived from his liberty, whether on the territory of the state or elsewhere, where such state has effective power and control, has the right to take proceedings before a court to challenge the lawfulness of his detention.<sup>76</sup> Accordingly, Basic Principles 2 and 3 orientate that, if violations of detainee rights occur in an abroad place where the state has effective control over it, individuals arbitrarily deprived of their liberty can seek effective reparations and receive, without delay, appropriate remedies and compensations from such state.<sup>77</sup>

#### IV THE HUMAN RIGHTS COUNCIL WORKING GROUP ON ARBITRARY DETENTION

The issue of persons being arbitrarily detained throughout the world has long been of a great concern for the United Nations, particularly for its Commission on Human Rights (‘the Commission’). Early works of the Commission from 1985 demonstrates such concern. In 1988, in awareness of the grave violations of the general guarantees entitled to persons deprived of their liberty, the United Nations General Assembly (General Assembly), approved a foundational document – the Body of Principles for the

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<sup>70</sup> *Sergio Euben Lopez Burgos v Uruguay*, Human Rights Committee, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) (June, 6 1979) ¶ 12.3; A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 30; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 64; *Lilian Celiberti de Casariego v Uruguay*, Human Rights Committee, Communication No. R.13/56, U.N. Doc. Supp. No. 40 (A/36/40) (July 17, 1979) ¶ 10.3.

<sup>71</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 2; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 63.

<sup>72</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 2; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 65.

<sup>73</sup> *Ibid.*

<sup>74</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 2.

<sup>75</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 65.

<sup>76</sup> A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 33.

<sup>77</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 85; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principles 2, 3.

Protection of All Persons under Any Form of Detention or Imprisonment.<sup>78</sup>

In 1990, the Commission on Human Rights requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to further investigate the practice of arbitrary detention world-wide and to submit its conclusions, as well as its recommendations to reduce and/or to extinguish such violations. In 1991, the Commission on Human Rights established the Working Group on Arbitrary Detention (the Working Group), through Resolution 1991/42,<sup>79</sup> whose main mandate was to receive and investigate information and communications from individuals arbitrarily deprived of their liberty by state agents, judicially or administratively, in violation of certain international human rights standards. These standards are set forth in the Universal Declaration<sup>80</sup> and International Covenant on Civil and Political Rights<sup>81</sup> and in the international human rights instruments ratified by states. Importantly, such standards also include international customary norms and peremptory, non-derogable *jus cogens* norms.<sup>82</sup>

In 2006, the United Nations established the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly. The General Assembly Resolution 60/251<sup>83</sup> and the Decision 1/102<sup>84</sup> extended to the Human Rights Council all mandates, mechanisms, functions and responsibilities of the of the former Commission on Human Rights, including the mandate of the Working Group on Arbitrary Detention.<sup>85</sup> Since then, the Working Group's mandate has been constantly renewed every three years.<sup>86</sup>

The Working Group on Arbitrary Detention is the main United Nations body in which individuals can make individual claims to challenge states in cases concerning

<sup>78</sup> Body of principles for the protection of all persons under any form of detention or imprisonment, U.N. Comm. H.R., 34<sup>th</sup> Sess., Resolution, U.N. Doc. E/CN.4/RES/19(XXXIV) (March 7, 1978); A/HRC/WGAD/2012/51. Opinion No. 51/2012. ¶ 1; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 1.

<sup>79</sup> Question of arbitrary detention, Commission on Human Rights, U.N. Doc. E/CN.4/RES/1991/42 (March, 5 1991).

<sup>80</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>81</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>82</sup> See preceding part and part V; See also, Human Rights Council. Working Group on Arbitrary Detention. 36<sup>th</sup> Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38 (July 13, 2017). ¶¶ 2, 7; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 1; Human Rights Council. Working Group on Arbitrary Detention, 36<sup>th</sup> Sess., Report of the Working Group on Arbitrary Detention on its visit to the United States of America, Note by the Secretariat, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017). ¶ 1; Human Rights Council. Working Group on Arbitrary Detention, 33<sup>rd</sup> Sess., Note by the Secretariat, U.N. Doc. A/HRC/33/50 (July 11, 2016). ¶ 1; Human Rights Council. Working Group on Arbitrary Detention, 30<sup>th</sup> Sess., Report, U.N. Doc. A/HRC/30/36 (July 10, 2015). ¶ 1; Question of arbitrary detention, Commission on Human Rights, U.N. Doc. E/CN.4/RES/1991/42 (March, 5 1991); Human Rights Council. Working Group on Arbitrary Detention, 27<sup>th</sup> Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014), ¶ 1.

<sup>83</sup> Human Rights Council, Resolution, U.N. Doc A/RES/60/251 (Apr. 3, 2006).

<sup>84</sup> Human Rights Council, Decision 1/102, Extension by the Human Rights Council of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, U.N. Doc A/HRC/DEC/1/102 (Nov. 13, 2006).

<sup>85</sup> Human Rights Council. Working Group on Arbitrary Detention, 36<sup>th</sup> Sess., Report of the Working Group on Arbitrary Detention on its visit to the United States of America, Note by the Secretariat, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017), ¶ 1; See also: A/HRC/WGAD/2012/51. Opinion No. 51/2012. ¶ 1; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 1.

<sup>86</sup> Human Rights Council. Working Group on Arbitrary Detention. 36<sup>th</sup> Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38 (July 13, 2017). ¶ 2.

the lawfulness of one's detention.<sup>87</sup> The Working Group is entitled the competence to acknowledge the allegations of persons whose fundamental right to an effective remedy has been denied by the domestic judiciary/administrative instances and to make dispositions accordingly.<sup>88</sup>

Other United Nation bodies and international human rights mechanisms are also competent forums to determine situations of unlawful detentions. Importantly, these bodies help in the interpretation of the scope and content of the right to liberty.<sup>89</sup> Accordingly, there are United Nations treaty bodies, under the authority of the Office of the High Commissioner for Human Rights, whose main mandate is to ensure that the commands of core United Nations treaties are observed and implemented by state Parties. Specific to the ICCPR,<sup>90</sup> the Torture Convention<sup>91</sup> and the Enforced Disappearance Convention,<sup>92</sup> there are the Human Rights Committee, the Committee Against Torture and the Committee on Enforced Disappearances respectively.<sup>93</sup> Particular to the Convention on the Rights of the Child,<sup>94</sup> the Migrant Workers Convention<sup>95</sup> and the Convention on the Rights of Persons with Disabilities,<sup>96</sup> there are the Committee on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of Persons with Disabilities respectively.<sup>97</sup>

In addition, there are independent experts appointed by the Human Rights Council that submit reports to this body and to General Assembly. They are: the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the human rights of migrants.<sup>98</sup> The Special Rapporteur on torture has a greater mandate compared to the other Rapporteurs because it has worldwide jurisdiction, that is, it is not

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<sup>87</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ II.A.10.

<sup>88</sup> *Ibid*

<sup>89</sup> *Ibid* ¶9.

<sup>90</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>91</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

<sup>92</sup> International Convention for the Protection of All Persons from Enforced Disappearance, U.N.G.A., 61th Sess., Resolution, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

<sup>93</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 9.

<sup>94</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3.

<sup>95</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N.G.A., 69th plenary meeting, Resolution, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

<sup>96</sup> Convention on the Rights of Persons with Disabilities, U.N.G.A., 61th Sess., Resolution, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

<sup>97</sup> Please see: Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 9.

<sup>98</sup> *Ibid*.

limited only to states that have ratified the Convention against Torture.<sup>99</sup>

The treaty bodies, along with the Special Rapporteurs and the mandates of the Working Groups, address the right to challenge the lawfulness of one's detention through: General Comments, General Observations, Concluding Observations, Fact-finding Country Visits, Inquiry Procedures, Decisions, statements and Guidelines, Recommendations, Follow-up Procedures, General Comments, Annual Reports, Joint Reports, Urgent Appeals to states, and other several special procedures.<sup>100</sup>

#### A *The Material Mandate Of The Working Group On Arbitrary Detention*

The mandate of the Working Group encompasses a series of practical measures to ensure that states observe international standards with regards to the arrest/detention of individuals under their jurisdiction/effective power. In exercising this mandate, the Working Group has powers to:

- (1) To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the states concerned;
- (2) To seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;
- (3) To act on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and to bring to their attention these cases;
- (4) To conduct field missions upon the invitation of Government, in order to understand better the situations prevailing in countries, as well as the underlying reasons for instances of arbitrary deprivation of liberty;
- (5) To formulate deliberations on issues of a general nature in order to assist states to prevent and guard against the practice of arbitrary deprivation of liberty and to facilitate consideration of future cases;
- (6) To present an annual report to the Human Rights Council presenting its activities, findings, conclusions and recommendations."<sup>101</sup>

The main *méthode de travail* ("method of work") of the Working Group is based upon communications from individuals allegedly detained by a state in a manner inconsistent with the relevant International Human Rights standards. The procedure starts when a case is submitted – *submission* – with a description of the relevant facts and the indication of which state breached these standards. Then, the Working Group opens an investigative procedure based upon external *sources* of information and evidence. At all times, the Working Group endeavours to establish a channel of communication with

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<sup>99</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

<sup>100</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 9.

<sup>101</sup> Human Rights Council. Working Group on Arbitrary Detention. 6th Sess., Extension of the Working Group Mandate, U.N. Doc. A/HRC/6/L.30 (Sept. 25, 2007).

states, who, more often than not, are unresponsive.<sup>102</sup>

In more serious cases, urgent appeals can be made to states.<sup>103</sup> The case is discussed by a panel – *discussion* – and, finally, an *opinion* is delivered in a form of *disposition*, requiring states to take specific measures in light of what was proven during the procedures. A *follow-up procedure* is usually set in order to monitor states compliance with the dispositions of the panel.<sup>104</sup> One of the serious hurdles of the Working Group is the fact that some states are not party to the International Covenant on Civil and Political Rights.<sup>105</sup>

Here, an important caveat must be stated. The Working Group is not a forum for appeals nor an *instance* for domestic lawsuits, in that it is not an oversight body on the internal state’s jurisdiction.<sup>106</sup> Also, it is not a substitute to *habeas corpus* proceedings.<sup>107</sup> It is up to the state itself to rule on the merits of complaints brought before its independent and impartial judges, in cases concerning deprivation of liberty of individuals.<sup>108</sup> The mandate of the Working group is solely restricted to the analysis of the arbitrariness or appropriateness of cases of deprivation of liberty,<sup>109</sup> the application of the ICCPR to those cases, as well as the fairness or the partiality of a domestic judgement, the independence or bias of the court.<sup>110</sup> The material bedrock for the validity of such mandate is deeply rooted in relevant international standards and in the provisions of the International Human Rights Law.<sup>111</sup>

Critically, persons arbitrarily deprived of their liberty are not required to exhaust domestic remedies prior to filing a case at the WGAD.<sup>112</sup> This offers “the broadest possible jurisdiction to hear individual cases.”<sup>113</sup> Jared Genser explains that “this flexible approach signals the WGAD’s intention to make its procedures available to the maximum number of arbitrarily detained persons and those advocating on their behalf.” Moreover, adds Genser, “it allows the WGAD to circumvent national courts that are

<sup>102</sup> Human Rights Council. Working Group on Arbitrary Detention, 36th Sess., Report of the Working Group on Arbitrary Detention on its visit to the United States of America, Note by the Secretariat, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017). Pages 5-11.

<sup>103</sup> *Ibid* ¶ 32.

<sup>104</sup> *Ibid* ¶ 3

<sup>105</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>106</sup> A/HRC/WGAD/2012/69. Opinion No. 69/2012. ¶ 40.

<sup>107</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 35.

<sup>108</sup> A/HRC/WGAD/2012/69. Opinion No. 69/2012. ¶ 40.

<sup>109</sup> *Ibid*; Human Rights Council. Working Group on Arbitrary Detention. 30th Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/69 (Aug. 4, 2015). ¶ 7.

<sup>110</sup> A/HRC/WGAD/2012/69. Opinion No. 69/2012. ¶¶ 41, 43.

<sup>111</sup> Human Rights Council. Working Group on Arbitrary Detention. 30th Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/69 (Aug. 4, 2015). ¶ 7.

<sup>112</sup> Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press, 2020) 15; See also: Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 697.

<sup>113</sup> Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press, 2020) 15; Jared Genser explains, however, that this early procedure may place the the WGAD in a risk of “getting involved in cases prematurely ... This may draw hostility from governments that view the WGAD as meddling in their sovereign affairs, and a premature WGAD opinion may have less impact since it could be made moot by any subsequent government action”: Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 697.

merely stalling to continue detaining a person.”<sup>114</sup> Although WGAD’s opinions are not legally binding, they “may serve to catalyze other states and international bodies to take action” and “to put diplomatic pressure on the detaining government.”<sup>115</sup>

The core international legal commands of the Working Group originate in the declarative Article 9 of the Universal Declaration of Human Rights<sup>116</sup> and the binding/peremptory Article 9 of the International Covenant on Civil and Political Rights, upon which “no one shall be subjected to arbitrary arrest, detention or exile.”<sup>117</sup> Importantly, Jared M. Genser and Margaret K. Winterkorn-Meikle highlight that the WGAD’s mandate “authorizes it to review cases of deprivation of liberty anywhere in the world, irrespective of whether a particular government is a party to any of the relevant human rights treaties.”<sup>118</sup>

In addition to the UDHR and the ICCPR, the Working Group also “looks for interpretive guidance from a wide array of treaties and other soft law sources,”<sup>119</sup> such as: 1) The Human Rights Council Resolutions on “Methods of Work” of the Working Group, which are extended every 3 years. The last of these Resolutions is the A/HRC/36/38, from 13 July 2017.<sup>120</sup> 2) The directive Principles on “Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court”<sup>121</sup> and 3) The interpretive canons of the “Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.”<sup>122</sup>

The Human Rights Council Resolution A/HRC/36/38 has renewed the scope and mandate of the Working Group on Arbitrary Detention. In this Resolution, the situations of arbitrary deprivation of liberty are divided in five legal categories. Accordingly, the Working Group’s mandate encompass the following situations:

- (1) 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 or her sentence or despite an amnesty law applicable to him or her (**category I**);
- (2) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13-14 and 18-21 of the Universal Declaration of Human Rights and, insofar as states parties are concerned, by articles 12, 18-19, 21-22 and 25-27 of the International Covenant on Civil and Political Rights (**category II**);
- (3) When the total or partial non-observance of the international norms relating to the

<sup>114</sup> Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press, 2020) 15.

<sup>115</sup> Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 697.

<sup>116</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Article 9.

<sup>117</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9.

<sup>118</sup> Jared M. Genser & Margaret K. Winterkorn-Meikle, ‘The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice’ (2008) 39 *Columbia Human Rights Law Review* 687, 709-710.

<sup>119</sup> Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (Cambridge University Press, 2020) 18.

<sup>120</sup> Human Rights Council. Working Group on Arbitrary Detention. 36th Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38 (July 13, 2017).

<sup>121</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015).

<sup>122</sup> *Ibid.*

right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (**category III**);

- (4) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (**category IV**);
- (5) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (**category V**).<sup>123</sup>

As regards to the “Principles on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court”<sup>124</sup>, the Working Group resorts to 21 commands relative to the states’ obligations in preventing, abstaining and/or remediating arbitrary or unlawful deprivation of liberty. These Principles concern to: Principle 1 on Right to be free from arbitrary or unlawful deprivation of liberty,<sup>125</sup> Principle 2 on Responsibilities of the state and others,<sup>126</sup> Principle 3 on Scope of application,<sup>127</sup> Principle 4 on Non-derogability of the rights of persons deprived of their liberty,<sup>128</sup> Principle 5 on Non-discrimination,<sup>129</sup> Principle 7 on Right to be informed,<sup>130</sup> Principle 8 on Time frame for bringing proceedings before a court,<sup>131</sup> Principle 9 on Assistance by legal counsel and access to legal aid,<sup>132</sup> Principle 10 on Persons able to bring proceedings before a court,<sup>133</sup> Principle 11 on Appearance of the detainee before the court,<sup>134</sup> Principle 12 on Equality before the courts,<sup>135</sup> Principle 13 on Burden of proof,<sup>136</sup> Principle 14 on Standard of review,<sup>137</sup> Principle 15 on Remedies and reparations,<sup>138</sup> Principle 16 on Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency threatening the independence or security of a state,<sup>139</sup> Principle 17 on Specific obligations to guarantee access to the right

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<sup>123</sup> Human Rights Council. Working Group on Arbitrary Detention. 36th Sess., Methods of work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38 (July 13, 2017). ¶ 8; See also: A/HRC/WGAD/2012/51. Opinion No. 51/2012. ¶ 2.a; A/HRC/WGAD/2017/90. Opinion No. 90/2017, ¶ 3.a.

<sup>124</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Annex.

<sup>125</sup> *Ibid* Principle 1.

<sup>126</sup> *Ibid* Principle 2.

<sup>127</sup> *Ibid* Principle 3.

<sup>128</sup> *Ibid* Principle 4.

<sup>129</sup> *Ibid* Principle 5.

<sup>130</sup> *Ibid* Principle 7.

<sup>131</sup> *Ibid* Principle 8.

<sup>132</sup> *Ibid* Principle 9.

<sup>133</sup> *Ibid* Principle 10.

<sup>134</sup> *Ibid* Principle 11.

<sup>135</sup> *Ibid* Principle 12.

<sup>136</sup> *Ibid* Principle 13.

<sup>137</sup> *Ibid* Principle 14.

<sup>138</sup> *Ibid* Principle 15.

<sup>139</sup> *Ibid* Principle 16.



to bring proceedings before a Court,<sup>140</sup> Principle 18 on Specific measures for children,<sup>141</sup> Principle 19 on Specific measures for women and girls,<sup>142</sup> Principle 20 on Specific measures for persons with disabilities,<sup>143</sup> and Principle 21 on Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons.<sup>144</sup>

In what regards the “Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,”<sup>145</sup> the Working Group resorts to 22 interpretative canons relative to the states duties in preventing and/or remediating arbitrary or unlawful deprivation of liberty. These Guidelines concern: Guideline 1 on Scope of application,<sup>146</sup> Guideline 2 on Prescription in national law,<sup>147</sup> Guideline 3 on Non-derogability of rights of persons deprived of their liberty,<sup>148</sup> Guideline 4 on Characteristics of the court and procedural guidelines for review of the detention,<sup>149</sup> Guideline 5 on the Right to be fully informed of all the charges against oneself and be capable to understand all of them,<sup>150</sup> Guideline 6 on Registers and record-keeping,<sup>151</sup> Guideline 7 on Time frame for bringing proceedings before a court,<sup>152</sup> Guideline 8 on the Right to assistance by legal counsel and access to legal aid,<sup>153</sup> Guideline 9 on Persons able to bring proceedings before a court,<sup>154</sup> Guideline 10 on Appearance before the court,<sup>155</sup> Guideline 11 on Equality of arms,<sup>156</sup> Guideline 12 on Admissibility of evidence obtained by torture or other prohibited treatment,<sup>157</sup> Guideline 13 on Disclosure of information,<sup>158</sup> Guideline 14 on Burden of proof,<sup>159</sup> Guideline 15 on Standard of review,<sup>160</sup> Guideline 16 on Remedies and reparations,<sup>161</sup> Guideline 17 on Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency threatening the independence or security of a state,<sup>162</sup> Guideline 18 on Specific measures for children,<sup>163</sup> Guideline 19 on Specific measures for women and girls,<sup>164</sup> Guideline 20 on Specific measures for persons with disabilities,<sup>165</sup>

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<sup>140</sup> Ibid Principle 17.

<sup>141</sup> Ibid Principle 18.

<sup>142</sup> Ibid Principle 19.

<sup>143</sup> Ibid Principle 20.

<sup>144</sup> Ibid Principle 21.

<sup>145</sup> Ibid Annex.

<sup>146</sup> Ibid Guideline 1.

<sup>147</sup> Ibid Guideline 2.

<sup>148</sup> Ibid Guideline 3.

<sup>149</sup> Ibid Guideline 4.

<sup>150</sup> Ibid Guideline 5.

<sup>151</sup> Ibid Guideline 6.

<sup>152</sup> Ibid Guideline 7.

<sup>153</sup> Ibid Guideline 8.

<sup>154</sup> Ibid Guideline 9.

<sup>155</sup> Ibid Guideline 10.

<sup>156</sup> Ibid Guideline 11.

<sup>157</sup> Ibid Guideline 12.

<sup>158</sup> Ibid Guideline 13.

<sup>159</sup> Ibid Guideline 14.

<sup>160</sup> Ibid Guideline 15.

<sup>161</sup> Ibid Guideline 16.

<sup>162</sup> Ibid Guideline 17.

<sup>163</sup> Ibid Guideline 18.

<sup>164</sup> Ibid Guideline 19.

<sup>165</sup> Ibid Guideline 20.

Guideline 21 on Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons<sup>166</sup> and Guideline 22 on Implementation measures.<sup>167</sup>

## V GENERAL RIGHTS OF THE ARRESTED/DETAINED PERSONS

The Universal Declaration of Human Rights<sup>168</sup> and the International Covenant on Civil and Political Rights<sup>169</sup> are the sources of obligations that protect persons arbitrarily detained. Articles 3 and 9 and articles 9 and 14 of these instruments, respectively, establish the right to liberty, the right to security of a person, the right to an effective remedy and the right to a fair trial.<sup>170</sup> They prescribe that persons held by state authorities, has, in all circumstances, the right to be formally informed of the reasons for the arrest. The reasons must include “not the subjective motivations of the arresting officer,”<sup>171</sup> but all the specific facts and legal circumstances that constituted the official basis for the complaint and for the subsequent arrest carried out.<sup>172</sup> The mere risk that someone may commit an offense is not sufficient ground for someone’s arrest if there are no other reasonable and practical facts to support the complaint.<sup>173</sup> Particular to this issue, the constant jurisprudence of the Working Group guides that:

If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on the state to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention.<sup>174</sup>

Under the Principles of Fair Trial and Equality of Arms, every arrested person shall be entitled, within a reasonable time, to take proceedings before an independent and impartial authority, competent by law to exercise judicial power in order to publicly challenge the lawfulness of his detention.<sup>175</sup> In doing so, every person is entitled to communicate with the legal counsel of his own choosing in private and adequate facilities.<sup>176</sup>

The arrested person has also judicial guarantees of: 1) Being informed “of the nature and cause of the charge against him,” through appropriate and accessible means,

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<sup>166</sup> Ibid Guideline 21.

<sup>167</sup> Ibid Guideline 22.

<sup>168</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>169</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>170</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Articles 3, 9; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Articles 9, 14; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 41; A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 48; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 23; For a more comprehensive approach on the rights of arrested or detained persons, please refer to: Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel, 2<sup>nd</sup> ed, 2005) 228-240; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 368-390

<sup>171</sup> A/HRC/WGAD/2017/18. Opinion No. 18/2017. ¶ 38.

<sup>172</sup> Ibid.

<sup>173</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 15; A/HRC/WGAD/2014/9. Opinion No. 9/2014. ¶ 24.

<sup>174</sup> A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 29.

<sup>175</sup> A/HRC/WGAD/2015/5. Opinion No. 5/2015. ¶ 22; A/HRC/WGAD/2017/18. Opinion No. 18/2017. ¶ 38.

<sup>176</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3 (d).

in a language which he understands “the reasons justifying the deprivation of liberty”;<sup>177</sup> 2) Being tried in his presence “with the free assistance of an interpreter if he cannot understand or speak the language used in court”;<sup>178</sup> 3) Cross-examining witnesses and evidence;<sup>179</sup> and 4) Not being “compelled to testify against himself or to confess guilt.”<sup>180</sup> Under such guarantees, prolonged detention without a trial constitutes a serious violation of the minimum guarantee that every arrested person shall be tried without undue delay.<sup>181</sup> Accordingly, anyone arrested or detained have the right to claim an order of release, if the state is not able to prove guilt, according to the law, through credible pieces of evidence.<sup>182</sup>

Ultimately, arrested persons have the right to sentence review by a higher tribunal.<sup>183</sup> Article 14, paragraph 5, of the ICCPR provides that everyone has the right to have their sentence being reviewed by a higher and different court from the one that established his conviction, according to law.<sup>184</sup> The upper court shall be entitled the power to review the elements of arbitrariness and lawfulness of the sentence of conviction from the lower court. According to the instruction of Basic Guideline 15, when executing such review, the upper court must be empowered to:

- (1) To examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, and on basic principles of reasonableness, proportionality and necessity. Such an examination will take into account details such as age, gender and marginalized groups;
- (2) To consider whether the detention remains justified or whether release is warranted in the light of all the changing circumstances of the detained individual’s case, including health, family life, protection claims or other attempts to regularize one’s status.<sup>185</sup>

In a democratic society, any person arbitrarily or unlawfully detained should be able to receive, “upon a successful challenge,” judicial remedies and reparations for the arbitrariness and physical/moral hardship they suffered.<sup>186</sup> Put in other words, when a conviction is reversed, as a result of “newly discovered facts show conclusively that there has been a miscarriage of justice,” the person who has suffered undue punishment

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<sup>177</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3 (a); See also: Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 7.

<sup>178</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3.d; 14.3 (f); Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 11.

<sup>179</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3. (e)

<sup>180</sup> Ibid Article 14.3. (g).

<sup>181</sup> Ibid Article 14.3. (c); A/HRC/WGAD/2015/5. Opinion No. 5/2015. ¶ 23.

<sup>182</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9.2, 9.3, 9.4.

<sup>183</sup> Ibid Article 14.5.

<sup>184</sup> Ibid; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 4.

<sup>185</sup> Ibid Guideline 15.

<sup>186</sup> Ibid Principles 1, 15; Guideline 16; See also: A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 85.

shall have an enforceable guarantee to compensation,<sup>187</sup> pursuant to article 9, paragraph 5, of the ICCPR.<sup>188</sup> The Working Group understands that these judicial remedies are essential to preserve legality.<sup>189</sup> Basic Principle 15 and Basic Guideline 16 inform that these reparations should include – but are not limited to – appropriate measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,<sup>190</sup> without any delay or any form of discrimination.<sup>191</sup>

### A *Right to a Fair Trial: The Guarantees of Equality of Arms and Access to Legal Assistance*

Often, in cases of arbitrary detention, the state authorities refuse to allow the arrested one from having access to legal counsel<sup>192</sup> and/or to legal assistance.<sup>193</sup> In some cases, the authorities do appoint lawyers, but against the own choosing of the detainee.<sup>194</sup> Such conducts violate the right to a fair trial – due process rights – and its guarantees. Article 14 of the ICCPR and article 10 of the Universal Declaration provide the bedrock for the protection of this right.<sup>195</sup>

The access to legal assistance to challenge criminal charges is a minimum guarantee of *equality of arms*, included in the right to a fair trial.<sup>196</sup> The opportunity to rebut accusations, to produce evidence, to make claims before a competent judge, to file writs of *habeas corpus* and, ultimately, to file petitions for sentence review, must be guaranteed to every person, without any discrimination before the courts.<sup>197</sup> The guarantee of equality of arms requires “that all parties to the proceedings in question be ensured the right to equal access to present their full case and the right to have access to all material related to the detention or presented to the court by state authorities”.<sup>198</sup> Article 10 of

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<sup>187</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.6; Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 10.

<sup>188</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9.5; A/HRC/WGAD/2012/62. Opinion No. 62/2012. ¶ 42.

<sup>189</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015), ¶ 3.

<sup>190</sup> *Ibid* Guideline 16.

<sup>191</sup> *Ibid* ¶ 3.

<sup>192</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 16.

<sup>193</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 10; A/HRC/WGAD/2012/57. Opinion No. 57/2012. ¶ 19; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 44.

<sup>194</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3; A/HRC/WGAD/2014/56. Opinion No. 56/2014. ¶ 35; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 44

<sup>195</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 41; A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 48; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Article 10.

<sup>196</sup> A/HRC/WGAD/2013/12. Opinion No. 12/2013. ¶ 39; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 44; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3.

<sup>197</sup> *Ibid* Article 14; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 12; A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 17.

<sup>198</sup> A/HRC/WGAD/2017/1. Opinion No. 1/2017. ¶ 50.

the Universal Declaration<sup>199</sup> and article 14.3 of the ICCPR<sup>200</sup> are the foundational legal standards upon which everyone is entitled equity in trial procedures.<sup>201</sup> The interpretative key for such standards can be found in Principles 9 and 12 and Guideline 11 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.<sup>202</sup>

According to the ICCPR, the arrested person's access to a defense counsel must be effective in all kinds of proceedings, whether of a criminal or non-criminal nature.<sup>203</sup> The *effectiveness* here is measured according to the interests of justice so require.<sup>204</sup> Basic Principle 9 as well as the jurisprudence of the Working Group instruct which main procedural aspects suffice the interests of justice: 1) Persons deprived of their liberty shall be assisted at all times by a counsel of their choice, which include the moment of apprehension, during their detention, upon conviction and, also, for later procedures such as appeals and seeking remedies and reparations;<sup>205</sup> 2) In performing their duties, lawyers shall assist their client to the fullest extent required; and 3) Persons deprived of their liberty shall have full access to all evidence and witnesses.<sup>206</sup>

Concerning the access to evidence, the Guideline 11 informs that all documents "related to the detention or presented to the court, as well as a complete copy of them"<sup>207</sup> shall be fully accessible to all parts to the proceedings. Accordingly, *in camera* presentation of evidence is deemed as violating equality of arms.<sup>208</sup> In what regards the scope of "documents related to the detention", the Guideline 11 also informs that "documents" include "all the arguments and material elements adduced by the authorities, including the prosecution, the security apparatus and the immigration authorities, to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention".<sup>209</sup> Basic Principle 5 informs that every piece of evidence shall be accessible to all the parts involved in the arrest/detention, without any discrimination of any order.<sup>210</sup>

<sup>199</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Article 10.

<sup>200</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3.

<sup>201</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Article 10; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3.

<sup>202</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 11.

<sup>203</sup> *Ibid*; A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 22; A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 32.

<sup>204</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3 (b); Human Rights Council. Working Group on Arbitrary Detention, 36th Sess., Report of the Working Group on Arbitrary Detention on its visit to the United States of America, Note by the Secretariat, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017). ¶ 78.

<sup>205</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principles 8, 9, 10.

<sup>206</sup> A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 20; A/HRC/WGAD/2018/2. Opinion No. 2/2018. ¶ 71.

<sup>207</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 11.

<sup>208</sup> A/HRC/WGAD/2013/12. Opinion No. 12/2013. ¶ 39.

<sup>209</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 11.

<sup>210</sup> *Ibid* Principle 5.

The effective and meaningful guarantee of assistance by a lawyer also includes the access to adequate facilities, where client and counsel can meet frequently and/or at any time, as well as privately, out of the presence of security guards.<sup>211</sup> The constant jurisprudence of the Working Group on Arbitrary Detentions considers client confidentiality “as a core element in the due process and fair trial guarantees in article 14 of the International Covenant on Civil and Political Rights<sup>212</sup> and article 10 of the Universal Declaration of Human Rights”.<sup>213</sup> Basic Principle 9 advises that the privacy and confidentiality of communications between individuals deprived of liberty and their legal counselors shall be respected at all circumstances by state authorities, without the fear of “reprisal, interference, intimidation, hindrance or harassment”.<sup>214</sup>

Ultimately, the legal counselor cannot be forced into rushed trials, within unreasonably, unlawful time constraints.<sup>215</sup> Accordingly, Basic Principle 9 informs that the counselor shall have sufficient time to communicate with the arrested person and have sufficient time to prepare and present the necessary defense, according to the law.<sup>216</sup> The counselor cannot be subjected to rushed summary proceedings.<sup>217</sup> At hearings, lawyers need adequate time to present claims and to rebut arguments.<sup>218</sup>

### 1 *Shifting the Burden Of Proof: A Guarantee Of The Right To A Fair Trial*

In dealing with evidentiary issues, the Working Group has a solid and well-established jurisprudence.<sup>219</sup> In circumstances when the *source* demonstrates a “prima facie case” for violations of international norms, the Government shall bear the burden

<sup>211</sup> Ibid Principle 9; Human Rights Council. Working Group on Arbitrary Detention, 36th Sess., Report of the Working Group on Arbitrary Detention on its visit to the United States of America, Note by the Secretariat, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017). ¶ 78; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3.(b); A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 22; A/HRC/WGAD/2017/1. Opinion No. 1/2017. ¶ 49; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 44; Please see Part V.A.1.

<sup>212</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.

<sup>213</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 78.

<sup>214</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 9.

<sup>215</sup> “The short duration of the trial [...] does not constitute a human rights violation per se, unless during this time the accused was denied the possibility of presenting evidence or having it examined, or denied access to evidence for the prosecution, or if there was malicious intent, but there were no complaints of such things in the communication from the source. The concept of what constitutes a reasonable time for bringing a case to trial always depends on whether there is a real possibility of investigating the acts considered as a crime”: A/HRC/WGAD/2012/69. Opinion No. 69/2012. ¶ 53; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.3 (b); A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 16; A/HRC/WGAD/2017/1. Opinion No. 1/2017. ¶ 57.

<sup>216</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 9; A/HRC/WGAD/2014/30. Opinion No. 30/2014. ¶ 45; A/HRC/WGAD/2015/1. Opinion No. 1/2015. ¶ 21.

<sup>217</sup> A/HRC/WGAD/2015/1. Opinion No. 1/2015. ¶ 21.

<sup>218</sup> A/HRC/WGAD/2014/30. Opinion No. 30/2014. ¶ 45.

<sup>219</sup> A/HRC/WGAD/2017/56. Opinion No. 56/2017. ¶ 33; A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 25; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 19; A/HRC/WGAD/2017/34. Opinion No. 34/2017. ¶ 34; A/HRC/WGAD/2017/45. Opinion No. 45/2017. ¶ 22.

of proof to rebut the claims made against it.<sup>220</sup> By *prima facie* case, the Working Group means the sum of the credible material requirements constitutive of arbitrary detention.<sup>221</sup>

Often, state's Governments choose not to challenge credible allegations made by the victims of arbitrary detention – or by their representative.<sup>222</sup> In these circumstances, the information submitted by these victims should, as a rebuttable presumption, be considered as reliable.<sup>223</sup> The Working Group's rationale for this is a practical one. Victims do not always have equal access to the facts to produce documentary evidence in support of their allegations.<sup>224</sup> Most of the times, it is solely the Governments that have full access to the significant data related to the said violation.<sup>225</sup> Because of this, the requirements of the law to which a victim is entitled to in producing documentary evidence are shifted.<sup>226</sup> This means that the burden of negatively proving the facts alleged in the initial application will rest on the public authority, and not on the victims.<sup>227</sup> Consequently, states are held responsible – both domestically and internationally – when they remain silent about credible allegations, choosing not to contest *prima facie* claims of arbitrary detention.<sup>228</sup> This silence is procedurally interpreted as tacit “agreement with the statement of facts provided in the application”.<sup>229</sup>

Beyond the burden of negatively proving, states have the obligation to demonstrate that the detention is proportional and absolutely necessary and no that other alternative measure is feasible.<sup>230</sup> Basic Principle 13 provides that the authorities responsible for the detention bear the burden of proving a “direct and immediate connection between the exercise of the right [to detain] and the threat [posed by the accused person]”.<sup>231</sup> In this regard, the Working Group has been extensively applying the test of the principle of proportionality against states' conducts. Accordingly, the analyses must assess:

- (1) whether the objective of the measure is sufficiently important to justify the limitation

<sup>220</sup> A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 21; A/HRC/WGAD/2016/47. Opinion No. 47/2016. ¶ 80; A/HRC/WGAD/2016/48. Opinion No. 48/2016. ¶ 37; A/HRC/WGAD/2016/51. Opinion No. 51/2016. ¶ 18; A/HRC/WGAD/2016/55. Opinion No. 55/2016. ¶ 14; A/HRC/WGAD/2017/25. Opinion No. 25/2017. ¶ 29; A/HRC/WGAD/2017/30. Opinion No. 30/2017. ¶ 56.

<sup>221</sup> A/HRC/WGAD/2016/10. Opinion No. 10/2016. ¶ 43; A/HRC/WGAD/2016/18. Opinion No. 18/2016. ¶ 17; A/HRC/WGAD/2016/20. Opinion No. 20/2016. ¶ 22. A/HRC/WGAD/2016/39. Opinion No. 39/2016. ¶ 26; A/HRC/WGAD/2017/83. Opinion No. 83/2017. ¶ 58.

<sup>222</sup> A/HRC/WGAD/2013/53. Opinion No. 53/2013. ¶ 26; A/HRC/WGAD/2016/2. Opinion No. 2/2016. ¶ 34; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 19; A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 21; A/HRC/WGAD/2016/50. Opinion No. 50/2016. ¶ 17; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 28; A/HRC/WGAD/2017/31. Opinion No. 31/2017. ¶ 24; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 26; A/HRC/WGAD/2017/49. Opinion No. 49/2017. ¶ 40; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 36.

<sup>223</sup> A/HRC/WGAD/2016/24. Opinion No. 24/2016. ¶ 15; A/HRC/WGAD/2016/34. Opinion No. 34/2016. ¶ 26.

<sup>224</sup> A/HRC/WGAD/2015/2. Opinion No. 2/2015; ¶ 16. A/HRC/WGAD/2017/27. Opinion No. 27/2017. ¶ 31.

<sup>225</sup> A/HRC/WGAD/2017/27. Opinion No. 27/2017. ¶ 31.

<sup>226</sup> A/HRC/WGAD/2013/53. Opinion No. 53/2013. ¶ 26; A/HRC/WGAD/2015/2. Opinion No. 2/2015. ¶ 15.

<sup>227</sup> A/HRC/WGAD/2013/48. Opinion No. 48/2013. ¶ 12; A/HRC/WGAD/2013/53. Opinion No. 53/2013. ¶ 26; A/HRC/WGAD/2015/2. Opinion No. 2/2015. ¶ 15.

<sup>228</sup> A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 17; A/HRC/WGAD/2017/85. Opinion No. 85/2017. ¶ 41.

<sup>229</sup> A/HRC/WGAD/2015/2. Opinion No. 2/2015. ¶ 15.

<sup>230</sup> A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 35.

<sup>231</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 13; Guideline 14; See also: A/HRC/WGAD/2018/37. Opinion No. 37/2018. ¶ 38.

of a protected right;

- (2) whether the measure is rationally connected to the objective;
- (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
- (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.<sup>232</sup>

Hence, states must prove that the exigencies of the situation required someone's arrest/detention as the only resort available at that moment to cease a threat.<sup>233</sup> Finally, states are under the obligation to prove that the length and the overall conditions of custody are in full respect of international guarantees.<sup>234</sup>

## 2 *Prosecuting Civilians in Military Tribunals: A Violation of the Right To a Fair Trial*

The Working Group has an extensive and consistent jurisprudence that establishes that the prosecution of civilians by military courts violates the right to a fair trial. In fact, the Working Group understands that military justice is incompetent, as judicial authority, to try civilians as well as to review the arbitrariness and lawfulness of their detention.<sup>235</sup> The Working Group comprehends that military judges and military prosecutors are incapable of fulfilling due process guarantees, impartiality and independence from hierarchical superior command.<sup>236</sup> The direct consequence of such understanding is that states must ensure that civilians are never tried by military courts, in all circumstances, irrespective of the nature of the charges brought against civilians.<sup>237</sup> The same rationale should exclude former/retired military officers from the application of military jurisdiction.<sup>238</sup> Exclusively current serving military officers are under the aegis of the military justice system.<sup>239</sup>

The trial of civilians before military courts – or quasi-military courts – violate international norms protective of the due guarantees for a fair trial.<sup>240</sup> Said norms arise from declarative, binding and customary sources. The prosecution of civilians, their judgement and placement in military detention – both preventively and/or finally after conviction – violate article 10 of the Universal Declaration of Human Rights<sup>241</sup> and

<sup>232</sup> A/HRC/WGAD/2017/56. Opinion No. 56/2017. ¶ 51.

<sup>233</sup> *Ibid* ¶ 64.

<sup>234</sup> A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 35; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 29.

<sup>235</sup> A/HRC/WGAD/2015/5. Opinion No. 5/2015. ¶ 24; A/HRC/WGAD/2016/51. Opinion No. 51/2016. ¶ 26; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 20.

<sup>236</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 4; See also: A/HRC/WGAD/2015/5. Opinion No. 5/2015. ¶ 22.

<sup>237</sup> A/HRC/WGAD/2014/10. Opinion No. 10/2014. ¶ 18; A/HRC/WGAD/2017/31. Opinion No. 31/2017. ¶¶ 27, 28.

<sup>238</sup> A/HRC/WGAD/2014/29. Opinion No. 29/2014. ¶ 18.

<sup>239</sup> Please see Section 5.1.1 on fair trial.

<sup>240</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 20; A/HRC/WGAD/2014/10. Opinion No. 10/2014. ¶ 18; A/HRC/WGAD/2014/24. Opinion No. 24/2014. ¶ 20; A/HRC/WGAD/2014/35. Opinion No. 35/2014. ¶ 17.

<sup>241</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).



article 14 of the International Covenant on Civil and Political Rights.<sup>242</sup>

Extensive and consolidated practice, as well as solid *opinio juris*, demonstrate a very well-developed rule of customary international law prohibitive of subjecting civilians to military trials.<sup>243</sup> All states and their institutions and instrumentalities (including judiciary, police and security personnel, and all of those who hold any sort of governmental power and/or perform any official duty) are bound to such *practice* of fulfilling international human rights obligations protective of the guarantees for a fair trial.<sup>244</sup>

The arbitrariness of states' conduct in trying civilians in military courts violate minimum guarantees they are entitled to respect at all times.<sup>245</sup> As already stated above, the fundamental due process requirements of independence and impartiality are not achieved in these cases.<sup>246</sup> Military courts violate the Principle of Legality (*nullum crimen sine lege* and *nulla poena sine lege*)<sup>247</sup> with the application of *ex post facto* laws,<sup>248</sup> (*lex praevia*; *lex scripta*; *lex stricta/lex certa*).<sup>249</sup>

Very commonly, these military tribunals are used to try members of opposition political parties, journalists and those involved with human rights advocacy.<sup>250</sup> Military judges, more concerned about obedience to their superiors and chain of command than with impartiality, jeopardize fairness in a criminal suit.<sup>251</sup> This contradiction between impartiality and subordination is deemed as irreconcilable.<sup>252</sup> It is also considered a very source of direct injustice.<sup>253</sup>

As regards the trials of civilians by military justice, the Working Group identified five categories of arbitrariness:

- (1) Category I: Military forces often stop and detain persons for a long time and military judges often order continuing detention in the absence of any legal basis;
- (2) Category II: Many detainees brought before military courts have been detained simply for exercising a fundamental freedom, such as the freedom of opinion and expression, freedom of association, freedom of assembly or freedom of religion;
- (3) Category III: Military judges and military prosecutors often do not meet the fundamental requirements of independence and impartiality; military procedures

<sup>242</sup> A/HRC/WGAD/2014/10. Opinion No. 10/2014. ¶ 23; A/HRC/WGAD/2014/35. Opinion No. 35/2014. ¶ 17; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 26.

<sup>243</sup> See also: A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 20; A/HRC/WGAD/2014/10. Opinion No. 10/2014. ¶ 23; Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 66.

<sup>244</sup> A/HRC/WGAD/2012/60. Opinion No. 60/2012. ¶ 21; A/HRC/WGAD/2014/22. Opinion No. 22/2014. ¶ 25; A/HRC/WGAD/2014/35. Opinion No. 35/2014. ¶ 19.

<sup>245</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 69.

<sup>246</sup> A/HRC/WGAD/2014/10. Opinion No. 10/2014. ¶ 18; A/HRC/WGAD/2014/35. Opinion No. 35/2014. ¶ 17; A/HRC/WGAD/2016/51. Opinion No. 51/2016. ¶ 26; A/HRC/WGAD/2017/31. Opinion No. 31/2017. ¶ 27; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 20.

<sup>247</sup> A/HRC/WGAD/2012/56. Opinion No. 56/2012. ¶ 12.

<sup>248</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 20.

<sup>249</sup> A/HRC/WGAD/2012/56. Opinion No. 56/2012. ¶ 13.

<sup>250</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 66.

<sup>251</sup> *Ibid* ¶¶ 66, 67.

<sup>252</sup> *Ibid* ¶ 67.

<sup>253</sup> *Ibid*.

applied by military courts often do not respect the basic guarantees for a fair trial;

- (4) Category IV: Individuals brought before military courts are often migrants in an irregular situation, asylum seekers and refugees captured by military forces at borders, at sea and in airports; and
- (5) Category V: Many people brought before military courts are foreign nationals coming from a country considered hostile to the country.<sup>254</sup>

With the aim of combating such arbitrariness, the Working Group has established some “minimum guarantees” that states’ military justice are under the duty to respect.<sup>255</sup>

- (1) The competence of military tribunals should be restricted to try military offences of active military personnel;<sup>256</sup>
- (2) If an indictment concerns at the same time active military personnel as well as civilians, the former should not be tried in military courts;<sup>257</sup>
- (3) If any of the victims of a case is a civilian, active military personal should not be tried in military tribunals;<sup>258</sup>
- (4) Cases of internal disturbances, democratic subversion and civil agitation involve persons of that country concerned. In such cases, military courts should not have material jurisdiction over them;<sup>259</sup>
- (5) Death penalty should never be imposed by military courts.<sup>260</sup>

### 3 *Administrative Detention: a Violation of the Right to a Fair Trial*

Administrative detention is prohibited by International Humans Rights Law. Nevertheless, states resort to such measures<sup>261</sup> to “hold detainees indefinitely on secret evidence without charging them or allowing them to stand trial”.<sup>262</sup> In practice, this means that nor the detainees or their lawyers are informed of the reasons for their detention and/or have access to all the supporting documents for the administrative custody.<sup>263</sup> As a direct consequence, the legality of the continued detention cannot be judicially challenged.<sup>264</sup>

Several provisions from the ICCPR address how this issue violates international human rights standards. Importantly, the recourse to administrative detention breaches detainees’ rights to a fair trial. Article 9, paragraphs (1), (3) and (4)<sup>265</sup> establishes that any procedure relative to deprivation of liberty must only be performed according to the law. If the arrest or detention is regarded as necessary and lawful, minimum guarantees must be respected. Accordingly, detainees should: 1) Be promptly informed of the

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<sup>254</sup> Ibid ¶ 70.

<sup>255</sup> A/HRC/WGAD/2016/51. Opinion No. 51/2016. ¶ 26.

<sup>256</sup> Ibid ¶ 26.a.

<sup>257</sup> Ibid ¶ 26.b.

<sup>258</sup> Ibid ¶ 26.c.

<sup>259</sup> Ibid ¶ 26.d.

<sup>260</sup> Ibid ¶ 26.e.

<sup>261</sup> A/HRC/WGAD/2012/45. Opinion No. 45/2012. ¶ 12; A/HRC/WGAD/2017/31. Opinion No. 31/2017. ¶ 6; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶¶ 5, 6.

<sup>262</sup> A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶¶ 12, 13.

<sup>263</sup> Ibid ¶¶ 14, 34.

<sup>264</sup> Ibid ¶ 34.

<sup>265</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9 (1), (2), (4).

criminal charge brought before them, in explicit details and translated to a language that allows him to fully understand the content and scope of the charges attributed to him; 2) Be promptly informed of their rights; 3) Be promptly granted private and wide access to legal assistance of their own choice to challenge the lawfulness of his detention, in adequate time, using the necessary facilities; 4) Be brought before a competent, independent and impartial judge or “other officer authorized by law to exercise judicial power” in timely manner; 5) Be publicly tried in their presence, within a reasonable time to prepare their defense and to cross-examine witnesses and documents, as established by law.<sup>266</sup>

As an exceptional clause, International Humanitarian Law permits administrative detention in the context of emergency situations in an armed conflict. Nevertheless, the limits for its use are very narrow.<sup>267</sup> In this circumstance: 1) The recourse to administrative detention must be an exceptional measure; 2) Competent authorities must observe basic rules of International Human Rights Law as well as of International Human Rights Law; 3) Every detainee shall have a fair trial at which he can challenge the charges concerning his detention; 4) Administrative detention must be for the shortest period of time as possible.<sup>268</sup>

#### 4 *Non-derogability of the Right to Challenge the Lawfulness of an Arrest/Detention*

Under international law, the “right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies” cannot be derogated, suspended, restricted or abolished, under any circumstance.<sup>269</sup> Basic Principle 15 of the ‘United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,’<sup>270</sup> for example, informs that the applicable domestic law cannot institute statutes of limitations, jurisdictional limitations, amnesties, immunities or any other state defense measure such as an “act of state doctrine” to attempt limiting the enforceability of the right to challenge the lawfulness of a detention.<sup>271</sup> Accordingly, liberty of a person can only be shortened in circumstances consistent with the combination of municipal law, International Law, as well as with the principles of

<sup>266</sup> A/HRC/WGAD/2012/58. Opinion No. 58/2012. At page 5; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 34; This guarantee is mandatory, “except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” (International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.1)

<sup>267</sup> A/HRC/WGAD/2014/57. Opinion No. 57/2014. ¶ 26.

<sup>268</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 16; A/HRC/WGAD/2014/57. Opinion No. 57/2014. ¶ 26; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 15.

<sup>269</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 4; See also: David S. Weissbrodt & Brittany Mitchell, ‘The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence’ (2016) 38 *Human Rights Quarterly* 655, 662.

<sup>270</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015).

<sup>271</sup> *Ibid* Principle 15; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 85.

necessity and proportionality, out of which it would constitute state arbitrariness.<sup>272</sup>

The ICCPR expressly prescribes that anyone arrested or detained must be presumed innocent until proved guilty of a criminal charge, according to law.<sup>273</sup> In other words, no category of detainees shall be denied the right to challenge the lawfulness of detention before court.<sup>274</sup> The scope of the term “anyone” communicate the concept that the prohibition of arbitrary detention and the consequent right to challenge the lawfulness of detention before court extends to all situations of deprivation of liberty, which include:

detention during armed conflicts and emergency situations, detention for the purposes of criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes, and other forms of administrative detention.<sup>275</sup>

States must provide the avenues to challenge an arbitrary arrest or detention to all individuals at any time. The absence of the right to challenge the lawfulness/arbitrariness of detention before a court constitutes a violation of a self-standing human right, which is indispensable to safeguard the core foundations of legality.<sup>276</sup>

Basic Principle 4 orientates that not even under the following circumstances this right can be precluded: “war times, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed.”<sup>277</sup> Concurrently, for the Working Group, “the rights related to liberty and security of the person in particular, apply everywhere and at all times, both in peace and in armed conflict, at

<sup>272</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9.1; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 23.

<sup>273</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.1, 14.2.

<sup>274</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 16; A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 32; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 33.

<sup>275</sup> A/HRC/WGAD/2017/6. Opinion No. 6/2017. ¶ 41; Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 15; See also: A/HRC/WGAD/2017/1. Opinion No. 1/2017; ¶ 45. A/HRC/WGAD/2017/17. Opinion No. 17/2017. ¶ 43.

<sup>276</sup> A/HRC/WGAD/2017/6. Opinion No. 6/2017. ¶ 41; A/HRC/WGAD/2017/8. Opinion No. 8/2017. ¶ 33; A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 33; A/HRC/WGAD/2018/4. Opinion No. 4/2018. ¶ 53; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). ¶ 2.

<sup>277</sup> *Ibid*; “In its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice affirmed the applicability of the International Covenant on Civil and Political Rights during armed conflicts, save through the effect of provisions for derogation of any kind to be found in Article 4 of the Covenant. The Court confirmed its view in its advisory opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (para. 106), and in its judgment of 19 December 2005 on the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (para. 216).” Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 24

home and abroad.”<sup>278</sup>

The application of International Humanitarian Law, in the presence of a non-international or international armed conflict, shall not preclude the application of international Human Rights Law, especially the application of the International Covenant on Civil and Political Rights.<sup>279</sup> The ICCPR, in Article 4, specifically addresses “situations of public emergency that threaten the life of the nation.”<sup>280</sup> International Humanitarian Law and international Human Rights Law are not mutually exclusive, but complimentary.<sup>281</sup> This means that, in the context of an armed conflict, International Humanitarian Law as *lex specialis* is not an interpretative canon for the International Law of Human Rights.<sup>282</sup> So that the ICCPR itself, in article 2, paragraph 1, hold states accountable to human rights violations, regardless of the context in which such violation occurred, whether in peace time or in times of armed conflict.<sup>283</sup>

Therefore, states cannot hold on to International Humanitarian Law as an attempt to escape jurisdiction of International Human Rights Law.<sup>284</sup> This means that states’ authorities and domestic courts must comply, at the same time, with the rules, principles and procedures of both bodies of law.<sup>285</sup> As a consequence, Basic Principle 16 orientates that all detained persons in a situation of armed conflict, including prisoners of war, are guaranteed the exercise of the right, to bring proceedings before a court, “to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies.”<sup>286</sup>

Nevertheless, Basic Guideline 3, read in conjunction with article 4 of the ICCPR,<sup>287</sup> recognizes that there are certain situations of public emergency that may threaten “the life of a nation”.<sup>288</sup> In these circumstances states are entitled to officially proclaim “measures strictly required by the exigencies of the situation to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention”.<sup>289</sup> In an event of “accommodation of practical constraints”, the state must ensure that:

- (1) The court’s authority to decide without delay on the arbitrariness and lawfulness of detention, and to order immediate release if the detention is not lawful, is not itself

<sup>278</sup> Ibid ¶ 22; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). ¶ 3.

<sup>279</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 66.

<sup>280</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 4.

<sup>281</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 66.

<sup>282</sup> Ibid ¶ 67.

<sup>283</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 2.1; A/HRC/WGAD/2012/58. Opinion No. 58/2012, 5.

<sup>284</sup> A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 68.

<sup>285</sup> Ibid ¶ 67.

<sup>286</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 16.

<sup>287</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 4.

<sup>288</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 3.

<sup>289</sup> Ibid.

- diminished;
- (2) The duty of relevant authorities to give immediate effect to an order for release is not diminished;
  - (3) Such measures are prescribed by law, necessary in the exigencies of the situation (including by virtue of the fact that less restrictive measures would be insufficient to achieve the same purpose) be proportionate and non-discriminatory;
  - (4) Such measures apply temporarily, only for as long as the exigencies of the situation require, and are accompanied by mechanisms to review periodically their continued necessity and proportionality;
  - (5) Such measures are consistent with ensuring fair, effective and adversarial proceedings;
  - (6) Such measures are not otherwise inconsistent with international law.<sup>290</sup>

Peremptorily, however, the working Group constant jurisprudence provides that the right to apply for *habeas corpus* shall not be suspended, rendered impracticable nor restricted under any circumstances, not even when a state of emergency or siege is declared,<sup>291</sup> nor in “accommodation of practical constraints”, nor when counter-terrorism measures are taken.<sup>292</sup> At all times, “deprivation of liberty must remain consistent with the norms of international law”.<sup>293</sup>

Particular to counter-terrorism measures, the Working Group has already stated in numerous opinions that “the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept.”<sup>294</sup> After dealing with numerous cases of persons deprived of their liberty for allegedly connections with terrorist organizations and practices, the

<sup>290</sup> Ibid.

<sup>291</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶ 25.

<sup>292</sup> “It has noted a further expansion of some States’ recourse to emergency legislation diluting the right of habeas corpus or amparo and limiting the fundamental rights of persons detained in the context of the fight against terrorism by means of new anti-terror or internal security legislation allowing detention for an unlimited time or for very long periods, without charge, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention. The Working Group has observed that this kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pretrial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence”: Ibid. ¶ 28.

<sup>293</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report. A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court. U.N. Doc. A/HRC/27/47 (June 30, 2014). ¶¶ 29, 30, 32; A/HRC/WGAD/2014/19. Opinion No. 19/2014. ¶ 25.

<sup>294</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 33; A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 68; “Guantanamo detainees’ lack of legal protection and the resulting anguish caused by the uncertainty regarding their future had led them to take the extreme step of going on hunger strike to demand a real change to their situation. The 2013 joint statement, the jurisprudence of the Working Group and statements by the United Nations High Commissioner for Human Rights underlined that, even in extraordinary circumstances, the indefinite detention of individuals goes beyond a minimal and reasonable period of time and constitutes a flagrant violation of international human rights law which in itself constitutes a form of cruel, inhuman and degrading treatment. Those international bodies have also confirmed that the continuing and indefinite detention of individuals without the right to due process is arbitrary and constitutes a clear violation of international law.”: A/HRC/WGAD/2014/50. Opinion No. 50/2014. ¶ 57.

Working Group has conceived of a list of Principles for the deprivation of liberty of persons accused of acts of terrorism. These Principles are:

- (1) The detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges;<sup>295</sup>
- (2) The persons detained under charges of terrorist acts shall be immediately informed of them, and shall be brought before a competent judicial authority, as soon as possible, and no later than within a reasonable time period;<sup>296</sup>
- (3) The persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention;<sup>297</sup>
- (4) The persons convicted by a court of having carried out terrorist activities shall have the right to appeal against their sentences.<sup>298</sup>

Even in the context of terrorism, the above the mentioned measures of “accommodation of practical constraints” can only be taken if they do not derogate the right to bring proceedings before a court and the right to challenge the arbitrariness and lawfulness of detention. In addition, the constant jurisprudence of the Working Group guides that such measures “must be of an exceptional and temporary nature and limited to the extent strictly required.”<sup>299</sup>

### *B Right to Physical and Psychological Integrity – Torture as an Instrument of Violating the Right to a Fair Trial and its Guarantees*

The right to physical and psychological integrity of arrested/detained persons and the prohibition of torture is thoroughly established in the International Human Rights. An extensive number of international legal instruments prohibits the use of torture.<sup>300</sup> The Universal Declaration of Human Rights (Article 5),<sup>301</sup> the 1949 Geneva Conventions for the protection of war victims (Common Article 3.1.a),<sup>302</sup> the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rules 1, 32.1.d, 43.1, 76.1.b),<sup>303</sup> the International Covenant on Civil and Political Rights (Article 7),<sup>304</sup> the United Nations General Assembly Resolution 3452/30 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 2-4),<sup>305</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 2-5),<sup>306</sup> and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle

<sup>295</sup> A/HRC/WGAD/2013/10. Opinion No. 10/2013. ¶ 27.b.

<sup>296</sup> *Ibid* ¶ 27.d.

<sup>297</sup> *Ibid* ¶ 27.e.

<sup>298</sup> *Ibid* ¶ para. 60.h.

<sup>299</sup> A/HRC/WGAD/2017/44. Opinion No. 44/2017. ¶ 31.

<sup>300</sup> A/HRC/WGAD/2013/27. Opinion No. 27/2013. ¶ 33; A/HRC/WGAD/2017/6. Opinion No. 6/2017. ¶ 43.

<sup>301</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>302</sup> International Committee of the Red Cross (ICRC). Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). 75 UNTS 287 (Aug. 12, 1949).

<sup>303</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016).

<sup>304</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>305</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading, U.N.G.A., 30<sup>th</sup> Sess., U.N. Doc. A/RES/30/3452 (Dec. 9, 1975).

<sup>306</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

Furthermore, the prohibition of torture and other cruel, inhuman or degrading treatment is vastly recognized and documented as a part of customary international law.<sup>308</sup> The prohibition is also grounded in a solid, constant and widespread recognition that it has become a peremptory international norm – *jus cogens* norm.<sup>309</sup> The scope and meaning of the conducts associated with crime of torture in the international treaties is *numerus apertus* and dynamic. There are many ways in which the conduct of states and their institutions and instrumentalities can constitute torture.<sup>310</sup> For example, the detainee’s peremptory right not to be subjected to torture includes a minimum expectation of a fair trial. This goes far beyond the protection of physical and psychological integrity safeguarded in several provisions of the international body of treaty law,<sup>311</sup> eg, by subjecting those in arbitrary deprivation of liberty to extreme levels of pain and suffering while in state custody,<sup>312</sup> trampling, electrocutions, burnings, beatings, poundings in the head, genital mutilations, rape, sexual exploitation and forced abortion.<sup>313</sup>

Many other conducts amount to torture, as a violation of a peremptory norm of international law. In the jurisprudence of the Working Group, victims of arbitrary detention have already been:

- (1) Subjected to prolonged sleep deprivation, in some cases for 20 days, including the first seven days in a row;
- (2) Forced to keep stress positions and be hooded during the interrogation sessions;
- (3) Subjected to waterboarding;
- (4) Beaten regularly on their hands and legs until they could no longer walk;
- (5) Placed in solitary confinement immediately after their arrest for several months in a cell without a bed or mattress;
- (6) Exposed to continuous light, as well as laser beam lighting that caused excruciating headaches, dizziness, hallucinations and muscle spasms;
- (7) Received threats against their female relatives, including threats of rape in front of their eyes;
- (8) Placed in a cell with a dysfunctional open toilet without a flush;
- (9) Deprived of drinking water;
- (10) Soaked in ice cold water and placed in an extremely cold room with the air conditioning on;

<sup>307</sup> Body of principles for the protection of all persons under any form of detention or imprisonment, U.N.Comm.H.R., 34<sup>th</sup> Sess., Resolution, U.N. Doc. E/CN.4/RES/19(XXXIV) (March 7, 1978).

<sup>308</sup> A/HRC/WGAD/2013/27. Opinion No. 27/2013. ¶ 31-33; A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 19; A/HRC/WGAD/2017/33. Opinion No. 33/2017. ¶ 91.

<sup>309</sup> A/HRC/WGAD/2013/27. Opinion No. 27/2013. ¶ 31-32; A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 19; A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 23; A/HRC/WGAD/2017/6. Opinion No. 6/2017. ¶ 43; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 27; A/HRC/WGAD/2017/33. Opinion No. 33/2017. ¶ 91.

<sup>310</sup> A/HRC/WGAD/2013/27. Opinion No. 27/2013. ¶ 34.

<sup>311</sup> A/HRC/WGAD/2016/42. Opinion No. 42/2016. ¶ 23.

<sup>312</sup> A/HRC/WGAD/2015/51. Opinion No. 51/2015. ¶ 33.

<sup>313</sup> A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 30; A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 25; A/HRC/WGAD/2017/33. Opinion No. 33/2017. ¶ 91.



- (11) Subjected to electric shocks in an electric chair;
- (12) Beaten with a stick and whipped;
- (13) Hanged with a rope around their neck;
- (14) Subjected to constant death threats with guns pointed at their head;
- (15) Received numerous injections that resulted in their losing consciousness;
- (16) Consistently drugged by their food, which caused severe stomach pain;
- (17) According to some accounts, placed in a freezer for 45 minutes.<sup>314</sup>

Commonly, victims of arbitrary detention have their procedural rights, arising from article 14 of the ICCPR, violated.<sup>315</sup> First, they are taken without warrants to secret interrogation/detention facilities.<sup>316</sup> Then, these victims are severely tortured during indefinite interrogation periods – both psychologically and physically – until a confession is obtained,<sup>317</sup> which violates Nelson Mandela Rule 1,<sup>318</sup> Basic Principle 6<sup>319</sup> and Basic Guidelines 1 and 12.<sup>320</sup> They are forced to recognize liability for crimes they have not committed and to sign false statements of guilt under circumstances of duress.<sup>321</sup> These states' conduct was held to violate norms in the domain of customary international law.<sup>322</sup> Said conducts are also forbidden under the ICCPR, in articles 7 and 14, paragraphs 3 (b), 3 (d) and 3 (e).<sup>323</sup> Consequentially, it is inadmissible in a court any evidence obtained in an unofficial place, either testimonies and/or secret documents.<sup>324</sup>

When convicted under imprecise and vague circumstances, such victims barred access to “judicial mechanisms to challenge the legality of the detention”<sup>325</sup> as well as “to launch an appeal against the decisions of conviction.”<sup>326</sup> Many of them are extrajudicially killed.<sup>327</sup> Some are transferred to prison camps for indefinite political

<sup>314</sup> A/HRC/WGAD/2015/51. Opinion No. 51/2015. ¶ 25.

<sup>315</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14.

<sup>316</sup> A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 23.

<sup>317</sup> A/HRC/WGAD/2013/34. Opinion No. 34/2013. ¶ 28; A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 23; A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29; A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶¶ 8, 9.

<sup>318</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016). Rule 1.

<sup>319</sup> Human Rights Council. Working Group on Arbitrary Detention, 30<sup>th</sup> Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Principle 6.

<sup>320</sup> *Id.* Guidelines 1, 12.

<sup>321</sup> A/HRC/WGAD/2013/34. Opinion No. 34/2013. ¶ 28; A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 30; A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 25.

<sup>322</sup> A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 21.

<sup>323</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 25; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Articles 7, 14, 3 (b), 3 (d) and 3 (e).

<sup>324</sup> A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 21; A/HRC/WGAD/2014/56. Opinion No. 56/2014. 2014. ¶ 35.

<sup>325</sup> A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 23.

<sup>326</sup> *Ibid.*

<sup>327</sup> A/HRC/WGAD/2013/35. Opinion No. 35/2013. para. 30; A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29.

detention.<sup>328</sup> In more extreme cases, some of these prisoners remain in custody until their death.<sup>329</sup>

The guarantee of presumption of innocence and right not to be tortured or compelled to testify against oneself or to confess guilt in police facilities and/or court proceedings are expressly recognized in the ICCPR, in article 14, paragraphs 2 and 3 (g).<sup>330</sup> This means that, in order to extract a confession, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant.<sup>331</sup> Such guarantee of not being compelled to self-incriminate “must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.”<sup>332</sup>

### 1 *Incommunicado Detention and Prolonged Solitary Confinement as a Form of Torture – A Violation of the Right to Dignity*

Thousands of persons are held in incommunicado detention every year around the globe.<sup>333</sup> When in incommunicado, detainees are often deprived from any contact with the outside world.<sup>334</sup> Only in very rare circumstances, authorities allow them to have a supervised contact with their family<sup>335</sup> and with their lawyers.<sup>336</sup> Recurrently, these prisoners do not have the chance to learn the charges against them, to defend from these charges, to make appeals to revisional panels and/or to be informed of the length of their detention.<sup>337</sup>

Holding persons in incommunicado detention is categorically prohibited under International Law, International Human Rights Law and under International Humanitarian law.<sup>338</sup> Customarily, such universal prohibition is applicable even during states of emergency and armed conflict.<sup>339</sup> In practice, this means that no one can be set aside from the protection of the law by acts or omissions of the competent authorities,

<sup>328</sup> A/HRC/WGAD/2013/34. Opinion No. 34/2013. ¶ 28; A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶¶ 23, 30; A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29.

<sup>329</sup> A/HRC/WGAD/2013/36. Opinion No. 36/2013. ¶ 29; A/HRC/WGAD/2013/34. Opinion No. 34/2013. ¶ 28.

<sup>330</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 14; A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 18; A/HRC/WGAD/2017/17. Opinion No. 17/2017. ¶ 42.

<sup>331</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 7; A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 18.

<sup>332</sup> A/HRC/WGAD/2014/1. Opinion No. 1/2014. ¶ 18; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 33.

<sup>333</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 6; A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 30; A/HRC/WGAD/2013/34. Opinion No. 34/2013. ¶ 28; A/HRC/WGAD/2014/56. Opinion No. 56/2014. ¶ 35; A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 19.a; A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 44; A/HRC/WGAD/2015/50. Opinion No. 50/2015. ¶ 5; A/HRC/WGAD/2016/28. Opinion No. 28/2016. ¶ 14; A/HRC/WGAD/2016/29. Opinion No. 29/2016. ¶ 2; A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 26; A/HRC/WGAD/2018/35. Opinion No. 35/2018. ¶ 38.

<sup>334</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 7.

<sup>335</sup> A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 19.a; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 7.

<sup>336</sup> A/HRC/WGAD/2015/50. Opinion No. 50/2015. ¶ 5; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 7.

<sup>337</sup> A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 23.

<sup>338</sup> A/HRC/WGAD/2014/48. Opinion No. 48/2014. ¶ 25; A/HRC/WGAD/2015/50. Opinion No. 50/2015; ¶ 25; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 22; A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 69; A/HRC/WGAD/2018/35. Opinion No. 35/2018. ¶ 38.

<sup>339</sup> A/HRC/WGAD/2014/48. Opinion No. 48/2014. ¶ 25.

even in more rough situations of agitations, in internal turmoil or external conflict.<sup>340</sup>

Numerous international documents, both with binding and soft nature, deal with this issue. The Universal Declaration of Human Rights, for example, expressly indicates the impermissibility of incommunicado detention, in articles 10 and 11 of the document.<sup>341</sup> Police personnel often torture these incommunicado detainees /until a confession is obtained.<sup>342</sup> This conduct constitutes a flagrant violation of the supra cited articles of the Universal Declaration, which stipulates presumption of innocence to all persons until proven guilty, according to law, in a timely public trial, presided by an independent, competent and impartial judge, ensuring the accused of all necessary means to their defense.<sup>343</sup>

The ICCPR, proclaims, in its preambular section, the inherent dignity of the human person and expressly recognizes that the rights enumerated thereof derive from this very dignity. Accordingly, article 9, paragraph 3 and article 14, paragraphs 3 (b), (c) and (d) of the ICCPR,<sup>344</sup> provides that every person should be entitled to the inherently right of being timely presented before a judge to challenge the lawfulness of his detention.<sup>345</sup> Said inherited dignity of the human person demands respect and humane treatment and should prevent arbitrary deprivations of liberty, as recognized in article 10, paragraph 1, of the same document.<sup>346</sup>

In addition, the Principles 8, 12, 15, 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, extensively covers the issue of incommunicado detention.<sup>347</sup> According to this Body of Principles, whenever someone is arrested, his *unconvicted* status must be respected until/unless proven guilty. Without delay, custody must be duly recorded. state agents must formally state the charges against the accused. Agents must also communicate the place and time of detention, the identification of the authorities involved in the arrest, the circumstances in which the accused was brought before a judge for a preliminary hearing, as well as the precise whereabouts of his place of custody.

Similarly, the Body of Principles orientates that detained persons should not be denied of having contact with their legal counselor in proper facilities, taking the necessary/reasonable time for confidential counseling sessions. The confidentiality of such meetings between lawyers and prisoners may be within sight, but not within

<sup>340</sup> A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 44.

<sup>341</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 26; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Articles 10, 11.

<sup>342</sup> Please see section V.B; A/HRC/WGAD/2015/51. Opinion No. 51/2015. ¶ 60.

<sup>343</sup> Ibid.

<sup>344</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Article 9.3 (b); Article 14. 3 (b), (c), (d).

<sup>345</sup> A/HRC/WGAD/2016/54. Opinion No. 54/2016. ¶ 17; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 26; A/HRC/WGAD/2017/17. Opinion No. 17/2017. ¶ 40; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 22.

<sup>346</sup> A/HRC/WGAD/2015/49. Opinion No. 49/2015. ¶ 44.

<sup>347</sup> A/HRC/WGAD/2017/17. Opinion No. 17/2017. ¶ 40; Body of principles for the protection of all persons under any form of detention or imprisonment, U.N.Comm.H.R., 34<sup>th</sup> Sess., Resolution, U.N. Doc. E/CN.4/RES/19(XXXIV) (March 7, 1978); See, generally: Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016).

the hearing.<sup>348</sup> Likewise, imprisoned persons should be entitled to be visited by family members and to communicate with them.

Moreover, incommunicado detention violates several provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular, Rules 1, 3, 43, paragraph 3, 58, paragraphs 58.1 (a), 58.1 (b) and 58.2, 59, 60, paragraphs 60.1 and 60.2, 61, paragraphs 61.1, 61.2 and 61.3, 62, paragraphs 62.1, 62.2, 63 and Rule 111.2.<sup>349</sup> Numerous prisoners' guarantees are safeguarded by these Rules:

- (1) Incommunicado aggravates the existing suffering of the separation of persons from the outside world;
- (2) Persons not yet tried and/or convicted should be presumed to be innocent;
- (3) At all times, in all circumstances, prisoners should have his dignity respected;
- (4) Prisoners must be granted the right to choose a legal adviser of his own consent and to communicate with him and receive legal advice, in a private, prompt and confidential way, without censorship, in reasonable facilities, and with all the guarantees afforded by the local law as well as by International Law;
- (5) If the detainee is a foreigner, he shall have the right to an independent competent interpreter, in order to fully understand all the charges brought before him, and to have access to consular/diplomatic representation from the state he is a national;
- (6) Under necessary supervision, prisoners shall be given the right to communicate with relatives and friends, in writing, in person or through other authorized means;
- (7) If disciplinary sanctions must be imposed due to inadequate behavior of a detainee, they should not include family separation, unless such measure is strictly necessary and applied for a limited time period until discipline, security and order is recovered;
- (8) To the extent possible, prisoners should be allocated to places of custody and rehabilitation centers close to their homes.

When combined, the Universal Declaration of Human Rights,<sup>350</sup> the International Covenant on Civil and Political Rights<sup>351</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment makes it indisputable that prolonged incommunicado detention creates all the conditions that may amount to torture.<sup>352</sup> Both article 5 of the Universal Declaration<sup>353</sup> and article 7 of the ICCPR<sup>354</sup> prescribes that no person can be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 1 of the Torture Convention establishes that one commits torture when, with the consent or acquiescence of a public official, intentionally inflicts

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<sup>348</sup> Please refer to Part IV.A; Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 8.

<sup>349</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016). Rules 1; 3; 43; 60; 61; 62; 111.

<sup>350</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>351</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>352</sup> A/HRC/WGAD/2012/53. Opinion No. 53/2012. ¶ 15; A/HRC/WGAD/2017/17. Opinion No. 17/2017. ¶ 40; A/HRC/WGAD/2017/46. Opinion No. 46/2017. ¶ 22; A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 69; A/HRC/WGAD/2018/35. Opinion No. 35/2018. ¶ 38.

<sup>353</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Article 5.

<sup>354</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

pain or suffering to intimidate or coerce a third person.<sup>355</sup> When a person is arbitrarily arrested, and he is not entitled minimum guarantees upon his detention, as established by law, such as being informed of the reasons for his arrest and be promptly brought before a judge with support of a legal adviser. This constitutes a form of intimidation and coercion, constitutive of torture, such as described in the Torture Convention.<sup>356</sup>

In what regards to prolonged solitary confinement, such conduct may amount, in certain instances, to torture or cruel, inhuman or degrading treatment or punishment.<sup>357</sup> The Nelson Mandela Rule 44 specifies that solitary confinement “shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact.”<sup>358</sup> Also, prolonged solitary confinement “shall refer to solitary confinement for a time period in excess of 15 consecutive days”.<sup>359</sup> The United Nations Special Rapporteur on Torture defined “solitary confinement in excess of 15 days as “prolonged”, at which point some of the harmful psychological effects of isolation can become irreversible.”<sup>360</sup>

Nelson Mandela Rules 43 (1) (a), (b) and 45 (1), (2) provide the necessary guidelines for the state use of solitary confinement.<sup>361</sup> Accordingly, Solitary confinement: 1) Shall be used only in exceptional cases as a last resort; 2) Shall extend for a period of time as short as possible; 3) Shall be subjected to independent review; 4) Shall never amount to torture or other cruel, inhuman or degrading treatment or punishment; 5) Shall never subject persons with mental or physical disabilities, women and children. Indefinite and prolonged solitary confinement shall be prohibited at all circumstances.

### C *The Right of Arrested/Detained Persons to Health*

It is widely reported that, while in custody of states, victims of arbitrary detention suffer from all sorts of health issues. Some of these victims already have previous health problems and such problems are worsened because they do not receive proper care in prison. Others suffer from health issues that are a direct consequence of imprisonment. Issues of these two sorts commonly include: Collapses;<sup>362</sup> Neurological disorders;<sup>363</sup> Seizures;<sup>364</sup> Paralysis;<sup>365</sup> Loss of consciousness due to extreme torture;<sup>366</sup> Blackouts;<sup>367</sup> Diabetes;<sup>368</sup> Hyperthyroidism;<sup>369</sup> Arthritis;<sup>370</sup> Severe back pain;<sup>371</sup> Bone fractures due to

<sup>355</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85. Article 1.

<sup>356</sup> *Ibid.*

<sup>357</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 20; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 7; A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 69.

<sup>358</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016). Rule 44.

<sup>359</sup> *Ibid.*

<sup>360</sup> A/HRC/WGAD/2017/63. Opinion No. 63/2017. ¶ 69.

<sup>361</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016). Rules 43.1 (a), (b); 45.1; 45.2.

<sup>362</sup> A/HRC/WGAD/2017/48. Opinion No. 48/2017. ¶ 8.

<sup>363</sup> A/HRC/WGAD/2017/48. Opinion No. 48/2017. ¶ 8; A/HRC/WGAD/2017/90. Opinion No. 90/2017. ¶ 44.

<sup>364</sup> A/HRC/WGAD/2017/48. Opinion No. 48/2017. ¶ 8.

<sup>365</sup> *Ibid* ¶ 8.

<sup>366</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 8.

<sup>367</sup> A/HRC/WGAD/2016/28. Opinion No. 28/2016. ¶ 14.

<sup>368</sup> A/HRC/WGAD/2016/50. Opinion No. 50/2016. ¶ 4.

<sup>369</sup> A/HRC/WGAD/2015/39. Opinion No. 39/2015. ¶ 12.

<sup>370</sup> A/HRC/WGAD/2016/50. Opinion No. 50/2016. ¶ 4.

<sup>371</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11.

extreme torture;<sup>372</sup> High blood pressure;<sup>373</sup> Heart diseases;<sup>374</sup> Strokes;<sup>375</sup> Deteriorated vision;<sup>376</sup> Deteriorated hearing;<sup>377</sup> Hair loss;<sup>378</sup> Malnutrition;<sup>379</sup> Weight loss<sup>380</sup> Weakness due to hunger strikes;<sup>381</sup> Great difficulty walking after solitary confinement.<sup>382</sup>

Many of these medical problems are chronic and require special medication and treatment.<sup>383</sup> They can lead to death if not properly treated.<sup>384</sup> In many cases of arbitrary detention, prison guards prohibit that medical doctors treat inmates.<sup>385</sup> Authorities commonly deny requests of some prisoners with more acute conditions, who need to receive urgent treatment with medical care specialists in hospitals.<sup>386</sup> Similarly, authorities reportedly deny pleas for release on bail due to medical conditions.<sup>387</sup> In extreme cases, prisoners in arbitrary detention are prevented from receiving even basic injections of food protein, when in situation of acute malnutrition.<sup>388</sup> Other victims are subjected to continued harsh sessions of torture, without having proper care for healing countless bone fractures.<sup>389</sup>

Preventing prisoners from having access to medical care violates a substantial number of the Nelson Mandela Rules.<sup>390</sup> Rules 5, 24, 25 and 31, for example, establish that it is a state responsibility to provide and promote continued health care and interdisciplinary treatment to prisoners with physical, mental or other disabilities. Rule 22 provides that prison administration shall afford drinkable water as well as “food of nutritional value adequate for health and strength” to prisoners.<sup>391</sup>

In fulfilling the obligation to ensure the right to health to prisoners, authorities shall ensure that sick detainees receive daily qualified healthcare in reasonable accommodations. Authorities shall provide full access to health professionals. Rules 109 and 110 particularly provides for specialized psychiatric treatment under the supervision of qualified health-care professionals.<sup>392</sup> Rule 27 ensures the transfer of prisoners who

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<sup>372</sup> *Ibid* ¶ 11.

<sup>373</sup> A/HRC/WGAD/2016/50. Opinion No. 50/2016. ¶ 4.

<sup>374</sup> A/HRC/WGAD/2015/39. Opinion No. 39/2015. ¶ 12.

<sup>375</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 13.

<sup>376</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11.

<sup>377</sup> *Ibid* ¶ 11.

<sup>378</sup> A/HRC/WGAD/2016/28. Opinion No. 28/2016. ¶ 14.

<sup>379</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11.

<sup>380</sup> A/HRC/WGAD/2016/28. Opinion No. 28/2016. ¶ 14; A/HRC/WGAD/2018/19. Opinion No. 19/2018. ¶ 17.

<sup>381</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11; A/HRC/WGAD/2018/19. Opinion No. 19/2018. ¶ 17.

<sup>382</sup> A/HRC/WGAD/2016/28. Opinion No. 28/2016. ¶ 14.

<sup>383</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 13; A/HRC/WGAD/2017/30. Opinion No. 30/2017. ¶ 4.

<sup>384</sup> A/HRC/WGAD/2015/39. Opinion No. 39/2015.

<sup>385</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 13; A/HRC/WGAD/2015/16. Opinion No. 16/2015. ¶ 20; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11.

<sup>386</sup> A/HRC/WGAD/2012/48. Opinion No. 48/2012. ¶ 13; A/HRC/WGAD/2015/39. Opinion No. 39/2015. ¶ 12; A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 8.

<sup>387</sup> A/HRC/WGAD/2015/39. Opinion No. 39/2015. ¶ 12.

<sup>388</sup> A/HRC/WGAD/2018/19. Opinion No. 19/2018. ¶ 17.

<sup>389</sup> A/HRC/WGAD/2017/10. Opinion No. 10/2017. ¶ 11.

<sup>390</sup> Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N.G.A., 70<sup>th</sup> Sess., Resolution, U.N. Doc. A/RES/70/175 (Jan. 8, 2016). Rules 5; 24; 25; 31.

<sup>391</sup> *Ibid* r 22.

<sup>392</sup> *Ibid* rr 109, 110.

require specialized treatment or surgery to specialized institutions or to civil hospitals.<sup>393</sup> Rules 26 and 31 provide that every medical appointment, procedure and examinations shall be subject to full medical confidentiality.<sup>394</sup>

#### D *The Rights of Arrested/Detained Children*

Every year, an alarming number of children become victims of arbitrary detention worldwide, including those subjected to prolonged administrative detention and/or held in prison/labor camps.<sup>395</sup> Authorities clearly subject these children to extreme abuse of power and to disproportionate use of force.<sup>396</sup> Then, while in detention, officers make use of torture and other cruel, inhuman and degrading treatments against minors.<sup>397</sup> As a common practice, children have their arms and legs beat with truncheons. They are kicked and tasered to the point of causing bleedings in their bodies.<sup>398</sup> Their feet, hands, chest, the back and the genitals are electrocuted for consecutive days by the prison personnel.<sup>399</sup> It is also reported that some children are burned to the point of causing them severe abrasions.<sup>400</sup> Many of them are denied access to medical care.<sup>401</sup>

Authorities also disrespect several procedural rights of these children. Minors are arrested without an arrest warrant and/or are held in indefinite pretrial detention.<sup>402</sup> When detained, they are often held in a prison cell with adult detainees.<sup>403</sup> Most children are interrogated without the assistance of a lawyer.<sup>404</sup> Many are rarely brought before a judge.<sup>405</sup> Intelligence-gathering agents use indefinite administrative detention in military facilities with the purpose of obtaining information from the minors.<sup>406</sup> In most cases, no evidence is presented to support their detention.<sup>407</sup> Under torture and duress, minors are forced to sign false confessions.<sup>408</sup>

Such procedures violate several commands of the Convention on the Rights of the

<sup>393</sup> Ibid r 27.

<sup>394</sup> Ibid rr 26, 31.

<sup>395</sup> For the purposes of the present paper, please consider the term “child” means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”: Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3. Article 1; A/HRC/WGAD/2016/35. Opinion No. 35/2016. ¶ 19; A/HRC/WGAD/2012/45. Opinion No. 45/2012. ¶ 12; A/HRC/WGAD/2016/24. Opinion No. 24/2016. ¶ 4; A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶ 4; A/HRC/WGAD/2015/17. Opinion No. 17/2015. ¶ 3; A/HRC/WGAD/2014/25. Opinion No. 25/2014. ¶; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 29; A/HRC/WGAD/2013/35. Opinion No. 35/2013. ¶ 30.

<sup>396</sup> A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 30.

<sup>397</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 4, 7.

<sup>398</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 4, 9; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 29.

<sup>399</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 5, 9.

<sup>400</sup> Id. ¶ 5.

<sup>401</sup> Id. ¶ 7, 9.

<sup>402</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 4, 8, 17; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 34.

<sup>403</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 7, 9.

<sup>404</sup> A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶ 29.

<sup>405</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶ 7.

<sup>406</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶ 9; A/HRC/WGAD/2016/24. Opinion No. 24/2016. ¶¶ 16, 17.

<sup>407</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶ 7.

<sup>408</sup> A/HRC/WGAD/2015/53. Opinion No. 53/2015. ¶¶ 5, 8; A/HRC/WGAD/2017/3. Opinion No. 3/2017. ¶¶ 29, 33.

Child: articles 37 (a), (b), (c), (d) and 40 (2), (b) (i), (ii), (iii), (iv).<sup>409</sup> Additionally, they breach the well-established Rule 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”).<sup>410</sup> Furthermore, they also violate Principles 4, 6, 10, 18, 19 and 21<sup>411</sup> as well as Guideline 18 of United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>412</sup>

Altogether and schematically, these norms and instructions detail 10 imperatives guarantees concerning arrested/detained children:

- (1) No child shall be unlawfully deprived of his liberty, in peace times or in situations of armed conflict;
- (2) Children have the right to presumption of innocence until proven guilty, according to law. If convicted, detention shall be a measure of last resort for the shortest time possible;
- (3) When a child is arrested in state custody, he shall have his humanity and dignity respected at all times;
- (4) state authorities shall take all effective measures to respect the human rights of detained children;
- (5) A detained child shall never be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- (6) Under no circumstance or any form of justification, a detained/imprisoned child shall be subjected to violent methods of interrogation and/or or compelled to confess guilt or to testify against any other person;
- (7) Every arrested child has the right to be promptly informed of the charges against him;
- (8) Children have the right to confidentially communicate with their legal counsel in order to challenge these charges before a competent, independent and impartial judge, without delay; Children have the right to communicate with their relatives, guardians and/or friends;
- (9) Children deprived of liberty shall be placed in a child-sensitive environment. Children shall not share the same prison cell or same detention facilities with adults, except when the child’s best interest guides contrariwise;
- (10) Children held in pre-trial detention have the right to be tried in the shortest possible period of time. Whenever possible, alternative measures shall replace children’s detention pending trial.

Particularly concerning the use of pre-trial detention (detention pending trial),

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<sup>409</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3. Articles 37 (a), (b), (c), (d) and 40 (2), (b) (i), (ii), (iii), (iv).

<sup>410</sup> United Nations. General Assembly. The Beijing Rules. 100.

<sup>411</sup> Human Rights Council. Working Group on Arbitrary Detention, 30th Sess., United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, U.N. Doc. A/HRC/30/37 (July 6, 2015). Guideline 18.

<sup>412</sup> Body of principles for the protection of all persons under any form of detention or imprisonment, U.N.Comm.H.R., 34<sup>th</sup> Sess., Resolution, U.N. Doc. E/CN.4/RES/19(XXXIV) (March 7, 1978).



both for children as well as for adults, such measure cannot be based on “vague and expansive standards such as public security”.<sup>413</sup> In fact, threats to national security must be singularly determined, based on factual circumstances. In resorting to counter-threat measures, states must demonstrate that there are unequivocal, lawful, reasonable and necessary grounds for action.<sup>414</sup> The necessity requirement must be measured on practical, credible facts, such as flight risk of the person to be tried, accused’s interference on the evidences of the case and/or risk of recurrence of crime.<sup>415</sup> Whenever pre-trial detention is required in a case, an independent judicial body shall regularly review that preventive detention, evaluating its proportionality by balancing the justifications of such measure against the danger the person’s liberty would cause.<sup>416</sup>

## VI CONCLUSION

Respect the right to liberty and the right of security of persons under their jurisdiction or effective control is a hallmark of a functioning democracy. Upon a detailed scrutiny of a total of 350 (three hundred and fifty) documents of Working Group on Arbitrary Detention, this paper reached conclusions of two orders: the first, regarding the mandate of the Working Group and the second, regarding the overall issue of arbitrary detention.

Regarding the conclusion on mandate of the Working Group, this paper makes it **in a form of recommendations**. States should always be responsive to its Communications, providing all the necessary information of a case required by the Group. states should always consider the dispositive part of the Opinions concerning complaints against them. Accordingly, they should make all efforts to fulfill the disposition’s recommendations. At all times, states should be responsive to the Urgent Calls made by the Working Group immediately releasing the persons concerned thereof. states should also inform follow-up procedures on actions taken in compliance to any Working Group Opinion rendered to them. states should accept technical assistance from the Working Group in implementing the recommendations made in a specific Opinion. As a best practice, states should take all the necessary legislative means to harmonize their laws and practices in conformity with the standards of the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

As regards arbitrary detention, this paper also makes it **in a form of recommendations**. In arresting a person, states must always inform the individual of the specific charges being brought before him, in the moment of the apprehension as well as in the custody hearing. Upon arrest, police personnel shall prove a person’s guilt, according to the law, through credible sources and evidence. states must provide enforceable instruments to challenge an arbitrary arrest or detention to all individuals at any time, whether within their boundaries or elsewhere where the state has effective power and control. If state fails in proving so, the arrested person has an order of release. At any time, state authorities shall compel individuals to testify against themselves or to confess guilt.

States must always try an accused in their presence. As a protection of the Principle of equality of arms, states must rigorously safeguard the arrested person’s access to a

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<sup>413</sup> A/HRC/WGAD/2017/56. Opinion No. 56/2017. ¶ 67.

<sup>414</sup> A/HRC/WGAD/2017/56. Opinion No. 56/2017. ¶ 67.

<sup>415</sup> Ibid.

<sup>416</sup> Human Rights Council. Working Group on Arbitrary Detention, 27th Sess., Report, U.N. Doc. A/HRC/27/48 (June 30, 2014). ¶ 75; A/HRC/WGAD/2015/4. Opinion No. 4/2015. ¶ 45.

defense counsel challenge criminal charges. States must zeal for the effectiveness of such procedural guarantee as a basilar protection of the interests of justice. states must ensure that detainees' access to the counsel of their choice is confidential, in adequate facilities and whenever needed. Authorities must grant access to lawyers to all evidence, all documents, interrogatories, witnesses and to any other piece which is necessary for a full defense of the allegedly victim.

States must provide lawyers with the opportunity of producing evidence, rebutting accusations and filing writs of *habeas corpus* and petitions to sentence review to a higher tribunal. Ultimately, upon successful complaint against the state, lawyers must have the opportunity to file petitions for reparations and compensations for those unjustly detained. Whenever necessary, in all procedures of apprehension, trial and custody, states shall provide persons with the assistance of an interpreter if they cannot understand or speak the language used in police custody and/or in court.

States must, at all times, respect the prohibition of administrative detention as well as incommunicado detention. states must not have unofficial place of interrogation and/or detention. states must not resort to such measures to indefinitely hold detainees without charging them as an expedient of torture to extract information. At all times, states must allow detainees access to lawyers and to their families. states must categorically prohibit the use of torture during interrogation periods – both psychologically and physically. Torture must never be used to obtain confessions. Competent judges must never admit evidence obtained through torture, through the use of secret documents and/or from unofficial places of interrogation. state agents must follow the safeguards of the Nelson Mandela Rules rigorously.

In relation to protection of children from arbitrary detention, states must respect, at all times, the commands of human rights treaty law, customary international human rights law and the interpretative canons of the Working Group on Arbitrary Detention, particularly: 1) The Convention on the Rights of the Child, especially articles 37 (a), (b), (c), (d) and 40 (2), (b) (i), (ii), (iii), (iv); 2) The Rule 13 of the Beijing Rules and 3) Basic Principles 4, 6, 10, 18, 19 and 21 and Basic Guideline 18 of United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Principle of the Best Interest of the Child must be the leading guide upon states' actions related to detained children.

## **APPENDICES – DOCUMENTS OF THE UN WORKING GROUP ON ARBITRARY DETENTIONS SCRUTINIZED**

### **APPENDIX A – Working Group Opinions based on individual complaints – Chronological Order (organized according to the United Nations Documentation codes)**

#### **2012**

Human Rights Council, Working Group on Arbitrary Detention, 65th Sess., Opinion No. 45/2012 concerning Umar Farooq Shaikh (India) U.N. Doc. A/HRC/WGAD/2012/45 (Nov. 15, 2012).

U.N. Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 48/2012 concerning Muhammad Kaboudvand (Islamic Republic of Iran) U.N. Doc. A/HRC/

WGAD/2012/48 (Nov. 16, 2012).

U.N. Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 51/2012 concerning Kim Young Hwan, Yoo Jae Kil, Kang Shin Sam and Lee Sang Yong (China) U.N. Doc. A/HRC/WGAD/2012/51 (Nov. 19, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 53/2012 concerning Nazir Hamza Magid Al Maged (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2012/53 (Nov. 19, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 54/2012 concerning Abdolfattah Soltani (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2012/54 (Nov. 19, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 56/2012 concerning César Daniel Camejo Blanco (Bolivarian Republic of Venezuela) U.N. Doc. A/HRC/WGAD/2012/56 (Nov. 19, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 57/2012 concerning Anita Ngendahoruri (Burundi) U.N. Doc. A/HRC/WGAD/2012/57 (Nov. 20, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 58/2012 concerning Mr. Ahmad Qatamish (Israel) U.N. Doc. A/HRC/WGAD/2012/58 (Nov. 20, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 60/2012 concerning Sayed Qaddafi Dam (Libya) U.N. Doc. A/HRC/WGAD/2012/60 (Nov. 20, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 62/2012 concerning Eskinder Nega (Ethiopia) U.N. Doc. A/HRC/WGAD/2012/62 (Nov. 21, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 65/2012 concerning Azamjon Farmonov and Alisher Karamatov (Uzbekistan) U.N. Doc. A/HRC/WGAD/2012/65 (Nov. 22, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 67/2012 concerning Dilmurod Saidov (Uzbekistan) U.N. Doc. A/HRC/WGAD/2012/67 (Nov. 23, 2012).

Human Rights Council. Working Group on Arbitrary Detention, 65th Sess., Opinion No. 69/2012 concerning Mr. Alan Phillip Gross (Cuba) U.N. Doc. A/HRC/WGAD/2012/69 (Nov. 23, 2012).

## 2013

Human Rights Council. Working Group on Arbitrary Detention, 66th Sess., Opinion No. 10/2013 concerning Mr. Obaidullah (United States of America) U.N. Doc. A/HRC/WGAD/2013/10 (May 3, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 66th Sess., Opinion No. 12/2013 concerning Nabeel Abdulrasool Rajab (Bahrain)

U.N. Doc. A/HRC/WGAD/2013/12 (May 3, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 18/2013 concerning Saeed Abedinicalangashi (Islamic Republic of Iran) U.N. Doc. A/HRC/WGAD/2013/18 (Aug. 26, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 19/2013 concerning Mohamed Dihani (Morocco) U.N. Doc. A/HRC/WGAD/2013/19 (Aug. 27, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 24/2013 concerning Yorn Bopha (Cambodia) U.N. Doc. A/HRC/WGAD/2013/24 (Aug. 28, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 25/2013 concerning Ali Aarrass (Morocco) U.N. Doc. A/HRC/WGAD/2013/25 (Aug. 28, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 27/2013 concerning Rami Shaher Abdel Jalil al-Mrayat (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2013/27 (Aug. 29, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 29/2013 concerning Jabeur Mejri (Tunisia) U.N. Doc. A/HRC/WGAD/2013/29 (Aug. 30, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 32/2013 concerning Khaled Al-Omeir (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2013/32 (Aug. 30, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 33/2013 concerning Le Quoc Quan (Viet Nam) U.N. Doc. A/HRC/WGAD/2013/33 (Aug. 30, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 34/2013 concerning Kim Im Bok, et al. (Democratic People's Republic of Korea) U.N. Doc. A/HRC/WGAD/2013/34 (Nov. 13, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 67th Sess., Opinion No. 35/2013 concerning Choi Seong Jai, et al. (Democratic People's Republic of Korea) U.N. Doc. A/HRC/WGAD/2013/35 (Nov. 13, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 42/2013 concerning Abdullah Al Hadidi (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2013/42 (Nov. 15, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 43/2013 concerning Mazen Darwish, Mohamed Hani Al Zaitani, Hussein Hammad Ghrer (Syrian Arab Republic) U.N. Doc. A/HRC/WGAD/2013/43 (Nov. 15, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 45/2013 concerning Mohammad Salih Al Bajadi (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2013/45 (Nov. 15, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 46/2013 concerning Abdulkarim Al Khodr (Saudi Arabia) U.N. Doc. A/HRC/WGAD/2013/46 (Nov. 18, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 48/2013 concerning Varnakulasingham Arulanandam (Sri Lanka) U.N. Doc. A/HRC/WGAD/2013/48 (Nov. 19, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 53/2013 concerning Mr. Hisham Al Heysah, Mr. Bassem Al Rawabedah, Mr. Thabet Assaf and Mr. Tarek Khoder (Jordan) U.N. Doc. A/HRC/WGAD/2013/53 (Nov. 21, 2013).

Human Rights Council. Working Group on Arbitrary Detention, 68th Sess., Opinion No. 54/2013 concerning Mustapha El Hasnaoui (Morocco) U.N. Doc. A/HRC/WGAD/2013/54 (Nov. 13, 2013).

## **2014**

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 1/2014 concerning Tagi al-Maidan (Bahrain) U.N. Doc. A/HRC/WGAD/2014/1 (Apr. 22, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 3/2014 concerning Ilham Tohti (China) U.N. Doc. A/HRC/WGAD/2014/3 (Apr. 22, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 5/2014 concerning Shawqi Ahmad Omar (Iraq) U.N. Doc. A/HRC/WGAD/2014/5 (Apr. 23, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 9/2014 concerning Iván Fernández Depestre. (Cuba)

U.N. Doc. A/HRC/WGAD/2014/9 (Apr. 23, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 10/2014 concerning 12 individuals (Egypt) U.N. Doc. A/HRC/WGAD/2014/10 (Apr. 24, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 12/2014 concerning Khalifa Rabia Najdi (United Arab Emirates) U.N. Doc. A/HRC/WGAD/2014/12 (Apr. 30, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 13/2014 concerning Mr. Mohammad Muthana Al Ammari (Yemen) U.N. Doc. A/HRC/WGAD/2014/13 (Apr. 30, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 22/2014 concerning Jassim al-Hulaibi (Bahrain) U.N. Doc. A/HRC/WGAD/2014/22 (Aug. 25, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 69th Sess., Opinion No. 19/2014 concerning Muhamadanwar Hajiteh also known as Muhamad Anwal or Anwar (Thailand) U.N. Doc. A/HRC/WGAD/2014/19 (May 1, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 22/2014 concerning Jassim al-Hulaibi (Bahrain) U.N. Doc. A/HRC/WGAD/2014/22 (Aug. 25, 2014).

Human Rights Council. Working Group on Arbitrary Detention, seventieth Sess., Opinion No. 23/2014 concerning Damián Gallardo Martínez (Mexico) U.N. Doc. A/HRC/WGAD/2014/23 (Aug. 26, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 24/2014 concerning La Ring (Myanmar) U.N. Doc. A/HRC/WGAD/2014/24 (Aug. 26, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 25/2014 concerning a minor whose name is known by the Working Group (Bahrain) U.N. Doc. A/HRC/WGAD/2014/25 (Aug. 26, 2014).

Human Rights Council. Working Group on Arbitrary Detention, seventieth Sess., Opinion No. 29/2014 Concerning: Juan Carlos Nieto Quintero (Bolivarian Republic of Venezuela) U.N. Doc. A/HRC/WGAD/2014/29 (Aug. 28, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 30/2014 concerning Daniel Omar Ceballos Morales (Bolivarian Republic of Venezuela) U.N. Doc. A/HRC/WGAD/2014/30 (Aug. 28, 2014).

Human Rights Council. Working Group on Arbitrary Detention, seventieth Sess., Opinion No. 33/2014 concerning Pierre-Claver Mbonimpa (Burundi) U.N. Doc. A/HRC/WGAD/2014/33 (Aug. 28, 2014).

Human Rights Council. Working Group on Arbitrary Detention, seventieth Sess., Opinion No. 34/2014 concerning Mohammed Hassan Sedif and Abdul Aziz Moussa (Bahrain) U.N. Doc. A/HRC/WGAD/2014/34 (Aug. 28, 2014).

Human Rights Council. Working Group on Arbitrary Detention, 70th Sess., Opinion No. 35/2014 concerning Khaled Mohamed Hamza Abbas, et al. (Egypt) U.N. Doc. A/HRC/WGAD/2014/35 (Aug. 28, 2014).

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