

# DETENTION ON DISCRIMINATORY GROUNDS: AN ANALYSIS OF THE JURISPRUDENCE OF THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

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## ABSTRACT

*Over the last 27 years, the United Nations Working Group on Arbitrary Detention has developed a rich jurisprudence on the circumstances in which individuals have been arbitrarily detained. Until recently, most of this jurisprudence focused on detention resulting from the exercise of rights and freedoms, and serious violations of the right to fair trial. The Working Group is increasingly receiving communications involving detention on discriminatory grounds and its findings are evolving in response. Despite significant progress, there are several issues yet to be resolved by the Working Group as it moves toward a more comprehensive equality-based conception of arbitrary detention. The unresolved issues include the need for greater clarity on what constitutes discrimination; how to deal with laws that are discriminatory; how to distinguish between detention resulting from the exercise of rights and from discrimination; whether protection should extend to a broader range of individuals and groups; why poverty matters in detention practices, and whether the Working Group's recommendations and follow-up need to be tailored in cases of discrimination. This article offers suggestions on the direction that the Working Group might take in its jurisprudence to resolve these remaining areas of uncertainty, including clarifying the circumstances in which differential treatment will amount to discrimination,*

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*determining that detention arising from discriminatory laws has no legal basis, taking a flexible approach to the overlap in the categories it employs to evaluate arbitrary detention, incrementally extending protection to marginalized groups such as those living in poverty, making recommendations to address the structural causes of discrimination, and using its follow-up procedure to highlight cases of detention on discriminatory grounds.\*\**

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\*\* To the best of the author's knowledge, this article does not contain information relating to any communication or request for review currently before the Working Group. It presents potential approaches to detention on discriminatory grounds, without pre-empting any action that the Working Group may take in any case or in carrying out its mandate. The views expressed are those of the author alone. The author is grateful to Miguel de la Lama, former Secretary of the Working Group, for background information and advice.

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## INTRODUCTION

I was arrested in my transition from work to my home at around 10 p.m. after a traffic stop. The initial officer inappropriately shouted, verbal insulted, and falsely accused me of intoxication and of having drugs in my possession. I didn't. A second police officer . . . arrived at the scene and also shout at me. They were intimidating and racist. I was transfer to . . . jail and then to the male unit of [the] detention center.

**(Transgender woman)<sup>1</sup>**

I could never have imagined just how traumatic . . . the process of involuntary hospitalization, even just for 72 hours, would be. During my hospitalization, I was invasively strip-searched, secluded and restrained, verbally abused by staff members, and given medication without being informed of potential side effects and told that I had to take the medication if I wanted to leave the hospital. . . . [We] . . . have very good reason to be afraid of the power . . . mental health professionals have to lock us up and take away our civil liberties. We do not get to post bail, we do not get fair trial, we do not even get to explain ourselves.

**(Patient involuntarily hospitalized for a psychosocial disability)<sup>2</sup>**

I was about to take bus . . . to another city, and they asked me for my passport and I said I don't have a passport. . . . I have my driver license, and it is valid. . . . She called the immigration services . . . and she said 'I have one for you guys.' [They] pull over next to the bus, and went directly to me. 'Do you have a passport?' I said why are you asking this only to me? Because the color of my skin? 'No, no, no, it's just a routine check' and they asked me to get off the bus and go to the station. . . . I got to [the] detention center. I spent 10 months in there.

**(Immigrant facing deportation)<sup>3</sup>**

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1. Written submission to the United Nations Working Group on Arbitrary Detention (n.d.) on behalf of a group of persons alleged to have been arbitrarily detained at a particular detention center (on file with the author).

2. Presentation to the United Nations Working Group on Arbitrary Detention (n.d.) (on file with the author).

3. Information provided to the United Nations Working Group on Arbitrary Detention in relation to persons detained at an immigration detention center and their families (n.d.) (on file with the author).

These words reflect the real experiences of people who have been detained.<sup>4</sup> Their testimony reminds us that the universality of human rights is far from being a reality for many people. The United Nations Working Group on Arbitrary Detention receives submissions from individuals and groups around the world in similar situations who have been detained solely because of their appearance; their beliefs; and the economic, social, cultural, and political circumstances in which they find themselves. They are often detained during wars on terrorism and drugs, as part of campaigns to improve “law and order,” in the midst of efforts to curb migration, or simply because they lack the power and resources to prevent their detention. The task of the Working Group is to ensure that their stories do not remain hidden, and to serve as a strong and clear voice that detention on discriminatory grounds is arbitrary and must not gain acceptance or legitimacy. The Working Group does not shy away from this important work and continually seeks to strengthen its jurisprudence, including when dealing with allegations of detention on discriminatory grounds.

Part I of this article commences by considering the context in which the Working Group operates, with a focus on the political and social factors at play. It then examines the Working Group’s mandate to consider cases of detention, including the five categories that it employs to determine whether a person has been arbitrarily detained, before turning to a discussion of the Working Group’s four key functions. The focus of Part I is on aspects of the Working Group’s capacity to contribute to a fuller understanding of discrimination and its impact on detention, rather than an exhaustive analysis of the Working Group’s practices and procedures, which have already been well documented.<sup>5</sup>

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4. The names of the detainees and other identifying details, such as the names and locations of the detention centers where they were held, have been removed from these accounts in order to maintain the confidentiality of the testimony.

5. See, e.g., 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*, 39 COLUM. HUM. RTS. L. REV. 101 (2008) (explaining in detail the Working Group’s history, procedures and practice); David S. Weissbrodt & Brittany Mitchell, *The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence*, 38 HUM. RTS. Q. 655 (2016) (discussing the competence of the Working Group and how it has responded through its jurisprudence to changes in the global human rights environment). A detailed description of the Working Group’s procedures and competence is found in Human Rights Council, *Methods of Work of the Working*

Part II explores the unique aspects of the Working Group's competence, subject-matter jurisdiction, interpretation of its mandate, and membership that represent opportunities for it to expand its jurisprudence on discrimination. At the same time, this Part also notes potential constraints on the Working Group's ability to do so. It describes the pivotal moment in 2010 when the Working Group amended its Methods of Work to include Category V, the addition of which gave the Working Group specific authority to determine that detention is arbitrary when it is motivated by a discriminatory purpose. The Part concludes by tracing the development of jurisprudence under Category V.

Part III identifies areas of the Working Group's jurisprudence in which further analysis is needed to address unresolved questions relating to detention on discriminatory grounds. It discusses how the Working Group has yet to fully explore the concept of detention on discriminatory grounds, including what kind of differential treatment amounts to discrimination, how to approach laws that are *de jure* or *de facto* discriminatory, and how to distinguish between detention resulting from the exercise of the rights listed in Category II (such as the right to equality before the law and to equal protection of the law) and detention on the basis of grounds prohibited under Category V, both of which may involve discrimination. Part III also considers the uncertainty surrounding the application of the Working Group's jurisprudence on discrimination to groups not expressly protected under Category V, as well as to people living in poverty. Part III goes on to discuss how the Working Group could more effectively address discrimination through its recommendations and follow up procedures. Finally, this Part presents potential ways forward, arguing that the Working Group could enhance its jurisprudence by further defining what is meant by discrimination under Category V, paying greater attention to laws that discriminate on their face or in their application, being flexible in applying its categories to cases of discrimination, extending protection to a wider range of vulnerable groups, and strategically using its recommendations and capacity to follow-up to provide a remedy in each case and to prevent future cases of discrimination.

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Group on Arbitrary Detention, U.N. Doc. A/HRC/36/38 (July 13, 2017), <http://www.ohchr.org/EN/Issues/Detention/Pages/MethodsOfWork.aspx> [<https://perma.cc/K2H2-2V3G>] [hereinafter *Methods of Work*].

The central theme of the article is that the Working Group can and must move toward what David Tanovich calls an “equality-based conception of arbitrary detention.”<sup>6</sup> That is, formal and substantive equality should be a key part of the Working Group’s assessment of detention, of equal importance to a technical focus on whether there is a legal basis for detention, whether a person has been detained for exercising his or her rights, or whether he or she was afforded a fair trial or held in prolonged administrative custody without review.<sup>7</sup> This author hopes that this article will raise awareness of the Working Group’s efforts to address detention on discriminatory grounds and lead to further discussion of how human rights mechanisms can promote greater fairness in detention practices.

### I. OVERVIEW OF THE WORKING GROUP, ITS CONTEXT, MANDATE, AND KEY FUNCTIONS

Developing jurisprudence on discriminatory detention practices is a complex and continually evolving area of work, which requires the Working Group to be aware of the political and social dynamics that result in the different treatment of individuals and groups. The Working Group’s broad mandate and Methods of Work give it the flexibility to respond to such changes and, since 2010, to make specific findings in relation to detention on discriminatory grounds. This Part discusses the realities of that work, commencing with an overview of the context in which the Working Group is developing its jurisprudence on discriminatory detention practices. This is followed by a review of the Working Group’s mandate and the five categories that it employs in its analysis of arbitrary detention. It concludes by considering the Working Group’s four key functions, particularly their relevance in identifying and addressing cases of discrimination.

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6. This phrase is borrowed from David M. Tanovich, *Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention*, 40 OSGOODE HALL L. J. 145 (2002), though used in a different sense and context in this article.

7. This is a summary of Categories I, II, III and IV in the Working Group’s Methods of Work. *See infra*, Part I.B.

### A. Context

These are the best and worst of times for the Working Group in developing its jurisprudence in relation to detention on discriminatory grounds. On the one hand, interest in discrimination and its impact on detention practices is high. During the Working Group's interactive dialogue at the U.N. Human Rights Council in September 2017, delegations from several regional groups commended the Working Group's initial analysis of discriminatory detention practices in its 2016 annual report,<sup>8</sup> while others drew the Council's attention to provisions in their domestic laws that address discrimination and arbitrary detention.<sup>9</sup> Not surprisingly, non-governmental organizations (NGOs) and national human rights institutions (NHRIs) also made positive statements referencing the Working Group's jurisprudence, particularly its decision in November 2016 that human rights defenders fall within their own protected class for the purposes of determining whether an individual has been detained on a discriminatory ground.<sup>10</sup> Furthermore, of the forty-one opinions adopted by the Working Group in 2017 in which it found a Category V violation, the sources—that is, the individuals or groups that had submitted a complaint to the Working Group—had raised the

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8. The delegations included the European Union, Tunisia (on behalf of the African Group), France, Pakistan, Greece, Morocco, Portugal, Ukraine, Palestine, Croatia and Saudi Arabia. While much of the discussion likely reflected each State's interests, the level of engagement on detention on discriminatory grounds was encouraging. *See also* U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det., U.N. Doc. A/HRC/36/37, at ¶¶ 46–49 (July 19, 2017) [hereinafter 2016 Rep. of the Working Grp.] (outlining the Working Group's initial analysis of discrimination). All of the Working Group's annual reports can be found online. *See Annual Reports: Reports to the Human Rights Council*, OFFICE OF THE U.N. HIGH COMM'N'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx> [<https://perma.cc/8Q7B-TF9U>].

9. *See* Press Release, Office of the High Comm'n'r for Human Rights, Human Rights Council Begins Interactive Dialogue on Arbitrary Detention and Contemporary Forms of Slavery (Sept. 12, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22056&LangID=E> [<https://perma.cc/8GXB-5XD8>]. *See also* Office of the U.N. High Comm'n'r for Human Rights, Human Rights Council Begins Interactive Dialogue on Use of Mercenaries and on Hazardous Wastes (Sept. 13, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22058&LangID=E> [<https://perma.cc/ZR5U-8JQQ>].

10. *See infra*, Part III.D.

issue of discrimination in their submissions in twenty-seven (or sixty-six percent) of those cases.<sup>11</sup>

Nevertheless, both the U.N. Secretary-General and the former U.N. High Commissioner for Human Rights have reportedly acknowledged that inequality is growing, as are nationalism, racism and xenophobia,<sup>12</sup> and that the retreat by States from their commitments to human rights has made it difficult for human rights mechanisms to be heard and respected.<sup>13</sup> The Working Group is also no stranger to commentary, including criticism, on how it carries out its role, particularly regarding its opinions in high profile cases.<sup>14</sup>

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11. See *infra*, Part II.D. The author obtained these statistics by examining each of the adopted opinions from 2017. The author conducted a similar assessment in relation to all data cited in this article on Category V, as the Working Group does not currently maintain this information. In its opinions, the Working Group refers to the individual or group that has submitted a complaint as the “source” and does not reveal the identity of the source. For further details on who can act as a source in making a submission to the Working Group, see the text accompanying *infra* note 58.

12. See António Guterres, U.N. Secretary-General, Remarks to G.A. (Jan. 16, 2018), <https://reliefweb.int/report/world/amid-serious-global-setbacks-secretary-general-urges-action-climate-migration-regional> [<https://perma.cc/U62D-KA7X>].

13. See Colum Lynch, *U.N. Human Rights Chief to Leave, Citing ‘Appalling’ Climate for Advocacy*, FOREIGN POLICY (Dec. 20, 2017), <http://foreignpolicy.com/2017/12/20/u-n-human-rights-chief-to-leave-citing-appalling-climate-for-advocacy/> [<https://perma.cc/34YL-VYX3>].

14. See, e.g., Beate Rudolf, *The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights*, in 4 MAX PLANCK YEARBOOK OF U.N. L. 289, 310–319 (J.A. Frowein & R. Wolfrum eds., 2000) (explaining the history and procedure of the Working Group and identifying the possibility that some States “intend to weaken” the Working Group); BERTRAND G. RAMCHARAN, *THE PROTECTION ROLES OF UN HUMAN RIGHTS SPECIAL PROCEDURES* 182–189 (2009) (describing the Working Group’s investigation procedures and identifying it as a “pioneer[]” in providing remedies for human rights abuses). In recent years, the Working Group has received very close scrutiny of some of its opinions. See, e.g., Liora Lazarus, *Is the United Nations Working Group on Arbitrary Detention Decision on Assange ‘So Wrong’?*, U.K. CONST. L. BLOG (Feb. 9, 2016), <https://ukconstitutionallaw.org/2016/02/09/liora-lazarus-is-the-united-nations-working-group-on-arbitrary-detention-decision-on-assange-so-wrong/> [<https://perma.cc/26Z7-7DWH>] (responding to criticism by various commentators that the Working Group’s opinion in Julian Assange’s case was “ridiculous,” “ludicrous,” and “so wrong”). The Working Group is often accused, particularly by governments, of overstepping its mandate or interfering in issues of national sovereignty. See, e.g., Ven Rathavong, *KH Permanent Mission to UN Blasts WGAD*, KHMER TIMES (May 11, 2018), <https://www.khmertimeskh.com/50488825/kh-permanent-mission-to-un-blasts-wgad/> [<https://perma.cc/7D7L-Y5F8>] (documenting the Permanent Mission of Cambodia’s

It will, however, have to navigate the challenges of populism and deep skepticism of the benefits of upholding human rights<sup>15</sup> by making the best use of its mandate and functions to deliver a relevant and credible message on discrimination in detention practices in the coming years.

#### B. Mandate of the Working Group

On March 5, 1991, the former U.N. Commission on Human Rights established the Working Group, giving it a three-year mandate of “investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.”<sup>16</sup> Since then, the Working Group’s mandate has been consistently renewed for three-year periods, most recently on September 30, 2016, for a further three years, ending in 2019.<sup>17</sup>

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criticism that the Working Group based its report, in which it called for the immediate release of a politician from detention, on unreliable sources).

15. See, e.g., Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 6 (2017) (arguing for the necessity of a renewed focus that takes into account those who felt they were left behind by globalization). Alston suggests that the majority in society feel that they have no stake in the human rights enterprise and that human rights groups are just working for “asylum seekers,” “felons,” and “terrorists.” The #MeToo movement has, however, sparked a renewed interest in gender equality, albeit outside the detention context.

16. Comm’n on Human Rights Res. 1991/42, U.N. Doc. E/CN.4/RES/1991/42 (Mar. 5, 1991). This resolution also entrusted the Working Group with a mandate to “seek and receive information from Governments and intergovernmental and non-governmental organizations,” to “receive information from the individuals concerned, their families or their representatives” and to “present a comprehensive report to the Commission” at its annual session. Further information on the creation of the Working Group can be found at *Working Group on Arbitrary Detention*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx> [<https://perma.cc/N8W7-LJGS>]. See also Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT’L L. 709 (1991) (documenting the Working Group’s creation and first session). Other important Working Group functions, such as issuing urgent appeals, conducting country visits, and formulating deliberations are discussed further below. See *infra*, Part I.C.

17. See Human Rights Council Res. 33/30, U.N. Doc. A/HRC/RES/33/30 (Sept. 30, 2016). This resolution was adopted by a vote of 46-0, with one abstention. The Human Rights Council previously extended the Working Group’s mandate, see, e.g., Resolution 24/7, U.N. Doc A/RES/24/7 (Sept. 26, 2013), while the Commission on Human Rights had previously done so, as well. See, e.g., Resolutions 2003/31, U.N. Doc E/CN.4/RES/2003/31 (Apr. 23, 2003). In the periods between extensions,

According to its Methods of Work, the Working Group is required, in discharging its mandate, to refer to five legal categories when it is determining whether detention is arbitrary:<sup>18</sup>

- (a) 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**);
- (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights (UDHR) and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (ICCPR) (**Category II**);
- (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (**Category III**);
- (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without

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the Council and the Commission kept the Working Group's mandate under review. *See, e.g.*, Human Rights Council Res. 20/16, U.N. Doc. A/HRC/RES/20/16 (July 6, 2012); Comm'n on Human Rights Res. 2004/39, U.N. Doc. E/CN.4/RES/2004/39 (Apr. 19, 2004); Comm'n on Human Rights Res. 1992/28, U.N. Doc. E/CN.4/RES/1992/28 (Feb. 28, 1992). It is not unusual for the mandate of a working group to be renewed for a three-year period. Other U.N. working group mandates are also renewed for this period. *See Thematic Mandates*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, [https://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM](https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM) [<https://perma.cc/C4RG-RJ55>]. This allows the Human Rights Council to assess at regular intervals whether the mandate is still needed.

18. Methods of Work, *supra* note 5, ¶ 8. The Working Group does not go beyond these five categories in determining that detention is arbitrary. For a detailed analysis of the Working Group's jurisprudence under each of these categories, *see* Weissbrodt & Mitchell, *supra* note 5, at 669–99. The Methods of Work also authorizes the Working Group to take into account various international instruments and standards, many of which deal specifically with, or contain provisions relating to, discrimination. Methods of Work, *supra* note 5, ¶ 7. *See* G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

the possibility of administrative or judicial review or remedy (**Category IV**);

(e) 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**).

The Working Group began its work in 1991, after consulting with relevant experts, by developing Categories I, II and III, and subsequently adding Categories IV and V to its Methods of Work in 2010 as its jurisprudence on arbitrary detention progressed. Unsurprisingly, the development of the five categories was closely related to the issues of the time. For example, in the early years, detention as a result of the exercise of rights and freedoms, particularly the freedom of opinion and expression, was a primary focus of the Working Group in its opinions and resulted in the addition of Category II.<sup>19</sup> Indeed, the issue was of such prominence that it prompted the Commission on Human Rights to express its concern in several resolutions that most cases of arbitrary detention were motivated by the exercise of this right.<sup>20</sup> Ten years later, the Working Group found

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19. *See, e.g.*, U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., ¶ 9, U.N. Doc. E/CN.4/1993/24 (Jan. 12, 1993) [hereinafter 1992 Rep. of the Working Grp.] (describing the adoption of resolution 1992/22, in which the Commission on Human Rights invited the Working Group to pay particular attention to the situation of those who were detained for exercising their right to freedom of opinion and expression.); U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., ¶ 37, U.N. Doc. E/CN.4/1994/27 (Dec. 17, 1993) (noting that the Working Group had previously expressed concern for the right to freedom of opinion and expression).

20. *See, e.g.*, U.N. Comm'n on Human Rights Res. 1993/36, U.N. Doc. E/CN.4/RES/1993/36, ¶ 14 (Mar. 5, 1993) (expressing concern that a majority of arbitrary detentions are motivated by the exercise of the right to freedom of opinion and expression); U.N. Comm'n on Human Rights Res. 1994/32, U.N. Doc. E/CN.4/RES/1994/32, ¶ 13 (Mar. 4, 1994) (reiterating its concern that a majority of arbitrary detentions are motivated by the exercise of the right to freedom of opinion and expression); U.N. Comm'n on Human Rights Res. 1995/59, U.N. Doc. E/CN.4/RES/1995/59, ¶ 13 (Mar. 7, 1995) (expressing its concern and emphasizing the need to pay close attention to detentions motivated by the exercise of fundamental rights and freedoms); U.N. Comm'n on Human Rights Res. 1996/28, U.N. Doc. E/CN.4/RES/1996/28, ¶ 15 (Apr. 19, 1996) (reiterating its concern and emphasizing the need to pay close attention to detentions motivated by the exercise

that the detention of fifty-five people was motivated by their sexual orientation, a discriminatory ground, and was therefore arbitrary and in violation of Articles 2(1) and 26 of the ICCPR.<sup>21</sup> As a result, the Working Group resolved to develop its jurisprudence in this area,<sup>22</sup> and added Category V to its Methods of Work in 2010 in order to deal specifically with detention on discriminatory grounds, as discussed below.<sup>23</sup>

### C. Key Functions

The Commission on Human Rights and the Human Rights Council entrusted the Working Group with four primary functions: investigating individual complaints of arbitrary detention, taking urgent action, conducting country visits, and formulating deliberations to provide guidance on detention practices.<sup>24</sup> This section examines each of these four functions, with a particular focus on how they can be employed by the Working Group to strengthen its analysis of discriminatory detention practices.

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of fundamental rights and freedoms). The Working Group informed the Commission that it had received many submissions involving allegations that individuals were detained for peacefully exercising their freedom of opinion and expression, including from prominent leaders and dissidents. *See e.g.*, Decision No. 8/1992 concerning U Nu and Aung San Suu Kyi (Myanmar) *in* U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., U.N. Doc. E/CN.4/1993/24, ann. I at 43 (finding that placement under house arrest for criticizing the Government was arbitrary); Decision No. 36/1995 concerning Mohamed Nasheed and Mohamed Shafeeq (Maldives) (Nov. 24, 1995) *in* U.N. Comm'n on Human Rights, Decisions Adopted by the Working Grp. on Arbitrary Det., at 9, U.N. Doc E/CN.4/1997/4/Add.1 (Oct. 29, 1996) (finding that the detention of two opposition members for expressing critical views on the eve of parliamentary elections was arbitrary).

21. Op. No. 7/2002 concerning Yasser Mohamed Salah et al. (Egypt) (Jun. 21, 2002) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. On Arbitrary Det., at 73, ¶ 28, U.N. Doc. E/CN.4/2003/8/Add.1 (Jan. 24, 2003) [hereinafter Op. No. 7/2002 (Egypt)].

22. U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., ¶¶ 68–70 U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002) [hereinafter 2002 Rep. of the Working Grp.].

23. *See infra*, Part II.C.

24. These functions are referenced in H.R.C. Res. 33/30, *supra* note 17, ¶¶ 4, 7–9, and further elaborated in the Working Group's Methods of Work, *supra* note 5. *See also* U.N. Comm'n on Human Rights Res. 2005/28, U.N. Doc. E/CN.4/RES/2005/28 (Apr. 19, 2005) (noting that the Working Group is tasked with investigating cases of detention that are not in accordance with international standards).

## 1. Legal Opinions

The Working Group investigates allegations of arbitrary detention received under its regular communications procedure, leading to the adoption of a legal opinion on whether the detention is consistent with the UDHR and, for States parties, the ICCPR.<sup>25</sup> At the end of 2017, the Working Group had adopted nearly 1,200 opinions in relation to more than 120 countries around the world.<sup>26</sup> The adoption of opinions is the Working Group's core business and its most direct means of addressing allegations of discrimination, primarily under Category V of its Methods of Work.<sup>27</sup> When the Working Group finds that a Category V violation has occurred, it makes recommendations (such as release<sup>28</sup> and compensation) intended to remedy the situation

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25. For a detailed description of the Working Group's regular procedure, *see* Weissbrodt & Mitchell, *supra* note 5, at 667–68 (explaining the Working Group's investigations procedure). The Working Group maintains a relationship of comity with the Human Rights Committee, regularly citing the Committee's jurisprudence and general comments, and transmitting cases to the Committee in accordance with its Methods of Work, *supra* note 5, ¶ 33(d)(ii). However, the Working Group maintains its own interpretation of the ICCPR, which, in some cases, varies from the Committee's views.

26. On the author's calculation, the exact number was 1,199 opinions as of December 2017 based on data kept by the Working Group's Secretariat in Geneva, as well as information available on the Working Group's website. Opinions adopted by the Working Group are publicly accessible in the Working Group's database. *See Detention Document Search*, U.N. WORKING GRP. ON ARBITRARY DETENTION, <https://www.unwgadatabase.org/un/> [<https://perma.cc/71FZ-4WVX>]. They are also posted on the Working Group's website. *See Opinions Adopted by the Working Grp. On Arbitrary Detention*, U.N. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx> [<https://perma.cc/L7CE-AGWT>]. All data cited in relation to Category V was current up to December of 2017.

27. *See infra*, Part II.D. The Working Group can also address issues of discrimination under Category II of its Methods of Work, *see infra*, Part III.C.

28. When a person has been released before an opinion is adopted, the Working Group may either file the case or render an opinion (*see* Methods of Work, *supra* note 5, ¶ 17(a)). In recent years, the practice has been to adopt an opinion despite the release of the victim, which allows the Working Group to comment on issues of principle, including under Category V. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session (21–25 August 2017): Op. No. 50/2017 concerning Maria Chin Abdullah (Malaysia), ¶ 53, U.N. Doc. A/HRC/WGAD/2017/50 (Sept. 21, 2017) [hereinafter Op. No. 50/2017 (Malaysia)] (Ms. Abdullah had been detained for ten days before being released).

of the victim,<sup>29</sup> and also reiterates the principles of equality and non-discrimination, with each opinion building upon the previous jurisprudence.

The potential impact of an opinion is not limited to an individual or even a country. Since adding Category V to its Methods of Work in 2010, the Working Group has adopted seventy-two opinions in which it found that a Category V violation had occurred and, of these, ten opinions involved more than one victim.<sup>30</sup> Moreover, in some of the Category V cases, the Working Group exercised its discretion to send the submission to more than one State, extending the applicability of its findings and recommendations beyond one country context.<sup>31</sup>

In some instances, individual complaints to the Working Group follow major world events such as coups d'état, large demonstrations or uprisings, mass migration events, acts of terrorism, internal armed conflict, elections, and other incidents in which large numbers of people

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29. See *infra* Part III.F where it is argued that, while opinions are useful in each case, they may not (at least in their present formulation) be the best vehicle for achieving broader societal change.

30. In some cases, there was a large number of victims. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session (21–25 November 2016): Op. No. 46/2016 concerning Wu Zeheng and 18 others (China), U.N. Doc. A/HRC/WGAD/2016/46 (Jan. 27, 2017) [hereinafter Op. No. 46/2016 (China)] (nineteen Buddhists detained on discriminatory grounds); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session (19–28 April 2017): Op. No. 9/2017 concerning Hana Aghighian et al. (Islamic Republic of Iran), U.N. Doc. A/HRC/WGAD/2017/9 (May 29, 2017) [hereinafter Op. No. 9/2017 (Islamic Republic of Iran)] (twenty-four members of the Baha'i faith detained on discriminatory grounds).

31. The Working Group sends submissions to multiple States when the facts in the submission suggest possible joint responsibility for arbitrary detention. See U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-First Session (17–21 November 2014): Op. No. 50/2014 concerning Mustafa al Hawsawi (United States of America and Cuba), ¶ 53, U.N. Doc. A/HRC/WGAD/2014/50 (Feb. 13, 2015) [hereinafter Op. No. 50/2014 (United States of America and Cuba)] (discussing both the United States' and Cuba's responsibility for the Guantánamo Bay detention facility); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 2/2015 concerning Andargachew Tsige (Ethiopia and Yemen), U.N. Doc. A/HRC/WGAD/2015/2 (July 6, 2015) [hereinafter Op. No. 2/2015 (Ethiopia and Yemen)] (finding, *inter alia*, a Category III violation for both Ethiopia and Yemen and a Category V violation in relation to Ethiopia only).

have been detained,<sup>32</sup> often on discriminatory grounds. The Working Group offers a relatively quick avenue of response to these situations,<sup>33</sup> as well as to allegations of arbitrary detention more generally, since its procedures do not require sources to exhaust domestic remedies before an opinion can be rendered.<sup>34</sup> The Working Group itself is also attempting to be more responsive, having already adopted a record ninety-four opinions in 2017, and by using digital tools to access and consider submissions during the periods between its three meetings in Geneva in April, August, and November each year.<sup>35</sup>

However, the Working Group finds itself within a perfect storm: as it achieves greater efficiency in adopting opinions and helping more victims, awareness of its work grows, its reputation is

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32. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session (19–28 April 2017): Op. No. 38/2017 concerning Kursat Çevik (Turkey), ¶ 9, U.N. Doc. A/HRC/WGAD/2017/38 (Jun. 16, 2017) (detention following an attempted coup d'état); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session (21–25 August 2017): Op. No. 58/2017 concerning Taysir Hasan Mahmoud Salman (United Arab Emirates), ¶ 37, U.N. Doc. A/HRC/WGAD/2017/58 (Oct. 20, 2017) [hereinafter Op. No. 58/2017 (United Arab Emirates)] (detention following the Arab Spring uprisings); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 89/2017 concerning Ammar al Baluchi (United States of America), ¶ 7, U.N. Doc. A/HRC/WGAD/2017/89 (Jan. 24, 2018) [hereinafter Op. No. 89/2017 (United States of America)] (detention at Guantánamo Bay of a suspect in the September 11 attacks). The occurrence of such events does not mean that the detention is arbitrary. The Working Group must be satisfied that the detention falls within one of its five categories in order to make such a finding.

33. The Working Group does not keep data on the average time taken to adopt an opinion. However, the waiting time is at least four months, as the Working Group has to prepare the submission for transmission to each State, allowing a period of sixty days for response. The State may also request an extension of time for up to an additional month. This does not take into account any backlog of cases that may occur during busy periods. See *Methods of Work*, *supra* note 5, ¶¶ 15–16.

34. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Seventh Session, (26–30 August 2013): Op. No. 19/2013 concerning Mohamed Dihani (Morocco), ¶ 28, U.N. Doc. A/HRC/WGAD/2013/19 (Jan. 14, 2014) [hereinafter Op. No. 19/2013 (Morocco)] (declining the Government of Morocco's argument that Mr. Dihani must exhaust his domestic remedies). See also Office of the High Comm'r for Human Rights, Fact Sheet No. 26, § V(A). <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> [<https://perma.cc/6S89-S94D>] [hereinafter Fact Sheet No. 26] (explaining the Working Group's procedures). The Working Group is currently revising this Fact Sheet.

35. U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det., ¶ 46, U.N. Doc. A/HRC/33/50 (July 11, 2016).

bolstered, and it receives even more submissions. With five members who serve in a part-time, *pro bono* capacity and a relatively small Secretariat given the mandate to investigate individual complaints, the Working Group can only adopt opinions in relation to a small number of the complaints that it receives. For example, from April 1 to July 31, 2017, the Working Group received sixty submissions under its regular communications procedure (i.e., requesting an opinion) and 223 requests for urgent action. Of those, the Working Group could only take up twenty-one regular communications and twenty-nine urgent appeals.<sup>36</sup>

In order to manage this heavy workload, the Working Group and its Secretariat attempt to prioritize urgent and emblematic cases that (i) involve threats to life or health or vulnerable groups, (ii) demonstrate ongoing patterns of violations or clarify important legal issues, (iii) affect a large number of victims, (iv) reflect an equitable geographic balance, and (v) may have an overall impact on arbitrary detention.<sup>37</sup> This does not mean that cases falling outside of this informal criteria will be rejected, as the Working Group carefully considers whether to take up each case.<sup>38</sup> If the Working Group is to expand its existing jurisprudence under Category V, however, it must continue to employ this criteria to select cases strategically in order to highlight the nature, extent, and damaging effects of detention on discriminatory grounds.

## 2. Urgent Action

The Working Group has another means of raising issues of arbitrary detention through its urgent action procedure. The Working Group is empowered under its Methods of Work to take urgent action when it receives reliable allegations that a person is being arbitrarily detained and that this constitutes a serious threat to the person's

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36. This data is maintained by the Working Group's Secretariat. It may include cases that did not fall within the Working Group's mandate.

37. These informal criteria are similar to that used by other Special Procedures mandate holders in sending communications. See *Communications*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx> [https://perma.cc/AJ4B-E5M6] (describing the criteria evaluated by mandate holders when deciding to intervene).

38. The Working Group also ensures that there is a fair balance between submissions received from professional bodies (such as law firms and highly experienced NGOs) and submissions received from individuals and groups with less experience in submitting claims to the Working Group.

health, physical or psychological integrity or life, or that there are other particular circumstances that warrant an urgent action.<sup>39</sup> An urgent action consists of the Working Group, either alone or jointly with other Special Procedures mandate holders, sending a written appeal or allegation letter to the State concerned setting out the allegations and the applicable international human rights norms, and requesting that preventive or investigatory action be taken.<sup>40</sup> The urgent action remains confidential until it is published in the Special Procedures Communications reports to the Human Rights Council<sup>41</sup> and does not prevent the Working Group from subsequently taking up the case through its regular procedure.<sup>42</sup>

Though less visible and without the detailed legal analysis of the Working Group's opinions, the urgent action procedure is essential when a rapid response by the United Nations is needed or a case is particularly sensitive. In 2016, the Working Group sent seventy-four urgent appeals to thirty-eight governments concerning 263 individuals.<sup>43</sup> Importantly for the purposes of developing jurisprudence on discriminatory detention practices, urgent action is not limited to individual cases, but can also deal with general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy, or practice. Over the last five years, the Working Group has sent a number of urgent appeals involving individuals who were allegedly detained on discriminatory grounds, including on the basis of

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39. Methods of Work, *supra* note 5, ¶¶ 22–24.

40. *Cf. Communications*, *supra* note 37 (describing the general procedure for a Special Procedures intervention).

41. The Special Procedures Communications reports include the urgent action taken and any response received from the State concerned. The reports can be found on the Office of the High Commissioner for Human Rights website. Communication Reports of Special Procedures, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications-reportsSP.aspx> [https://perma.cc/2ZFG-PDAF].

42. Methods of Work, *supra* note 5, ¶ 23.

43. 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 32–37. In 2016, the Working Group also sent nineteen letters of allegation and other letters to seventeen governments. *Id.*

disability,<sup>44</sup> sexual orientation and gender identity,<sup>45</sup> gender,<sup>46</sup> and religion.<sup>47</sup> The urgent action procedure is a valuable tool for the Working Group in drawing attention to discrimination and arbitrary detention.<sup>48</sup>

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44. *See, e.g.*, Letter from José Antonio Guevara Bermúdez, Vice Chair of the Working Group on Arbitrary Detention, et al. to the Gov't of Brazil (Jan. 24, 2017), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22937> [<https://perma.cc/BA9Q-8LRF>] (containing the joint urgent appeal alleging the arbitrary detention of more than 500 individuals with psychosocial disabilities); *see also* Federative Republic of Brazil, Response to Communication UA BRA 1/2017 (Aug. 15, 2017), <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33646> [<https://perma.cc/G6XP-DX86>] (containing the State response).

45. *See, e.g.*, U.N. Human Rights Council, Commc'ns Rep. of Special Procedures, U.N. Doc. A/HRC/27/72, at 44 (Aug. 20, 2014) (describing Case No. JUA EGY 4/2014 (Apr. 17, 2014), which alleged arbitrary arrest and detention of four individuals in Egypt on the basis of their sexual orientation and/or gender identity); *see also* Letter from Mads Andenas (Chair-Rapporteur of the Working Group on Arbitrary Detention), et al. to the Gov't of Egypt (Apr. 17, 2014), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22362> [<https://perma.cc/4PA5-SA4U>] (containing the joint urgent appeal).

46. *See, e.g.*, U.N. Human Rights Council, Commc'ns Rep. of Special Procedures, U.N. Doc. A/HRC/26/21, at 42 (June 2, 2014) (describing Case No. JUA FJI 1/2014 (Jan. 16, 2014), which alleged arbitrary detention of a woman from a disadvantaged socio-economic group in Fiji following her alleged abduction and rape by her ex-boyfriend); *see also* Letter from Mads Andenas (Chair-Rapporteur of the Working Group on Arbitrary Detention) et al. to the Gov't of Fiji (Jan. 16, 2014), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=17036> [<https://perma.cc/VQQ9-MRB9>] (containing the joint urgent appeal).

47. *See, e.g.*, U.N. Human Rights Council, Commc'ns Rep. of Special Procedures, U.N. Doc. A/HRC/22/67, at 68 (Feb. 20, 2013) (describing Case No. JUA CHN 8/2012 (Aug. 9, 2012), which alleged arbitrary detention in China of numerous Tibetans on religious and ethnic grounds); *see also* Letter from El Hadji Malick Sow (Chair-Rapporteur of the Working Group on Arbitrary Detention) et al. to the Gov't of the People's Republic of China (Aug. 9, 2012), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=15583> [<https://perma.cc/DU4X-79EN>] (containing the joint urgent appeal); *see also* Reply by the Gov't of the People's Republic of China to the Office of the High Commissioner of Human Rights (Sept. 28, 2012), [https://spdb.ohchr.org/hrdb/22nd/China\\_28.09.12\\_\(8.2012\)\\_Trans.pdf](https://spdb.ohchr.org/hrdb/22nd/China_28.09.12_(8.2012)_Trans.pdf) [<https://perma.cc/S9PY-PCVE>] (containing the State response).

48. The value of the urgent action procedure could be further enhanced by including an outline of statistics, trends, patterns, and key issues in the Special Procedures Communications reports, and ensuring that communications are debated during the Human Rights Council sessions.

### 3. Country Visits

The Working Group aims to conduct two country visits each year, with two or three of its members taking part in the visit.<sup>49</sup> The Working Group attempts to strike a fair geographical balance in requesting country visits. It has conducted fifty visits, including follow-up visits, to forty-three countries around the world.<sup>50</sup> During the visits, the Working Group meets with a range of interlocutors, including government representatives, NGOs and NHRIs, U.N. agencies, and individuals being held in different types of detention centers. As such, country visits are often a rich source of information about the underlying reasons for arbitrary detention, such as discrimination, as well as information on positive detention practices. This information forms the basis of findings and recommendations made in a report presented by the Working Group to the Human Rights Council in the year following each country visit.<sup>51</sup>

### 4. Deliberations

Finally, the Working Group prepares ‘deliberations’ relating to topical issues of arbitrary detention, often based on recurring practices or issues that it has encountered in adopting opinions or conducting country visits. Deliberations are similar to the general comments and general recommendations issued by the U.N. treaty bodies, as they provide guidance to States on what constitutes arbitrary detention under international law, with a view to preventing arbitrary detention in future. So far, the Working Group has produced nine deliberations covering diverse topics such as house arrest,<sup>52</sup> rehabilitation through

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49. See *Methods of Work*, *supra* note 5, ¶¶ 25–32.

50. See Office of the High Comm’r for Human Rights, *Country Visits—Working Grp. on Arbitrary Det.*, <http://www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx> [<https://perma.cc/SB8E-RTDF>]. As of this writing, this list includes a recent visit to Sri Lanka in December 2017. In addition, the Working Group can only visit a country by government invitation. *Id.*

51. In Part III below, several examples are given of information that has been obtained by the Working Group on discriminatory detention practices during recent country visits.

52. *Deliberation No. 1 in 1992 Rep. of the Working Grp.*, *supra* note 19, at 9 [hereinafter *Deliberation No. 1*] (describing *Deliberation No. 1* on house arrest, which holds that house arrest may be compared to deprivation of liberty as long as it involves closed premises that the person is not allowed to leave).

labor,<sup>53</sup> the situation of immigrants and asylum seekers,<sup>54</sup> psychiatric detention,<sup>55</sup> and detention resulting from use of the internet.<sup>56</sup> As the Working Group has explained, by adopting deliberations, it “takes a position on a number of pertinent questions which may arise in other countries, thus laying the ground for its own jurisprudence and facilitating the consideration of future cases.”<sup>57</sup> The Working Group has not, however, brought together its analysis of detention on discriminatory grounds in one place, and a deliberation would be the ideal means of doing so. Part II of this article explores additional ways in which the Working Group might clarify and expand its analysis of discriminatory detention practices.

## II. OPPORTUNITIES AND CONSTRAINTS IN DEVELOPING DISCRIMINATION JURISPRUDENCE

In order to strengthen its Category V jurisprudence, the Working Group will need to undertake a realistic appraisal of the factors that either bolster or hinder its analyses of discriminatory detention practices. Just as there are several aspects of the Working Group’s competence, subject-matter jurisdiction, interpretation of its mandate, and current membership that represent potential opportunities to add depth to its discrimination jurisprudence, there are constraints—such as the Working Group’s limited reach outside Geneva and its limited ability to consider allegations of arbitrary detention committed by non-state actors—that inhibit its ability to

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53. Deliberation No. 4 *in* 1992 Rep. of the Working Grp., *supra* note 19, at 16–20 [hereinafter Deliberation No. 4] (describing Deliberation No. 4 on rehabilitation through labor, which outlined the circumstances in which such rehabilitation is inherently arbitrary).

54. *See* Working Grp. on Arbitrary Det., Rev’d Deliberation No. 5 on deprivation of liberty of migrants (Feb. 7, 2018), ¶¶ 13–21, [http://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation\\_AdvanceEditedVersion.pdf](http://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf) [<https://perma.cc/4BHS-4RXF>] (providing that migration detention policies and procedures must not be discriminatory, that those detained in the course of migration proceedings must be treated without discrimination, and that detention of someone *solely* on the basis of a prohibited ground is arbitrary detention).

55. *See* Deliberation No. 7 on issues related to psychiatric detention *in* U.N. Comm’n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., U.N. Doc. E/CN.4/2005/6, ¶¶ 47–58 (Dec. 1, 2004).

56. *See generally* Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet *in* U.N. Comm’n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., U.N. Doc. E/CN.4/2006/7, ¶¶ 32–52 (Dec. 12, 2005).

57. 1992 Rep. of the Working Grp., *supra* note 19, at 9, ¶ 19.

advance that same end. This Part considers each of these factors before turning to a discussion of the development of the Working Group's discrimination jurisprudence under Category V and its current status.

#### A. Opportunities

According to its Methods of Work, the Working Group is competent to accept individual complaints from a wide range of sources—that is, the alleged victims, their families or representatives; governments; intergovernmental organizations; NGOs; and NHRIs.<sup>58</sup> The Working Group may also, on its own initiative, take up cases that might constitute arbitrary detention,<sup>59</sup> allowing it to identify and address new situations and expand its jurisprudence. In addition, the Working Group is not a treaty-based human rights mechanism, and its ability to consider individual complaints involving arbitrary detention does not depend upon States recognizing its competence to do so.<sup>60</sup> The Working Group's mandate is also not limited to States party to the ICCPR.<sup>61</sup> While the Working Group must only apply the ICCPR (or any other treaty) to States

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58. Methods of Work, *supra* note 5, ¶ 12.

59. *Id.* ¶ 13. *See also* C.H.R. Res. 1993/36, *supra* note 20, ¶ 4 (empowering the Working Group to take up cases *suo motu*). However, due to capacity constraints and the need in practice to find a source to supplement information obtained by the Working Group, it is rare for this power to be exercised. For examples of its use, *see* Genser & Winterkorn-Meikle, *supra* note 5, at 110.

60. *See* Fact Sheet No. 26, *supra* note 34, § III. It has been argued that the legal basis for the Working Group's ability to receive individual complaints is the obligation of U.N. Member States to cooperate with the United Nations under Article 56 of the U.N. Charter. *See* Rudolf, *supra* note 14, at 314. This can be contrasted with the U.N. Human Rights Committee, which can only accept individual complaints against States party to the ICCPR and its First Optional Protocol. *See* Office of the U.N. High Comm'r for Human Rights, Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1) (May 2005), at 25, <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> [<https://perma.cc/K7MW-6TY2>].

61. *See* U.N. Comm'n on Human Rights Res. 1997/50, U.N. Doc. E/CN.4/Res/1997/50, at ¶ 5 (Apr. 15, 1997).

parties,<sup>62</sup> it regularly refers to the UDHR<sup>63</sup> in cases involving other States. As a result of these factors, the Working Group considers allegations and situations of arbitrary detention worldwide and has truly vast scope to comment upon discriminatory laws, policies and practices.<sup>64</sup>

The Working Group also has wide subject-matter jurisdiction in relation to arbitrary detention. In its first annual report to the Commission on Human Rights in 1992, the Working Group initially considered detention to be arbitrary when it has no legal basis (Category I), when it results from the exercise of rights or freedoms (Category II), or when there is a grave violation of the right to a fair trial (Category III).<sup>65</sup> In 1997, the Commission extended the Working Group's mandate by requesting it to "devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy."<sup>66</sup> This requirement has become Category IV of the Working Group's Methods

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62. See C.H.R. Res. 1996/28, *supra* note 20, ¶ 5 (requesting the Working Group to apply the treaties relevant to each case under consideration only to States parties); see also Genser & Winterkorn-Meikle, *supra* note 5, at 114–16 (describing the process that led to the Working Group changing its initial position of invoking the ICCPR in all cases). See also C.H.R. Res. 1997/50, *supra* note 61, ¶ 5 (taking note of the Working Group's decision not to apply the ICCPR to non-parties and requesting the Working Group not to apply other relevant international legal instruments to non-parties).

63. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 69/2017 concerning Tashi Wangchuk (China), U.N. Doc. A/HRC/WGAD/2017/69 (Dec. 7, 2017) [hereinafter Op. No. 69/2017 (China)] (detailing detention of individual for promoting Tibetan language).

64. The Working Group has been able to comment upon discriminatory detention practices in a wide variety of countries, including those not party to the ICCPR. See, e.g., Op. No. 50/2017 (Malaysia), *supra* note 28, ¶¶ 72–74 (finding discrimination on the basis of "political or other opinion" and status as a human rights defender); U.N. Human Rights Council, Working Grp. on Arbitrary Det., Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session, (13–22 November 2013): Op. No. 49/2013 concerning Tun Aung (Myanmar), U.N. Doc. A/HRC/WGAD/2013/49, ¶¶ 21, 28 (Apr. 23, 2015) (finding discrimination on the basis of religion).

65. U. N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., at 10, U.N. Doc. E/CN.4/1992/20 (Jan. 21, 1992) [hereinafter 1991 Rep. of the Working Grp.]; see also *supra* Part I.B.

66. C.H.R. Res. 1997/50, *supra* note 61, ¶ 4.

of Work. As discussed earlier,<sup>67</sup> the Working Group added Category V to its Methods of Work in 2010, which allows the Working Group to consider allegations involving detention on discriminatory grounds.<sup>68</sup>

In addition, the Working Group interprets its mandate to include all forms of “deprivation of liberty,”<sup>69</sup> provided that the individual is not, as a matter of fact, at liberty to leave the place of detention.<sup>70</sup> This has given the Working Group considerable latitude to analyze detention on discriminatory grounds in traditional settings such as police stations and prisons, as well as ports and airports,<sup>71</sup> migrant holding centers,<sup>72</sup> re-education camps and centers for rehabilitation through labor,<sup>73</sup> military camps,<sup>74</sup> psychiatric

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67. See *supra* Part I.B.

68. See U.N. Human Rights Council, *Rep. of the Working Grp. on Arbitrary Det.*, U.N. Doc. A/HRC/16/47, annex at 23, ¶ 8(e), (Jan. 19, 2011) [hereinafter 2010 Rep. of the Working Grp.]; see also *infra* Part II.C.

69. See U.N. Human Rights Council, *Rep. of the Working Grp. on Arbitrary Det.*, ¶ 57, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012) [hereinafter 2012 Rep. of the Working Grp.]. In this article, the term “detention” is used as it may be more widely understood. However, the Working Group now regularly refers to the “deprivation of liberty” in its opinions and other work to signal that detention is wider than the criminal justice context and applies to various forms of administrative detention. See also Fact Sheet No. 26, *supra* note 34, § IV.A.

70. 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 50–56.

71. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 67/2017 concerning Adilur Rahman Khan (Malaysia), ¶¶ 4–14, U.N. Doc. A/HRC/WGAD/2017/67 (Dec. 7, 2017) [hereinafter Op. No. 67/2017 (Malaysia)] (human rights defender detained at airport holding facilities).

72. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Fourth Session, (27–31 August 2012): Op. No. 37/2012 concerning Adnam El Hadj (Spain), ¶¶ 3–11, U.N. Doc. A/HRC/WGAD/2012/37 (Nov. 26, 2012) [hereinafter Op. No. 37/2012 (Spain)] (foreign national held at a migrant holding center).

73. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Ninth Session (22 April–1 May 2014): Op. No. 4/2014 concerning Ma Chunling (China), ¶¶ 3–13, U.N. Doc. A/HRC/WGAD/2014/4 (July 1, 2014) [hereinafter Op. No. 4/2014 (China)] (Falun Gong practitioner sentenced to re-education at a labor camp); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Seventy-Third Session, (31 August–4 September 2015): Op. No. 29/2015 concerning Song Hyeok Kim (Democratic People’s Republic of Korea), ¶¶ 4–15, U.N. Doc. A/HRC/WGAD/2015/29 (Nov. 2, 2015) (Christian missionary detained at a re-education camp).

74. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session (21–25 August 2017): Op. No. 43/2017 concerning Daniil Islamov (Tajikistan), ¶¶ 4–16, U.N. Doc. A/HRC/WGAD/2017/43 (Oct. 5, 2017) (conscientious objector detained at a military camp).

facilities,<sup>75</sup> and hospitals.<sup>76</sup> As a result, the Working Group has been able to address detention on discriminatory grounds that takes place in criminal proceedings as well as during administrative detention. Administrative detention is often used for security purposes, such as detaining terrorism suspects and asylum seekers, refugees and stateless persons.<sup>77</sup> In this type of detention, discrimination occurs frequently,<sup>78</sup> and its prevalence represents a rich area for further

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75. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20-24 November 2017): Op. No. 68/2017 concerning Zaheer Seepersad (Trinidad and Tobago), ¶ 5, U.N. Doc. A/HRC/WGAD/2017/68 (Dec. 20, 2017) [hereinafter Op. No. 68/2017 (Trinidad and Tobago)] (individual interned at a psychiatric hospital).

76. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det., at Its Seventy-Third Session, (31 August-4 September 2015): Op. No. 24/2015 concerning Gloria Macapagal-Arroyo (Philippines), ¶ 7, U.N. Doc. A/HRC/WGAD/2015/24 (Nov. 16, 2015) [hereinafter Op. No. 24/2015 (Philippines)] (former President detained in a hospital).

77. The Working Group can also consider the prolonged administrative detention of asylum seekers, immigrants or refugees under Category IV.

78. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session (19-28 Apr. 2017): Op. No. 28/2017 concerning Abdalrahman Hussain (Australia), ¶ 40, U.N. Doc. A/HRC/WGAD/2017/28 (June 16, 2017) [hereinafter Op. No. 28/2017 (Australia)] (finding that a non-citizen asylum seeker of Syrian origin was unable to challenge his continued administrative detention in Australia because of his non-citizen status); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 42/2017 concerning Mohammad Naim Amiri (Australia), ¶ 45, U.N. Doc. A/HRC/WGAD/2017/42 (Sept. 22, 2017) [hereinafter Op. No. 42/2017 (Australia)] (finding that a non-citizen asylum seeker of Afghan origin was unable to challenge his continued administrative detention in Australia because of his non-citizen status); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 71/2017 concerning Said Imasi (Australia), ¶ 55, U.N. Doc. A/HRC/WGAD/2017/71 (Dec. 21, 2017) [hereinafter Op. No. 71/2017 (Australia)] (finding that a stateless individual had been detained in administrative detention because of his non-citizen status). See also Op. No. 68/2017 (Trinidad and Tobago), *supra* note 75, ¶ 33 (finding that an individual had been involuntarily confined under an administrative detention regime because of his disability); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 31/2017 concerning Omar Nazzal (Israel), ¶ 35, U.N. Doc. A/HRC/WGAD/2017/31 (July 25, 2017) [hereinafter Op. No. 31/2017 (Israel)] (finding that administrative detention was directed against Palestinians in practice); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 44/2017 concerning Ali Abdul Rahman Mahmoud Jaradat (Israel), ¶ 38, U.N. Doc. A/HRC/WGAD/2017/44 (Oct. 2, 2017) [hereinafter Op. No. 44/2017 (Israel)] (finding that an individual had been detained due to his

development of the Working Group's jurisprudence on discriminatory detention practices.

Moreover, the Working Group has not limited itself to considering only formal equality in detention practices. Rather, it has also highlighted the importance of substantive equality by finding that the State is obliged to provide additional protection to individuals who are in a position of disadvantage in claiming their right to liberty, and that a failure by the State to do so may be found to be discriminatory.<sup>79</sup> These findings represent only an initial consideration by the Working Group of how inequality can result in discriminatory detention practices, and this is certainly an area in which the Working Group has an opportunity to expand its analysis.

Finally, absent an unforeseen departure, the Working Group's five independent experts will not change until September 2020, when two members complete their six-year term.<sup>80</sup> This gives greater stability to the mandate than in previous years, making the next two

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Palestinian nationality); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 86/2017 concerning Salem Badi Dardasawi (Israel), ¶ 43, U.N. Doc. A/HRC/WGAD/2017/86 (Dec. 18, 2017) [hereinafter Op. No. 86/2017 (Israel)] (finding that continuous administrative detention orders had been imposed on Palestinian detainees because of their national origin).

79. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 72/2017 concerning Marcos Antonio Aguilar-Rodríguez (United States of America), ¶ 68, U.N. Doc. A/HRC/WGAD/2017/72 (Dec. 28, 2017) [hereinafter Op. No. 72/2017 (United States of America)] (finding that the failure to provide a Spanish-speaking asylum seeker with translation services was discriminatory as he could not challenge the lawfulness of his detention without such assistance). *See also* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session, (13–22 November 2013): Op. No. 50/2013 concerning Laphai Gam (Myanmar), ¶ 35, U.N. Doc. A/HRC/WGAD/2013/50 (Apr. 2, 2014) [hereinafter Op. No. 50/2013 (Myanmar)] (finding that the State did not provide protection to an internally displaced person who was particularly vulnerable to being charged with membership of a separatist group); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session, (19–28 April 2015): Op. No. 21/2015 concerning A. (New Zealand), ¶ 23, U.N. Doc. A/HRC/WGAD/2015/21 (Aug. 5, 2015) [hereinafter Op. No. 21/2015 (New Zealand)] (finding that an intellectually-disabled person should have been offered psychological and rehabilitative care to assist in his reintegration into the community rather than being detained under preventive detention on suspicion that he might reoffend).

80. *See* Office of the High Comm'r for Human Rights, Current and Former Mandate-Holders for Existing Mandates, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx> [https://perma.cc/ZP9C-M35X].

years an ideal time to consolidate and develop new principles relating to detention on discriminatory grounds.

### B. Constraints

There are, however, some aspects of the Working Group's mandate that may limit its ability to address arbitrary detention and, more specifically, may hinder its ability to raise awareness about discriminatory detention practices. Apart from two potential country visits each year, the Working Group has limited exposure outside Geneva. It is one of several Special Procedures mandates that only reports to the Human Rights Council and has no opportunity to brief and interact with the U.N. General Assembly and the human rights community in New York. Its three annual sessions are also only held in Geneva. The ability to communicate with a wider audience would require an amendment to the Working Group's Human Rights Council resolution or a new General Assembly resolution that requests the Working Group to submit reports to the General Assembly, as well as an increased budget, but both of these changes are unlikely, at least in the near future. The Working Group may need to focus on other means of outreach, including social media. Perhaps more than any other area of the Working Group's mandate, countering discrimination requires the ability to inform and influence opinion.

Similarly, while the Working Group has a worldwide mandate, it has not yet achieved global reach with its opinions. Over the last twenty-seven years, the Working Group has adopted opinions in relation to only a handful of countries in the Caribbean, and even less in the Pacific.<sup>81</sup> Several States in these regions are not party to the ICCPR and are not subject to the oversight of the Human Rights Committee.<sup>82</sup> The Working Group could utilize the power under its

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81. The Working Group has adopted opinions in relation to Barbados, Cuba, Dominican Republic, Haiti, and Trinidad and Tobago, as well as Australia, New Zealand and Papua New Guinea. The Caribbean region is subject to scrutiny within the Inter-American human rights system, but no such regional human rights mechanism exists in the Pacific. In addition to these two regions, the Working Group does not generally receive many submissions from Europe (particularly Western Europe), given that petitioners are able to take cases of arbitrary detention to the European Court of Human Rights.

82. However, various Special Procedures mandate holders have recently visited countries in these regions (such as the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, who visited Fiji in December 2016), and they are also subject to the Universal Periodic Review ("UPR"). The U.N. High Commissioner for Human Rights also visited

Methods of Work to take up cases on its own initiative in the Caribbean and the Pacific<sup>83</sup> and increase its outreach to civil society in order to raise awareness of its work in these regions. Given the Working Group's limited capacity to take on cases, achieving this goal might require taking fewer cases from other regions until a more equitable geographic balance is achieved. However, it would allow the Working Group to take on more cases that involve detention on discriminatory grounds in new country contexts.

More seriously, the Working Group does not have a mandate to address detention carried out by non-state actors.<sup>84</sup> Yet armed groups are often involved in arresting and detaining individuals,<sup>85</sup> particularly in countries experiencing conflict. As the privatization of government functions becomes more common, large corporations are also increasingly assuming responsibility for places of detention. This includes the management of prisons, immigration detention facilities, social care facilities for older persons, and institutions for people with psychosocial disabilities, where the potential for discriminatory practices is high and the commercial incentive is to make a profit rather than protect human rights. In some countries, private companies are also involved in the administration of alternatives to

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Papua New Guinea and Fiji in February 2018. *See* Press Release, Office of the High Comm'r for Human Rights, U.N. Human Rights Chief to visit Indonesia (5-7 Feb.), Papua New Guinea (8 Feb.) and Fiji (9-12 Feb.), U.N. Press Release (Feb. 2, 2018), <http://bangkok.ohchr.org/news/press/HCRegVisit.aspx> [<https://perma.cc/8JLT-VDGQ>].

83. *See supra* text accompanying note 59.

84. Op. No. 25/1999 concerning Olga Rodas et al. (Colombia) (Nov. 26, 1999) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det., at 7-8 ¶ 5, 7(b), U.N. Doc. E/CN.4/2001/14/Add.1 (Nov. 9, 2000) (finding that the Working Group's mandate did not extend to detention carried out by an illegal paramilitary group). The Working Group requested that the Government of Colombia conduct a judicial investigation to punish those responsible. *See also* H.R.C. Res. 33/30, *supra* note 17, which is premised on the fact that the Working Group's mandate only extends to States.

85. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18-27 April 2016): Op. No. 3/2016 concerning Farida Ali Abdul Hamid and Salim Mohamed Musa (Libya), ¶¶ 14-15, U.N. Doc. A/HRC/WGAD/2016/3 (June 15, 2016); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18-27 April 2016): Op. No. 4/2016 concerning Abdul Majed al-Gaoud et al. (Libya), ¶ 36, U.N. Doc. A/HRC/WGAD/2016/4 (June 15, 2016). In both cases, the Working Group found that armed groups were acting on behalf or with the support of Libya.

detention such as bail, bonds or electronic monitoring devices.<sup>86</sup> In these situations, the Working Group can at least hold the State responsible if a company or other non-state actor is acting under the State's control or with its support, or if the State otherwise knowingly tolerates or fails to prevent the commission of arbitrary detention by a non-state actor.<sup>87</sup> It may be that the Working Group could also expand its findings to include non-state actors when those actors are effectively exercising government functions.<sup>88</sup>

### C. Development of Category V Jurisprudence

After submitting its initial report in 1992,<sup>89</sup> the Working Group regularly revised its Methods of Work to reflect lessons learned, information acquired during the consideration of submissions, and requests from the Commission on Human Rights for recommendations on how the Working Group might further improve, as it implemented a new mandate.<sup>90</sup> According to this author's observations and analysis,

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86. See U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det. on Its Visit to the United States of America, ¶¶ 29–36, 51, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017) [hereinafter USA Visit Rep.].

87. See, e.g., Op. No. 30/1999 concerning Volodymyr Timchenko et al. (Nigeria) (Nov. 30, 1999) in U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det., at 26, ¶ 18(b), U.N. Doc. E/CN.4/2001/14/Add.1 (Nov. 9, 2000) (finding that detention by a private company did not absolve the State of its responsibilities).

88. Other U.N. Special Procedures mandates have taken this approach. See, e.g., Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to the Republic of Moldova*, ¶¶ 45–48, U.N. Doc. A/HRC/10/44/Add.3 (Feb. 12, 2009) (expressing concern in relation to the conditions in detention facilities operated by the *de facto* authorities in the Transnistrian Region); Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), U.N. Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Mission to Cyprus*, ¶¶ 81–87 U.N. Doc. A/HRC/22/51/Add.1 (Dec. 24, 2012) (addressing recommendations to the *de facto* authorities in Northern Cyprus to comply with Article 18 of the ICCPR).

89. See 1991 Rep. of the Working Grp., *supra* note 65, at ¶¶ 12–13, ann. I–II. In this report, the Working Group set out an initial interpretation of its mandate through the Methods of Work, and annexed principles applicable in the consideration of cases (which included what is now Categories I, II and III) and a model questionnaire to be completed by sources.

90. The Working Group annexed revised Methods of Work to its annual reports for 1992 to 1997. See *id.* at 4–7; see also 1992 Rep. of the Working Grp., *supra* note 19, at 102–04.

there were no further changes to the Methods of Work between 1998 and 2010, and the Working Group continued to apply Categories I, II and III in determining whether detention was arbitrary.

During this period, however, the Working Group continued to receive serious allegations involving detention on discriminatory grounds, both under its regular procedure<sup>91</sup> and during country visits.<sup>92</sup> On several occasions, the members discussed whether Category II was sufficient to respond to this emerging trend or whether a new category was needed.<sup>93</sup> Ultimately, the Working Group resolved this question in favor of developing a new category embodying the principles of equality and non-discrimination and took the opportunity to add Categories IV and V to its Methods of Work in 2010.<sup>94</sup> The Human Rights Council reacted by taking note with interest of the Working Group's report, including the recommendations made therein, and did not raise any objection to the new categories.<sup>95</sup>

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91. Op. No. 7/2002 (Egypt), *supra* note 21, ¶ 28; Op. No. 22/2006 concerning François Ayissi et al. (Cameroon) (Aug. 31, 2006) in U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det., at 93–94, ¶¶ 19–20, U.N. Doc. A/HRC/4/40/Add.1 (Feb 2, 2007) [hereinafter Op. No. 22/2006 (Cameroon)]; Op. No. 42/2008 concerning Messrs. A, B, C and D (Egypt) (Nov. 25, 2008) in U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det., at 112, ¶¶ 25, 28, U.N. Doc. A/HRC/13/30/Add.1 (Mar. 4, 2010) [hereinafter Op. No. 42/2008 (Egypt)] (also finding that detention on the basis of HIV/AIDS status is contrary to international human rights law); Op. No. 25/2009 concerning ten individuals (Egypt) (Nov. 24, 2009) in U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det., at 19–20, ¶¶ 24, 31, U.N. Doc. A/HRC/16/47/Add.1 (Mar. 2, 2011) [hereinafter Op. No. 25/2009 (Egypt)]. This led the Working Group to comment on issues of discrimination in its annual reports. *See* 2002 Rep. of the Working Grp., *supra* note 22, at 22, ¶¶ 68–70; U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., at 21, ¶¶ 72–73, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003).

92. *See, e.g.*, U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det. on Its Visit to Indonesia (31 January–12 February 1999), ¶ 53, U.N. Doc. E/CN.4/2000/4/Add.2 (Aug. 12, 1999) (discussing discrimination against members of a political party in the granting of amnesty); U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det.: Mission to Mauritania, ¶¶ 81–83, U.N. Doc. A/HRC/10/21/Add.2 (Nov. 21, 2008) (discussing discrimination in detaining certain ethnic groups and foreign nationals).

93. The Working Group sits in closed sessions and does not keep a public record of its meetings. This information was provided by some of those who were present at the discussions.

94. 2010 Rep. of the Working Grp., *supra* note 68, at 21.

95. H.R.C. Res. 20/16, *supra* note 17, ¶ 2. The following year, the Human Rights Council appeared to accept the change by encouraging the Working Group, in accordance with its Methods of Work, to continue to provide the State concerned

Although the Working Group added Category V to the introductory paragraphs of opinions adopted from the beginning of 2011, it did not actually find that a Category V violation had occurred until it considered the case of *Adnam El Hadj v. Spain*<sup>96</sup> in August of 2012. In that case, a Moroccan national was arrested during an identity check and allegedly tortured and racially abused while being detained in a migrant holding center in Spain before being expelled from the country. The Working Group found that the case fell within Category V because the detention of Mr. El Hadj was motivated by discrimination based on his national, ethnic, and social origin.<sup>97</sup> Thus began the Working Group's journey in developing and refining its jurisprudence under Category V, a journey that has continued to the present day. Despite its relatively short history in the Working Group's consideration of arbitrary detention, Category V of the Methods of Work is now firmly established within the Working Group's jurisprudence and is an integral part of its efforts to draw attention to the need for fairness in detention practices.

#### D. Current Jurisprudence on Discriminatory Detention Practices

In some ways, the addition of Category V to the Methods of Work represented a natural progression from the Working Group's previous jurisprudence. The Working Group already had significant experience in dealing with allegations under Category II involving individuals who had been discriminated against in exercising their rights.<sup>98</sup> Moreover, the Working Group has frequently been asked to determine under Category III whether individuals have been treated fairly compared to the advantages enjoyed by the State during criminal trials,<sup>99</sup> with particular reference to the equality of arms and due

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with information concerning allegations of arbitrary detention. See H.R.C. Res. 24/7, *supra* note 17, ¶ 9.

96. Op. No. 37/2012 (Spain), *supra* note 72, at ¶ 19.

97. *Id.* The Working Group also found Category II and IV violations in this case. *Id.*, ¶ 20.

98. See *supra*, Part I.B.

99. The Working Group continues to receive submissions relating to the right to a fair trial and the equality of arms between the alleged victim of arbitrary detention and the State. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 85/2017 concerning Franck Kanyambo Rusagara, Tom Byabagamba, and François Kabayiza (Rwanda), ¶ 51, U.N. Doc. A/HRC/WGAD/2017/85 (Jan. 4, 2018) (finding that the detainees were not permitted to cross-examine all witnesses testifying against them).

process guarantees found in Article 14 of the ICCPR.<sup>100</sup> Yet Category V takes the Working Group into new territory of determining whether a person has been treated differently on the basis of one or more prohibited grounds of discrimination, an inquiry that not only involves considering the facts of the case at hand, but also the previous treatment of the person and others in his or her position.

As of December 2017, the Working Group had found Category V violations in seventy-two cases concerning 173 individuals in thirty-four countries.<sup>101</sup> Over the past five years, the number of Category V findings has risen significantly, perhaps reflecting greater confidence of the Working Group in its interpretation of Category V, as well as the fact that sources are increasingly raising Category V in their submissions. The Working Group issued two opinions containing Category V violations in 2012, six in 2013, five in 2014, ten in 2015, eight in 2016, and forty-one in 2017.<sup>102</sup>

An important point that emerges from these cases is that discrimination affects detention in two ways. That is, the decision to detain a person in the first place, as well as the treatment of a person who is already in detention, may be based on discriminatory grounds. For example, the Working Group has found a Category V violation when the decision to arrest and detain was based on the individual's national<sup>103</sup> or ethnic

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100. See ICCPR, *supra* note 18, art. 14(1)–(3).

101. The author has conducted an assessment of the Working Group's annual reports and of the opinions in order to obtain data on the use of Category V.

102. For examples of opinions containing Category V violations, see *infra* app. A.

103. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran), ¶¶ 47–49, U.N. Doc. A/HRC/WGAD/2016/28 (Sept. 21, 2016) [hereinafter Op. No. 28/2016 (Islamic Republic of Iran)] (Iranian government discriminating against a dual Iranian-British national); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 7/2017 concerning Kamal Foroughi (Islamic Republic of Iran), ¶¶ 39–40, U.N. Doc. A/HRC/WGAD/2017/7 (May 30, 2017) [hereinafter Op. No. 7/2017 (Islamic Republic of Iran)] (same); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 49/2017 concerning Siamak Namazi and Mohammed Baquer Namazi (Islamic Republic of Iran), ¶¶ 43–45, U.N. Doc. A/HRC/WGAD/2017/49 (Sept. 22, 2017) [hereinafter Op. No. 49/2017 (Islamic Republic of Iran)] (Iranian government discriminating against dual United States-Iranian nationals).

origin,<sup>104</sup> religion,<sup>105</sup> political or other opinion,<sup>106</sup> or gender.<sup>107</sup> The Working Group has also found that discriminatory treatment of a detainee violated Category V when a non-citizen was unable to challenge the lawfulness of his detention because of his national origin,<sup>108</sup> when an intellectually-disabled man remained in preventive detention after serving a criminal sentence because of his disability,<sup>109</sup> when a person was continuously detained under renewable administrative detention orders because of his national origin,<sup>110</sup> and

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104. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Fourth Session (27-31 August 2012): Op. No. 38/2012 concerning Gunasundaram Jayasundaram (Sri Lanka), ¶ 31, U.N. Doc. A/HRC/WGAD/2012/38 (Nov. 26, 2012) [hereinafter Op. No. 38/2012 (Sri Lanka)] (Tamil arrested under emergency regulations); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Ninth Session (22 April–1 May 2014): Op. No. 6/2014 concerning Brang Yung (Myanmar), ¶ 22, U.N. Doc. A/HRC/WGAD/2014/6 (July 1, 2014) [hereinafter Op. No. 6/2014 (Myanmar)] (ethnic Kachin targeted for prosecution).

105. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Sixth Session (29 April–3 May 2013): Op. No. 4/2013 concerning Gaybullo Jalilov (Uzbekistan), ¶ 76, U.N. Doc. A/HRC/WGAD/2013/4 (July 25, 2013) [hereinafter Op. No. 4/2013 (Uzbekistan)] (individual detained for being a practicing Muslim); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Seventh Session (26–30 Aug. 2013): Op. No. 18/2013 concerning Saeed Abedinigalangashi (Islamic Republic of Iran), ¶ 28, U.N. Doc. A/HRC/WGAD/2013/18 (Jan. 14, 2014) [hereinafter Op. No. 18/2013 (Islamic Republic of Iran)] (individual detained for being a practicing Christian).

106. See, e.g., Op. No. 2/2015 (Ethiopia and Yemen), *supra* note 31, ¶ 25 (individual detained because of his political convictions in founding an opposition party); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 4/2017 concerning Tsegon Gyal (China), ¶ 26, U.N. Doc. A/HRC/WGAD/2017/4 (Aug. 11, 2017) (former Tibetan political prisoner detained for his political views).

107. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 1/2016 concerning Zeinab Jalalian (Islamic Republic of Iran), ¶¶ 37–38, U.N. Doc. A/HRC/WGAD/2016/1 (June 13, 2016) [hereinafter Op. No. 1/2016 (Islamic Republic of Iran)] (woman advocate for women's rights detained on the basis of gender).

108. See Op. No. 71/2017 (Australia), *supra* note 78, ¶ 55.

109. See Op. No. 21/2015 (New Zealand), *supra* note 79, ¶ 27.

110. See Op. No. 31/2017 (Israel), *supra* note 78, ¶¶ 35–37; see also Op. No. 44/2017 (Israel), *supra* note 78, ¶¶ 38–39. (Palestinian individual detained under administrative detention orders on the basis of nationality).

when an asylum seeker remained in the custody of immigration authorities because he could not afford to pay a bond.<sup>111</sup>

While this point may seem obvious, it can be important in terms of the remedies that the Working Group recommends.<sup>112</sup> If victims are discriminated against at the point of arrest, this suggests that a review of legislation used to charge people, profiling practices, or arrest procedures may be warranted. Discrimination that occurs during detention may, however, require improvement of procedures to ensure that judicial review of the lawfulness and necessity of detention takes place, and change of early release or pardon processes. In some cases, both types of remedial action may be needed, as discrimination often occurs at the point of arrest and during detention.

Another common thread running through the jurisprudence is the differential treatment that the victims experienced in being detained because of their own distinguishing characteristics (*e.g.*, disability) or because of their real or suspected membership of a group (*e.g.*, persons with certain religious or political views) referred to in Category V. The Working Group explained its approach in a recent annual report to the Human Rights Council.<sup>113</sup> In considering the information submitted by the source to demonstrate a *prima facie* case of detention on discriminatory grounds, the Working Group takes into account a number of factors, including whether:

- (a) The deprivation of liberty was part of a pattern of persecution against the detained person (*e.g.*, a person was targeted on multiple occasions through previous detention, acts of violence or threats);<sup>114</sup>

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111. See Op. No. 72/2017 (United States of America), *supra* note 79, ¶ 68; see also the *infra* text accompanying note 247 (individual detained after being unable to pay the bond required for release).

112. See *infra*, Part III.F.

113. 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 46–49.

114. See, *e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session, (21–25 November 2016): Op. No. 58/2016 concerning Paulo Jenaro Díez Gargari (Mexico), ¶ 20, U.N. Doc. A/HRC/WGAD/2016/58 (Jan. 30, 2017) (noting that the victim was previously subjected to harassment and persecution for his work); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 29/2017 concerning Aramais Avakyan (Uzbekistan), ¶¶ 70–71, U.N. Doc. A/HRC/WGAD/2017/29 (June 8, 2017) [hereinafter Op. No. 29/2017 (Uzbekistan)] (noting that the victim was subjected to threats of imprisonment on several occasions).

(b) Other persons with similarly distinguishing characteristics have also been persecuted (*e.g.*, several members of a particular ethnic group are detained for no apparent reason, other than their ethnicity);<sup>115</sup>

(c) The authorities have made statements to, or conducted themselves toward, the detained person in a manner that indicates a discriminatory attitude (*e.g.*, female detainees threatened with rape or forced to undergo virginity testing,<sup>116</sup> or a detainee being held in worse conditions or for a longer period than other detainees in similar circumstances);<sup>117</sup>

(d) The context suggests that the authorities have detained a person on discriminatory grounds or to prevent them from exercising their human rights (*e.g.*, political leaders detained after expressing their political opinions or detained for offenses that disqualify them from holding political office);<sup>118</sup>

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115. See, *e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventieth Session (25–29 August 2014): Op. No. 24/2014 concerning La Ring (Myanmar), ¶ 22(c), U.N. Doc. A/HRC/WGAD/2014/24 (Nov. 21, 2014) (finding that an ethnic Kachin was arrested as part of mass arrests of people from the same minority group); see also Op. No. 89/2017 (United States of America), *supra* note 32, ¶ 62 (finding that, in practice, the Guantánamo Bay military commissions are held solely for defendants who are not United States citizens, and have never prosecuted anyone of any religious faith, other than Muslim men).

116. See Op. No. 1/2016 (Islamic Republic of Iran), *supra* note 107, ¶ 37.

117. See, *e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 36/2016 concerning Biram Dah Abeid, Brahim Bilal Ramdane and Djibril Sow (Mauritania), ¶¶ 26, 35, U.N. Doc. A/HRC/WGAD/2016/36 (Dec. 28, 2016) [hereinafter Op. No. 36/2016 (Mauritania)] (finding that two of the victims who were of Haratine ethnicity had not been granted bail, and were held in detention for longer and in different conditions than the other victim); see also Op. No. 46/2016 (China), *supra* note 30, ¶ 24 (noting that the authorities referred to a Buddhist group, whose members were prosecuted, as an “evil cult”); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 62/2017 concerning Teymur Akhmedov (Kazakhstan), ¶ 42, U.N. Doc. A/HRC/WGAD/2017/62 (Oct. 2, 2017) [hereinafter Op. No. 62/2017 (Kazakhstan)] (noting that a Jehovah’s Witness was entrapped by the authorities who set up situations to provoke him into committing what was deemed to be a crime).

118. See, *e.g.*, Op. No. 24/2015 (Philippines), *supra* note 76, ¶ 44 (noting that as a result of her ongoing detention, the victim was barred from serving as an elected member of the legislature); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Third Session (31 August–4

- (e) The alleged conduct for which the person is detained is only a criminal offense for members of his or her group (*e.g.*, criminalization of consensual same-sex conduct between adults).<sup>119</sup>

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September 2015): Op. No. 30/2015 concerning Frédéric Bamvuginyumvira (Burundi), ¶¶ 39, 44, 47, U.N. Doc. A/HRC/WGAD/2015/30 (Nov. 30, 2015) (finding that the real reason for the detention was the victim's role as leader of the opposition and preventing him from standing in elections); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Third Session (31 August–4 September 2015): Op. No. 33/2015 concerning Mohamed Nasheed (Maldives), ¶ 84, U.N. Doc. A/HRC/WGAD/2015/33 (Nov. 10, 2015) (referring to the previous criminal proceedings against the victim, as well as the adoption of a law two weeks after he was sentenced banning all prisoners from being members of political parties); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 36/2017 concerning Ahmad Suleiman Jami Muhanna al-Alwani (Iraq), ¶ 108, U.N. Doc. A/HRC/WGAD/2017/36 (Aug. 14, 2017) [hereinafter Op. No. 36/2017 (Iraq)] (considering the detention of a parliamentarian four months before an election and in violation of parliamentary immunity to be arbitrary).

119. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 14/2017 concerning Cornelius Fonya (Cameroon), ¶¶ 47–51, U.N. Doc. A/HRC/WGAD/2017/14 (July 3, 2017) [hereinafter Op. No. 14/2017 (Cameroon)] (noting that the detainee, having been detained pursuant to a section of the penal code criminalizing consensual same-sex relations, was deprived of his liberty based on his sexual orientation); *see also* Commc'ns Rep. of Special Procedures (A/HRC/27/72), *supra* note 45, at 44 (describing Case No. EGY 4/2014 (Apr. 17, 2014), which alleged arbitrary arrest and detention of four individuals in Egypt based on their sexual orientation and/or gender identity); Letter from Mads Andenas (Chair-Rapporteur of the Working Group on Arbitrary Detention), et al., to Gov't of Egypt, *supra* note 45, at 1, 4 (describing circumstances of Case No. EGY 4/2014, and noting that United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law); *see also* Op. No. 7/2002 (Egypt), *supra* note 21, at 73, ¶ 28 (finding persons prosecuted because of their sexual orientation on the grounds it caused “social dissention” were deprived of their fundamental liberties); Op. No. 22/2006 (Cameroon), *supra* note 91, at 93–94, ¶¶ 19–20 (finding detention pursuant to laws criminalizing homosexual behavior violates rights of privacy and freedom, and is contrary to international law); Op. No. 42/2008 (Egypt), *supra* note 91, at ¶¶ 25, 27–28 (finding freedom from discrimination on basis of sex includes sexual orientation, and thus detention was contrary to international human rights law); Op. No. 25/2009 (Egypt), *supra* note 91, at 19–20, ¶¶ 24, 27, 31 (finding detention based on sexual orientation pursuant to regulating public health and morals contravenes international law). Another example occurs when the behavior of women is criminalized (*e.g.*, prostitution, soliciting, failure to hold mandatory health records, adultery) more harshly than for men who participate in or carry out the same act. *See* Comm. on the Elimination of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, ¶ 47(a), U.N. Doc.

While these are by no means the only examples of differential treatment, they illustrate that the Working Group's consideration of discrimination often depends on the totality of the facts, particularly whether the alleged victim was targeted because of his or her characteristics and in circumstances which suggest that others would not have been subjected to similar treatment.<sup>120</sup> Given that differential treatment often consists of arrest without a legal basis and denial of fair trial rights, Category V is not a standalone category and is usually accompanied by findings that other categories were also violated.<sup>121</sup>

As its Category V jurisprudence develops, the Working Group continues to receive allegations that detention was motivated by a variety of discriminatory grounds. In the seventy-two opinions adopted up to the end of 2017 in which a Category V violation was found, the Working Group determined that the victims had been detained on the basis of their "political or other opinion" (thirty-one cases);<sup>122</sup> "national

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CEDAW/C/GC/33, (Aug. 3, 2015) [hereinafter Comm. on the Elimination of Discrimination against Women, General Recommendation No. 33]; *see also For a Better Inclusion of Women's Rights in Detention in Senegal*, OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS (Mar. 13, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/WomenRightsInDetentionInSenegal.aspx> [<https://perma.cc/EV3E-L53S>]. A further example is found in laws that criminalize behavior that can be performed only by women, such as abortion, or that result in the confinement of pregnant women suspected of substance abuse. *See* USA Visit Rep., *supra* note 86, ¶¶ 72–74.

120. In most Working Group opinions, an implicit comparison is made between the victim and persons who do not share the same characteristics as the victim (*e.g.*, if a person is detained on the basis of membership of a particular religion, the hypothetical comparator is someone of another religion or no religion who would not have been detained in the same circumstances).

121. As noted above, discriminatory detention practices often involve the deliberate and extralegal targeting of an individual or group. As a result, there is often a failure by the authorities to follow legal procedures, resulting in multiple violations of the categories employed by the Working Group. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 84/2017 concerning Roberto Antonio Picón Herrera (Venezuela), ¶ 64, U.N. Doc. A/HRC/WGAD/2017/84 (Jan. 23, 2018) (finding deprivation of victim's liberty fell within Category I, II, III, V); Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 87/2017 concerning Marcelo Eduardo Crovato Sarabia (Venezuela), ¶ 51, U.N. Doc. A/HRC/WGAD/2017/87 (Jan. 23, 2018) (same).

122. U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-First Session (17–21 November 2014): Op. No. 39/2014 concerning Salem Lani et al. (Tunisia), ¶ 33, U.N. Doc. A/HRC/WGAD/2014/39 (Feb. 11, 2015) [hereinafter Op. No. 39/2014 (Tunisia)] ("[T]hese eight persons are being prosecuted for exercising their rights to freedom of opinion, expression

origin” (sixteen cases);<sup>123</sup> “religion” (fourteen cases);<sup>124</sup> “any other status” (*i.e.*, human rights defender) (nine cases);<sup>125</sup> “ethnic origin” (six cases);<sup>126</sup> “disability” (two cases);<sup>127</sup> “economic condition” (one case);<sup>128</sup> “gender” (one case);<sup>129</sup> “language” (one case),<sup>130</sup> and “sexual orientation” (one case).<sup>131</sup> These findings reflect the fact that arrest and detention place some individuals and groups in a situation of heightened vulnerability to discrimination on a range of grounds, and in some cases, multiple grounds. In nine of the seventy-two cases, the Working Group found that the detention was motivated by more than one ground of discrimination.<sup>132</sup>

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and demonstration”); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 7/2015 concerning Rosmit Mantilla (Venezuela), ¶ 27, U.N. Doc. A/HRC/WGAD/2015/7 (July 13, 2015) [hereinafter Op. No. 7/2015 (Venezuela)] (“Mr. Mantilla’s detention may also be intended to punish him for his activities as a human rights defender, in particular his activities in defence of the rights of the LGBTI community and the right to equal marriage.”).

123. *See, e.g.*, Op. No. 37/2012 (Spain), *supra* note 72, ¶ 19 (“[T]he deprivation of liberty affecting Adnam El Hadj was motivated by discrimination based on his national, ethnic and social origin.”); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Sixth Session (29 April–3 May 2013): Op. No. 10/2013 concerning Obaidullah (United States of America), ¶ 42, U.N. Doc. A/HRC/WGAD/2013/10 (July 25, 2013) [hereinafter Op. No. 10/2013 (United States of America)] (“Mr. Obaidullah has been subjected to prolonged detention because of his status as a foreign national.”).

124. *See, e.g.*, Op. No. 4/2013 (Uzbekistan), *supra* note 105, ¶ 74 (“Mr. Jalilov has been deprived of his liberty for being a practising Muslim and for criticizing the Government’s treatment of independent Muslims”); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fourth Session (30 November–4 December 2015): Op. No. 42/2015 concerning Irina Zakharchenko and Valida Jabrayilova (Azerbaijan), ¶ 43, U.N. Doc. A/HRC/WGAD/2015/42 (Mar. 15, 2016) (“Ms. Zakharchenko and Ms. Jabrayilova have been deprived of liberty for peacefully exercising the right to freedom of religion and belief”).

125. *See infra* Part III.D.

126. *See, e.g.*, Op. No. 6/2014 (Myanmar), *supra* note 104, ¶ 22 (“Mr. Brang Yung was targeted for prosecution as he belongs to the minority Kachin ethnic group”).

127. *See, e.g.*, Op. No. 68/2017 (Trinidad and Tobago), *supra* note 75, ¶ 33 (“[T]he deprivation of liberty of Mr. Seepersad was made purely on the basis of his physical impairment”).

128. *See* Op. No. 72/2017 (United States of America), *supra* note 79, ¶ 67.

129. *See* Op. No. 1/2016 (Islamic Republic of Iran), *supra* note 107, ¶ 37.

130. *See* Op. No. 72/2017 (United States of America), *supra* note 79, ¶ 68.

131. *See* Op. No. 14/2017 (Cameroon), *supra* note 119, ¶ 46.

132. *See generally* Op. No. 50/2013 (Myanmar), *supra* note 79 (ethnic origin and religion), Op. No. 4/2014 (China), *supra* note 73 (religion and political or other

While the Working Group is aware of the abundant evidence demonstrating that intersectional discrimination impacts the enjoyment of human rights,<sup>133</sup> it is not yet clear how, if at all, the Working Group will take into account multiple, intersecting forms of discrimination in its reasoning in future. For example, when a source presents a credible *prima facie* case alleging multiple grounds of discrimination, it remains to be seen whether the Working Group will require the State to rebut each alleged ground with evidence,<sup>134</sup> or

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opinion); Op. No. 1/2016 (Islamic Republic of Iran), *supra* note 107 (national, ethnic or social origin, political or other opinion, and gender); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 16/2017 concerning Max Bokayev and Talgat Ayanov (Kazakhstan), U.N. Doc. A/HRC/WGAD/2017/16 (June 27, 2017) [hereinafter Op. No. 16/2017 (Kazakhstan)] (political or other opinion and human rights defender); Op. No. 36/2017 (Iraq), *supra* note 118 (religion and political or other opinion); Op. No. 50/2017 (Malaysia), *supra* note 28 (political or other opinion and human rights defender); Op. No. 72/2017 (United States of America), *supra* note 79 (language and economic condition); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 88/2017 concerning Thirumurugan Gandhi (India), U.N. Doc. A/HRC/WGAD/2017/88 (Jan. 23, 2018) [hereinafter Op. No. 88/2017 (India)] (political or other opinion and human rights defender); and Op. No. 89/2017 (United States of America), *supra* note 32 (national origin and religion). *See also* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 13/2016, concerning a Minor (Whose Name is Known by the Working Group) (Israel), U.N. Doc. A/HRC/WGAD/2016/13 (June 24, 2016) [hereinafter Op. No. 13/2016 (Israel)]; U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 3/2017 concerning a Minor (Whose Name is Known by the Working Group) (Israel), U.N. Doc. A/HRC/WGAD/2017/3 (June 16, 2017) [hereinafter Op. No. 3/2017 (Israel)]. Both of these cases might also be considered as multiple cases of discrimination as they involved Palestinian minors, but the Working Group did not explicitly consider the age of the individuals as a ground of discrimination.

133. *See generally* Ivona Truscan & Joanna Bourke-Martignoni, *International Human Rights Law and Intersectional Discrimination*, 16 THE EQUAL RTS. REV. 103 (2016); U.N. High Comm'r for Human Rights, Rep. of the U.N. High Comm'r for Human Rights on the Impact of Multiple and Intersecting Forms of Discrimination and Violence in the Context of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the Full Enjoyment of All Human Rights by Women and Girls, U.N. Doc. A/HRC/35/10 (Apr. 21, 2017); Shreya Atrey, *Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR*, 35 NORDIC J. HUM. RTS. 220 (2017).

134. The Working Group took a similar approach in the case of Op. No. 89/2017 (United States of America), *supra* note 32, ¶ 62. In every case, the Working Group requires the State to produce evidence in support of its claims if it wishes to refute the source's case. *See* U.N. Human Rights Council, Ops. Adopted by the

whether the Working Group will require the State to demonstrate that the cumulative effect of multiple forms of discrimination did not result in arbitrary detention. Similarly, it is uncertain whether the Working Group will reflect multiple forms of discrimination in its recommendations and follow-up action.<sup>135</sup> Even if the Working Group simply continues to find, in appropriate cases, that multiple factors have led to detention on discriminatory grounds, this will add depth to its opinions and place its jurisprudence closer to the lived experience of people in detention. Part III explores how the Working Group might continue to add depth to its opinions and ensure that its discrimination jurisprudence evolves toward an equality-based conception of arbitrary detention.

### III. TOWARD AN EQUALITY-BASED CONCEPTION OF ARBITRARY DETENTION

The preceding examination of the Working Group's jurisprudence since 2012 reveals an increasing awareness of the socio-legal factors that motivate detention on discriminatory grounds and a genuine willingness to address those factors by determining that the detention is arbitrary. The Working Group's treatment of discrimination, however, has not yet reached a level commensurate with its role as "the only specialized international human rights mechanism dedicated to the elaboration and enforcement of the protections against arbitrary detention."<sup>136</sup>

The analysis of discrimination in the Working Group's opinions usually consists of one or two paragraphs outlining why the Working Group considers that the detention was discriminatory under Category V on the facts of each case, often persuasively argued with reference to previous opinions and the findings of other Special Procedures mandate holders and treaty bodies. However, there are broader questions relating to detention on discriminatory grounds that remain largely unanswered in the Working Group's jurisprudence so far that fall into two overarching areas. First, there is significant scope for the Working Group to expand on its understanding of discriminatory

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Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session, (13–22 November 2013): Op. No. 41/2013 concerning Saif Al-Islam Gaddafi (Libya), ¶¶ 27–28, U.N. Doc. A/HRC/WGAD/2013/41 (Apr. 7, 2014).

135. See *infra* Part III.F.

136. Liara Lazarus, *Introductory Note to United Nations Basic Principles and Guidelines on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court*, 55 I.L.M. 361 (2016).

detention practices, particularly (i) what kind of behavior constitutes discrimination under Category V, (ii) how to approach laws that are *de jure* or *de facto* discriminatory, and (iii) whether it is possible to distinguish between detention that results from the exercise of rights found in Category II (including the right to equality before the law) and detention motivated by a prohibited ground under Category V, both of which may involve discrimination. Second, there is a need for further guidance on the application of the jurisprudence on discrimination to emerging human rights priorities, including (i) whether protection under Category V should be extended to other vulnerable groups, (ii) why poverty and inequality matter in detention practices and how they might be addressed, and (iii) whether the Working Group's recommendations and follow-up procedures can be tailored to respond more effectively to cases involving discrimination.

This Part considers these unresolved issues in the Working Group's jurisprudence, commencing with an analysis of the Working Group's current conception of discriminatory detention practices in parts III.A to III.C before moving to a discussion in parts III.D to III.F of how the Working Group might address discrimination in new contexts, particularly in relation to groups that have not previously been protected under Category V but frequently experience arbitrary detention. It proposes potential solutions that the Working Group might advance in resolving remaining areas of uncertainty, including clarifying what is meant by the requirement under Category V that the detention "aims towards or can result in ignoring the equality of human beings"; allowing States to present evidence to justify differential treatment based on reasonable and objective grounds; declaring detention under discriminatory laws to have no legal basis; and taking a flexible approach to the overlap between Category II and V. It also presents approaches that the Working Group might take in ensuring the relevance of its jurisprudence to contemporary forms of discrimination, such as incrementally extending the protection offered by Category V to marginalized individuals and groups, especially those living in poverty; adopting specific recommendations aimed at securing guarantees of non-repetition and other remedies that address the structural causes of discrimination; and making more extensive use of its follow-up procedure and referral mechanism to draw attention to discriminatory detention practices.

#### A. Nature of Discrimination

In the Working Group's jurisprudence, there are two unresolved issues as to what constitutes discrimination under

international law. First, the Working Group has not elaborated on the type of behavior that “aims towards or can result in ignoring the equality of human beings” under Category V. Second, it has not clarified whether different treatment of a person who has been arrested and detained can ever be justified by a State. This section examines these two issues, suggesting how the Working Group might provide further guidance and ensure that its jurisprudence and practice is consistent with that of other international and regional human rights mechanisms.

### 1. Definition of Discrimination under Category V

In order to find that detention is arbitrary under Category V of its Methods of Work, the Working Group must be satisfied that three requirements have been met: first, that the victim has, as a matter of fact, been treated differently on the basis of one or more grounds of discrimination; second, that the differential treatment “aims towards or can result in ignoring the equality of human beings”; and third, that as a matter of law, “the deprivation of liberty constitutes a violation of international law.”<sup>137</sup>

As the review of Category V cases suggests,<sup>138</sup> the Working Group’s jurisprudence is markedly stronger on the first requirement, with most of its findings under Category V clearly demonstrating that the victim was, in fact, treated differently and that the differential treatment was motivated by a discriminatory purpose. The Working Group’s jurisprudence is not, however, as developed in relation to the second requirement of Category V. Most of the Working Group’s opinions under Category V do not make explicit reference to whether the differential treatment “aims towards or can result in ignoring the equality of human beings” or allude to it only in passing,<sup>139</sup> and the Working Group has not elaborated on what is meant by that phrase.

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137. Category V applies 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. *See* Methods of Work, *supra* note 5, ¶ 8(e).

138. *See supra*, Part II.D.

139. *See, e.g.*, Op. No. 13/2016 (Israel), *supra* note 132, ¶¶ 3(e), 29 (discussing the arbitrary nature of a minor’s detention without referencing the equality of human beings); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 18/

By adding the requirement to Category V that the differential treatment “aims towards or can result in ignoring the equality of human beings”, the Working Group has made two important points. First, that differential treatment can either be intentional in its aim of ignoring the equality of human beings or can unintentionally do so if a neutral measure has a disproportionate impact on certain groups.<sup>140</sup> In other words, both direct and indirect forms of differential treatment can amount to discrimination under Category V. Second, not all differences in treatment will violate Category V, but only less favorable treatment that involves “ignoring the equality of human beings,” either in its purpose or potential result.<sup>141</sup>

However, the requirement that the differential treatment “aims towards or can result in ignoring the equality of human beings” is problematic in several ways, not least of which because it has no clear definition. It also appears to be redundant because, in most cases, once the Working Group has determined that an individual has been subject to differential treatment on one or more of the grounds of discrimination found in Category V, it is very likely that such treatment will aim towards or result in ignoring the equality of human beings. The uncertainty surrounding this requirement may explain why it has received so little attention in the Working Group’s opinions. Moreover, it sets a low threshold for discriminatory treatment—as a wide range of conduct might be described as ignoring the equality of human beings—and certainly lower than that set by the Human Rights Committee.

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2017 concerning Yon Alexander Goicoechea Lara (Venezuela), ¶ 44, U.N. Doc. A/HRC/WGAD/2017/18 (Aug. 4, 2017) (mentioning the principle of equality among human beings within the context of a Category V detention instigated by the Venezuelan government); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 52/2017 concerning Gilbert Alexander Caro Alfonzo (Venezuela), ¶ 24, U.N. Doc. A/HRC/WGAD/2017/52 (Oct. 23, 2017) (briefly referencing the principle of equality among human beings within the context of a Category V detention).

140. See *infra* Part III.B.

141. As noted earlier, Category V was added to the *Methods of Work* in 2010, after the Working Group had adopted opinions in several egregious cases of discrimination on the basis of sexual orientation. See *supra* Part I.B. It is likely that the members at that time were attempting to give the greatest possible effect to the right to liberty, as well as to the principles of equality and non-discrimination. Their formulation reminds us that we are dealing with the rights of all human beings. More favorable treatment, such as special measures to help disadvantaged groups, would arguably not ignore the equality of human beings.

In its General comment No. 18 (1989), the Human Rights Committee stated that “discrimination” as used in the ICCPR should be understood to imply any distinction, exclusion, restriction or preference “which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>142</sup> This appears to involve a more rigorous assessment of the differential treatment than Category V requires, including whether the differential treatment has the purpose or effect of nullifying or impairing the enjoyment or exercise of rights. Interestingly, unlike the Human Rights Committee’s reference to the “purpose or effect” of the differential treatment, the use of the words “can result” in ignoring the equality of human beings in Category V implies that it need only be possible for the differential treatment to cause this result, and that the source need not demonstrate that the differential treatment actually had this effect. This language could conceivably result in the Working Group finding that arbitrary detention has occurred when other human rights mechanisms might not. For these reasons, the second requirement of Category V would benefit from further clarification by the Working Group in its jurisprudence and possibly also in the form of a new deliberation.

## 2. Justification of Different Treatment

The Working Group’s consideration of the third requirement of Category V (that “the deprivation of liberty constitutes a violation of international law”) has also been limited. While the Working Group typically provides detailed reasoning as to why a detention is in violation of norms found in international instruments such as the UDHR and ICCPR, it has not had occasion to consider whether detention will always be arbitrary whenever a person has been treated less favorably on one of the grounds contained in Category V, or whether different treatment might be justified in some cases and therefore not discriminatory.

The Human Rights Committee has confirmed that not every differentiation of treatment will constitute discrimination under Articles 2(1) and 26 of the ICCPR, “if the criteria for such

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142. U.N. International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 197, ¶ 7 (May 27, 2008).

differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”<sup>143</sup>

An example in the detention context came before the Human Rights Committee in the case of *Michael O'Neill and John Quinn v. Ireland*.<sup>144</sup> In that case, two individuals alleged that they had been subject to discrimination because they were not designated as qualifying prisoners for the purposes of early release under the Good Friday Agreement, even though other persons convicted of comparable or more serious offenses had been granted early release. Recalling its earlier jurisprudence that not every distinction constitutes discrimination, a majority of the Human Rights Committee considered that the alleged distinction was not based on any of the grounds in Article 26 of the ICCPR and, given the factors that the State had taken into account, that there was no arbitrary detention resulting from the denial of equality before the law and equal protection of the law.<sup>145</sup>

A similar approach to that taken by the Human Rights Committee has been adopted by other international and regional human rights mechanisms.<sup>146</sup> This approach gives fair weight to competing State interests. In this author's opinion, the requirement in Category V that “the deprivation of liberty constitutes a violation of international law” should include an assessment of whether the

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143. *Id.* at 198, ¶ 13.

144. U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Comm. at its Eighty-Seventh Session: Commc'n No. 1314/2004, U.N. Doc. CCPR/C/87/D/1314/2004 (Sep. 14, 2006).

145. *Id.*, ¶¶ 8.3–8.5.

146. *See, generally*, Comm. on the Elimination of Racial Discrimination, *General Recommendation XIV on Article 1, Paragraph 1 of the Convention*, at 115, ¶ 2, U.N. Doc. A/48/18 (1994) (stating that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate); Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, ¶ 13 (June 10, 2009), U.N. Doc. E/C.12/GC/20 [hereinafter *Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20*]; *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium”* (No. 6), Eur. Ct. H.R. (ser. A), ¶ 10 (July 23, 1968); *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 15, ¶¶ 56–57 (Jan. 19, 1984); *Dabolorivhuwa Patriotic Front v. the Republic of South Africa*, Communication No. 335/2006, 53<sup>rd</sup> Ordinary Session, African Commission on Human and Peoples' Rights [Afr. Cmmn. H.P.R.] ¶ 117, (Apr. 23, 2013) [http://www.achpr.org/files/sessions/53rd/communications/335.06/achpr53\\_335\\_06\\_eng.pdf](http://www.achpr.org/files/sessions/53rd/communications/335.06/achpr53_335_06_eng.pdf) [<https://perma.cc/4WJ6-PMFX>].

differential treatment can be justified on reasonable and objective grounds, and whether it has a legitimate purpose. The Working Group could undertake this assessment when it is considering allegations that Article 7 of the UDHR and Article 26 of the ICCPR have been violated, and also when considering whether a person has been detained on discriminatory grounds for exercising other rights, such as the rights to freedom of religion, expression, peaceful assembly or association under Articles 18, 19, 21 and 22 of the ICCPR.<sup>147</sup> This suggested change of approach in interpreting Category V would not require a radical shift in practice, since the Working Group's existing assessment of arbitrariness under Article 9 of the ICCPR involves similar considerations of whether a detention is reasonable, necessary and proportionate.<sup>148</sup> However, the approach would be applied under Category V with a different nuance, as the Working Group would consider the legitimacy of differential treatment by a State in detaining an individual.

There has been limited opportunity for the Working Group to take this approach in its jurisprudence under Category V. As noted earlier, between August 2012 and November 2017, the Working Group adopted seventy-two opinions in which it found that a Category V violation had occurred.<sup>149</sup> States replied to the Working Group's communications and requests for information in only thirty-eight of those cases, representing a response rate of fifty-three percent.<sup>150</sup> This is higher than the overall response rate to the Working Group's communications and urgent appeals, but is still quite discouraging.<sup>151</sup> When the State does not respond, the Working Group adopts its

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147. This would include equivalent provisions in the UDHR, particularly for States that are not party to the ICCPR. *See infra* Part III.C for a discussion of detention on discriminatory grounds while exercising other rights.

148. *See* 2012 Rep. of the Working Grp., *supra* note 69, ¶ 61; *see also* Human Rights Comm., *General Comment No. 35 on Article 9 (Liberty and Security of Person)*, ¶ 12, U.N. Doc. CCPR/C/GC/35, (2014) [hereinafter Human Rights Comm., *General Comment No. 35*] (defining arbitrariness under Article 9 of the ICCPR).

149. *See supra*, Part II.D.

150. This data is based on the author's review of all Category V cases as of the end of 2017.

151. The overall response rate to the Working Group's communications and urgent appeals was 37 percent. 2016 Rep. of the Working Grp., *supra* note 8, at 21, ¶ 61 (noting that States did not reply to the Working Group's communications and request for information in 63 percent of the cases in which the Working Group adopted an opinion in 2016).

opinion on the basis of the *prima facie* case established by the source.<sup>152</sup> Even when a response is received from a State, it may not add to the substance of the case. In the author's experience, late responses, blanket denials of the allegations, and assertions without supporting information or evidence that the State has acted in accordance with its domestic laws and procedures and met its international human rights obligations, often fail to respond meaningfully to the source's claims.

As a result, most submissions from States do not provide evidence that would allow the Working Group to consider whether the differential treatment in detaining an individual is reasonable and objective and has a legitimate purpose. The closest that States generally come to challenging allegations of discrimination is by claiming that there was no differential treatment and that the victim was treated in the same way as others in his or her position. This is likely to continue, although the Working Group could indicate through its deliberations that it approves of the approach taken by the Human Rights Committee and will adopt it whenever possible in its opinions. In addition to providing more balance and depth to its opinions, this approach might encourage engagement with States.<sup>153</sup> It might also serve an educative function in providing feedback to States on whether their detention practices are reasonable, objective and legitimate. By being more explicit in its analysis of what constitutes discrimination under international law, the Working Group could add significant value to its jurisprudence, as well as to the broader understanding of detention on discriminatory grounds.

## B. Discriminatory Laws

Another area that would benefit from further clarity is the Working Group's approach to laws that are *de jure* discriminatory. In particular, the Working Group has yet to develop a strong body of jurisprudence on whether detention pursuant to such a law lacks a

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152. See *Methods of Work*, *supra* note 5, ¶¶ 15–16; see also U.N. Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/19/57, ¶ 68 (Dec. 26, 2011) (noting that in cases in which the Government does not respond to the Working Group's request for information, the Group bases its opinion solely on the information that the source has provided).

153. Such an approach would be fully consistent with the Working Group's decision to establish an adversarial procedure for its investigation of individual complaints, which is intended to bring to light all relevant information. See Deliberation No. 3 in U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., at 15 B, U.N. Doc. E/CN.4/1993/24 (Jan. 12, 1993).

legal basis under Category I of its Methods of Work, as well as being arbitrary under Category V. Moreover, the Working Group has not commented extensively on how laws that are *de facto* discriminatory may result in arbitrary detention. This section considers these issues, suggesting how the Working Group might approach both types of discrimination.

### 1. *De Jure* Discrimination

From time to time, the Working Group receives cases in which the legislative provision or case law<sup>154</sup> relied upon to detain an individual is itself discriminatory and in violation of international law. The Working Group is not a substitute for a domestic court.<sup>155</sup> However, in its jurisprudence, the Working Group has repeatedly held that, even when a person is detained in conformity with national law, it must ensure that the detention is also consistent with international human rights law.<sup>156</sup> This necessarily involves analysis of the relevant law invoked to detain an individual.

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154. In a series of recent opinions involving Australia's mandatory immigration detention policy, the Working Group found that the effect of a High Court of Australia decision was that non-citizens could not challenge the continued legality of their administrative detention. The Working Group stated that this amounts to a Category V violation and requested Australia to bring its laws into conformity with international norms. *See* Op. No. 28/2017 (Australia), *supra* note 78, ¶ 40; Op. No. 42/2017 (Australia), *supra* note 78, ¶ 45; Op. No. 71/2017 (Australia), *supra* note 78, ¶ 55.

155. *See* Fact Sheet No. 26, *supra* note 34, § IV.B.

156. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Sixty-Fourth Session, (27–31 August 2012): Op. No. 25/2012 (Rwanda), ¶ 52, U.N. Doc. A/HRC/WGAD/2012/25 (Nov. 22, 2012) (emphasizing that ensuring conformity with international human rights law is part of the Working Group's mandate); U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Sixty-Eight Session, (13–22 November 2013): Op. No. 56/2013 (Myanmar), ¶ 13, U.N. Doc. A/HRC/WGAD/2013/56 (Apr. 2, 2014) (reminding the Government of Myanmar that the Working Group assesses cases based on international, not domestic, law); U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Seventy-First Session (17–21 November 2014): Op. No. 41/2014 (Thailand), ¶ 24, U.N. Doc. A/HRC/WGAD/2014/41 (Feb. 13, 2015) (noting that conformity with national law does not equate to conformity with the relevant provisions of international human rights law, and that the Working Group must ensure the latter is respected); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 26/2017 concerning Nguyen Van Dai (Viet Nam), ¶ 49, U.N. Doc. A/HRC/WGAD/2017/26 (June 8, 2017) [hereinafter Op. No.

An example of *de jure* discrimination has arisen in the case of legislation that criminalizes consensual same-sex relations between adults. The Working Group has considered such laws in several opinions, citing the landmark decision by the Human Rights Committee in *Nicholas Toonen v. Australia*,<sup>157</sup> and finding that the criminalization of homosexuality is discriminatory and incompatible with the ICCPR.<sup>158</sup> In most of these cases, detention on the basis of these laws was found to be arbitrary according to Category II.<sup>159</sup> With one notable exception in the recent case of *Cornelius Fonya v. Cameroon*,<sup>160</sup> the jurisprudence has not taken the next logical step of finding that the legislation violates international law and that there is therefore no legal basis for the detention under Category I of the Working Group's *Methods of Work*.

There may be advantages in finding that a law, or one of its provisions, is facially discriminatory and that any detention arising from that provision has no legal basis. A finding that an individual has been detained pursuant to a provision that was never valid under international law might allow a plaintiff to make a stronger case for compensation in domestic courts<sup>161</sup> than, for example, other types of

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26/2017 (Viet Nam)] (reiterating that detention must comply with international law, and it is the Working Group's mandate to ensure such conformity).

157. U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Committee at its Fiftieth Session: Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) [hereinafter Commc'n No. 488/1992 (Australia)].

158. See Op. No. 7/2002 (Egypt), *supra* note 21, ¶ 28 (finding detention based on notion that sexual orientation incited social dissention violated the ICCPR); Op. No. 42/2008 (Egypt), *supra* note 91, ¶¶ 25, 28 (finding that persecuting persons based on their sexuality both violates principles of international law generally and the ICCPR specifically); Op. No. 25/2009 (Egypt), *supra* note 91, ¶¶ 24, 31 (noting detention on the basis of sexual orientation violates the UDHR and the ICCPR); see also Op. No. 14/2017 (Cameroon), *supra* note 119, ¶¶ 47–49 (finding violations of articles 2, 17, and 26 of the ICCPR). These cases referred to violation of several articles of the ICCPR, including Articles 2(1), 17 and 26.

159. Category V had not yet been added to the *Methods of Work* at the time.

160. Op. No. 14/2017 (Cameroon), *supra* note 119, ¶ 49.

161. As noted earlier in this article, the Working Group does not require the exhaustion of domestic remedies. See *supra* Part I.C. As a result, a victim of arbitrary detention may have an opinion from the Working Group before a matter is subject to a final judgment within the domestic hierarchy of courts. This might be useful in seeking domestic remedies, such as compensation. While victims of arbitrary detention have sought compensation and other remedies in domestic proceedings based on the Working Group's findings, the author is not aware of any cases in which compensation has been awarded on that basis.

arbitrary detention envisaged under Category I.<sup>162</sup> That is, a finding that detention was never valid may be stronger than the situation referred to in Category I in which an individual is initially lawfully detained but the detention only becomes arbitrary if he or she is kept in detention after the completion of a sentence or despite a pardon or an applicable amnesty law. Such an opinion is arguably of more weight because of the use of an additional category of arbitrary detention, and it would be available for domestic courts to refer to as persuasive authority or to use as an interpretive tool in assessing the same law.<sup>163</sup>

Moreover, as noted earlier, the Working Group can only consider a fraction of communications that it receives from sources worldwide.<sup>164</sup> While it has been argued that the Working Group's quasi-judicial process does not produce legally binding precedents capable of being enforced,<sup>165</sup> its opinions still carry a degree of hortatory force.<sup>166</sup> A finding in an opinion, or a repeated finding in multiple opinions, that a discriminatory law is contrary to international law may generate momentum and assist advocacy efforts by civil society, NHRIs and U.N. field presences in the country in question to repeal such laws.<sup>167</sup> This momentum may, by analogy,

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162. Category I applies “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.” See *Methods of Work*, *supra* note 5, ¶ 8(a).

163. See Deliberation No. 9 in 2012 Rep. of the Working Grp., *supra* note 69, ¶ 65, [hereinafter Deliberation No. 9] (giving an example of an Australian court that had drawn upon notions of arbitrariness developed by the Human Rights Committee).

164. See *supra* Part I.C.

165. Genser & Winterkorn-Meikle, *supra* note 5, at 118–19; see also Rudolf, *supra* note 14, at 315; Elvira Domínguez Redondo, *Rethinking the Legal Foundations of Control in International Human Rights Law - The Case of Special Procedures*, 29 NETH. Q. HUM. RTS. 261, 283, 286 (2011); but cf. Liora Lazarus, *United Nations Working Group on Arbitrary Detention Decision on Assange: The Balanced View*, OPINIO JURIS (Mar. 1, 2016), <http://opiniojuris.org/2016/03/01/unit-ed-nations-working-group-on-arbitrary-detention-decision-on-assange-the-balance-d-view/> [https://perma.cc/N98W-WEDK].

166. Genser & Winterkorn-Meikle, *supra* note 5, at 160.

167. *Id.* at 117. For example, the Working Group has adopted several opinions drawing attention to certain vague national security offenses under the Vietnamese Penal Code and to lèse-majesté offenses in Thailand. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 75/2017 concerning Tran Thi Nga (Viet Nam), ¶¶ 40–41, U.N. Doc. A/HRC/WGAD/2017/75 (Dec. 15, 2017) [hereinafter Op. No. 75/2017 (Viet Nam)] (noting “widespread concern” about Viet

accelerate the repeal of similar laws in other countries.<sup>168</sup> Similarly, such a finding could form part of broader U.N. efforts to draw attention to human rights violations in a particular country, such as the Universal Periodic Review, treaty body reports, the activities of other Special Procedures mandate holders, and subsequent country visits by the Working Group.

The possibility of finding a law to be inconsistent with international law and therefore without legal basis has not escaped the attention of the Working Group. Considerable thought is being given to the issue, including in areas other than detention on discriminatory grounds.<sup>169</sup> The Working Group is, however, almost exclusively reliant

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Nam's national security legislation in restricting the exercise of human rights); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at its Seventy-Ninth Session, (21–25 August 2017): Opinion No. 51/2017 (Thailand), ¶¶ 30–32. U.N. Doc. A/HRC/WGAD/2017/51 (Oct. 13, 2017) (noting the same in Thailand). In addition, the Working Group's findings are being used by civil society in advocating for changes in detention laws and practices. For example, a coalition of Mexican NGOs recently released a publication on some of the Working Group's opinions relating to Mexico, including cases in which findings were made under Category V. The coalition is seeking to monitor implementation of the Working Group's opinions, in coordination with the Office of the High Commissioner for Human Rights in Mexico. See ARBITRARY AND ILLEGAL DETENTIONS – CRIMINALIZATION: A STATE POLICY TO HINDER THE DEFENSE OF HUMAN RIGHTS IN MEXICO (Emilie de Wolfe & Yesica Sánchez Maya, eds.) (n.d.), [http://www.omct.org/files/2016/09/23961/report\\_arbitrary\\_detention\\_hrds\\_mexico\\_sept\\_2016.pdf](http://www.omct.org/files/2016/09/23961/report_arbitrary_detention_hrds_mexico_sept_2016.pdf). [<https://perma.cc/WN43-ZUGU>].

168. Given that a recent study found that same-sex acts are still criminalized in seventy-one countries around the world, the ability of Working Group findings to inspire and influence advocacy may be significant. See AENGUS CARROLL & LUCAS RAMÓN MENDOS, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION, STATE-SPONSORED HOMOPHOBIA – A WORLD SURVEY OF SEXUAL ORIENTATION LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION 37 (12<sup>th</sup> ed., May 2017), [https://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) [<https://perma.cc/WZA2-RNHC>]. See generally Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 649 (2016) (discussing discrimination on the basis of sexual orientation under international and domestic laws).

169. The Working Group has previously stated in jurisprudence involving Guantánamo Bay that Category I embodies the principle of legality and requires a legal basis for detention in domestic law that complies with international law. It considered that the domestic law used by the United States to detain two individuals at Guantánamo Bay on a prolonged and indefinite basis did not conform with human rights law and international humanitarian law, and that there was therefore a Category I violation. See Op. No. 10/2013 (United States of America),

upon the types of claims brought to it by sources.<sup>170</sup> It is relatively rare to receive a case of a law which is obviously discriminatory and contrary to international law on its face and thus will always result in arbitrary detention, and rarer still for the source to advance an argument based on Category I.<sup>171</sup> Moreover, the discriminatory application of neutrally-worded laws—or, as one opinion put it, the “apparently neutral but actually discriminatory wheels of justice”<sup>172</sup>—is by far the more common type of case brought to the Working Group under Category V.<sup>173</sup> While many of the Category V cases involve legislative provisions that are overly broad and vague and thus capable of arbitrary application,<sup>174</sup> most of these provisions

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*supra* note 123, ¶ 37; Op. No. 50/2014 (United States of America and Cuba), *supra* note 31, ¶ 74. These cases did not involve any direct link between the Category V finding of discrimination and Category I, as the legislation was not facially discriminatory but was applied in a discriminatory way.

170. A source can include alleged victims, their families or representatives, governments, intergovernmental organizations, NGOs, and NHRIs. *See supra* note 58 and accompanying text. The Working Group can, however, take up cases on its own initiative. *See supra* note 59 and accompanying text.

171. The source made this argument in Op. No. 14/2017 (Cameroon), *supra* note 119, ¶ 11. The Working Group can make a finding under Category I even if it is not argued by the source, but the argument often serves as the prompt for doing so, as the Working Group responds to arguments raised in the submissions.

172. U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 33/2017 concerning Rasha Nemer Jaafar al-Husseini and 18 others (Iraq), ¶ 99, U.N. Doc. A/HRC/WGAD/2017/33 (Aug. 3, 2017).

173. *See, e.g.*, Op. No. 39/2014 (Tunisia), *supra* note 122, ¶¶ 11, 15 (involving eight men charged with murder and accessory to murder as a result of their affiliation with a political movement); Op. No. 24/2015 (Philippines), *supra* note 76, ¶¶ 6, 19 (involving the former President being charged with and detained for corruption offenses in circumstances suggesting that the prosecution was politically motivated).

174. This is particularly true of national security offenses and anti-terrorism provisions. *See, e.g.*, Op. No. 9/2017 (Islamic Republic of Iran), *supra* note 30, ¶ 25 (documenting that the Government charged members of the Baha’i faith with “receiving orders from the center of the sect in the lands occupied by Israel”); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 79/2017 concerning Can Thi Theu (Viet Nam), ¶¶ 14, 53–54, U.N. Doc. A/HRC/WGAD/2017/79 (Dec. 12, 2017) [hereinafter Op. No. 79/2017 (Viet Nam)] (recounting how an individual was charged with “fomenting public disorder” under the Penal Code for temporarily obstructing traffic).

do not, on their face, specifically target any individual or group in violation of international law.<sup>175</sup>

In addition, members are mindful that they are the current custodians of the credibility of the Working Group, and that the Working Group's ability to help victims of arbitrary detention can only be maintained through consistent and well-reasoned opinions<sup>176</sup> capable of withstanding procedural and substantive scrutiny, particularly on highly contested topics such as sexual orientation. A new finding in this area may well have consequences in other areas of arbitrary detention and requires careful consideration. Nevertheless, given the rare cases in which legislation will be facially discriminatory, this area lends itself to an incremental approach by the Working Group in finding Category I violations for laws that do not meet international standards, thus strengthening its jurisprudence in relation to detention on discriminatory grounds. The Working Group could request sources to provide a copy of the relevant legislative provision or case law so that it can examine provisions in greater detail when adopting opinions, as such information rarely forms a part of submissions.<sup>177</sup> Another option would be for the Working Group to use

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175. See, e.g., Op. No. 49/2017 (Islamic Republic of Iran), *supra* note 103, ¶ 43 (documenting that the victims were convicted of the vague criminal offense of “collaboration with a hostile government”); Op. No. 75/2017 (Viet Nam), *supra* note 167, ¶¶ 39–40 (finding the section of the Penal Code used to charge persons with “distributing propaganda hostile to the State” to be vague and broad in the present and numerous times before); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 83/2017 concerning Mahmoud Hussein Gomaa Ali (Egypt), ¶ 68, U.N. Doc. A/HRC/WGAD/2017/83 (Jan. 15, 2018) [hereinafter Op. No. 83/2017 (Egypt)] (pre-trial detention based on overly broad and vague grounds such as “harming national security or the public order”).

176. See Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 924 (2009) (asserting that because the output of the U.N. treaty bodies is non-binding, its *de facto* legal force and impact depends on how convincingly and persuasively it is argued). See also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 318–323 (1997) (making a connection between the quality of legal reasoning of international bodies and its enforcement).

177. The Working Group's model questionnaire only requires sources to state the legal basis including the relevant legislation applied, and to provide details on whether the detention is authorized by the Constitution or by domestic law. See U.N. Human Rights Council, Model Questionnaire to be Completed by Persons Alleging Arbitrary Arrest or Detention, [http://www.ohchr.org/Documents/Issues/Detention/WGADQuestionnaire\\_en.doc](http://www.ohchr.org/Documents/Issues/Detention/WGADQuestionnaire_en.doc). [<https://perma.cc/6ATL-3Z5C>]. Similarly, sources are only required to indicate, rather than provide, the legislation applied.

the power under its Methods of Work to take up cases of its own initiative when it discovers *de jure* discrimination during country visits,<sup>178</sup> which would allow it to adopt more opinions on facially discriminatory laws.

## 2. *De Facto* Discrimination

While most of the opinions adopted by the Working Group under Category V involve the conscious and direct targeting of disadvantaged and vulnerable groups—either through facially discriminatory laws or the application of otherwise unobjectionable laws in a discriminatory way—it is also possible for a detention to be arbitrary due to laws that result in *de facto* or indirect discrimination. The Working Group is conscious that a law may be discriminatory because of the context in which it is applied or the characteristics of certain individuals or groups to whom it is applied, and has identified several cases during its recent country visits. For example, during its follow-up visit to Malta in June 2015, the Working Group found that a new parole system led to *de facto* discrimination because only citizens could in practice benefit from parole, as foreign nationals serving sentences lack the family and employment structure to take advantage of this opportunity for release and reintegration into the community.<sup>179</sup> Moreover, during its visit to the United States in October 2016, the Working Group was informed that certain laws and policies are having a disparate impact upon disadvantaged groups, such as asylum seekers and people being prosecuted for minor criminal offenses, who are

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See *Methods of Work*, *supra* note 5, ¶ 10(c). Additional materials would need to comply with the Working Group’s new limit of twenty pages for submissions. See *Methods of Work*, *supra* note 5, ¶ 11.

178. See, e.g., U.N. Human Rights Council, *Rep. of the Working Grp. on Arbitrary Det. on Its Mission to Greece*, ¶ 63, U.N. Doc. A/HRC/27/48/Add.2 (June 30, 2014) (noting that a law that provided for migrants and asylum seekers to be detained if they represent “a danger to public health,” including “if they are ‘suffering from an infectious disease,’ ‘belong to groups vulnerable to infectious diseases,’ or are living in conditions that do not meet ‘minimum standards of hygiene,’” was discriminatory).

179. U.N. Human Rights Council, *Rep. of the Working Grp. on Arbitrary Det. on its Follow-up Visit to Malta*, ¶ 68, U.N. Doc. A/HRC/33/50/Add.1 (Oct. 7, 2016) [hereinafter *Malta Visit Rep.*].

detained or remain in detention because they cannot afford to pay a bond or bail,<sup>180</sup> discussed further below.<sup>181</sup>

By paying greater attention to discriminatory laws, the Working Group can extend its jurisprudence beyond merely highlighting instances of discriminatory action in each case to a more holistic approach that addresses the structural factors that drive or permit detention on discriminatory grounds. Doing so would allow the Working Group to make recommendations regarding the repeal of offending laws, as well as their replacement with laws that give effect to international standards on equality and non-discrimination,<sup>182</sup> and the creation of conditions that allow the broadest possible range of people to benefit from those laws.<sup>183</sup>

### C. Discrimination under Categories II and V

When the Working Group meets with States and civil society representatives, it is often asked to explain the difference between arbitrary detention under Category II and Category V of its Methods of Work. At first glance, the difference seems to be obvious: Category II violations arise when an individual is detained for peacefully exercising his or her rights, while Category V applies when an individual is detained on discriminatory grounds. In general, this overall distinction holds true in the Working Group's jurisprudence, but there are situations in which such a distinction is difficult to make. The Working Group has attempted to resolve the confusion in two

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180. USA Visit. Rep., *supra* note 86, ¶¶ 28, 51; *see also* U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., ¶ 66, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005) (noting that in legal systems where pre-trial detention is linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of release and the outcome of the case).

181. *See infra*, Part III.E.

182. During its 2016 visit to Azerbaijan, the Working Group found that certain legislation permitted detention based on disability and that the national legal framework contained derogatory terminology referring to persons with disabilities. However, the Working Group observed that the country's legislative reforms provided an opportunity for incorporating the Convention on the Rights of Persons with Disabilities into national legislation. *See* U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det. on its Mission to Azerbaijan, ¶¶ 31–33, U.N. Doc. A/HRC/36/37/Add.1 (Aug. 2, 2017).

183. Malta Visit Rep., *supra* note 179, ¶ 78. In its concluding remarks, the Working Group recognized the need for greater financial resourcing of the parole system. This would, for example, allow detainees who do not have ties to the community to receive supervision after release.

ways: (i) by distinguishing between detention on the basis of an action (Category II) or on the basis of an innate characteristic (Category V), or (ii) by determining whether the detention was the result of a single act (Category II) or a pattern of discrimination (Category V). This section discusses these scenarios, suggesting that, in many cases, the findings under Category II and Category V will overlap in their practical effect, and that there may not always be a need to distinguish between the two categories.

### 1. Background

Since 1991, the Working Group has adopted many opinions finding that detention was arbitrary under Category II when it resulted from victims peacefully exercising certain rights guaranteed by the UDHR and ICCPR.<sup>184</sup> For example, the Working Group has found detention to be arbitrary when it resulted from the exercise of the rights to freedom of movement,<sup>185</sup> to seek asylum,<sup>186</sup> to freedom of thought and religion,<sup>187</sup> to freedom of opinion and expression,<sup>188</sup> to

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184. Category II only includes certain rights, namely Articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR and, insofar as States parties are concerned, Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR. The rights listed in Category II have not changed since the Working Group submitted its first annual report in 1992. *See* 1991 Rep. of the Working Grp., *supra* note 65, at 10.

185. *See, e.g.*, Op. No. 36/2007 concerning Dolma Kyab (China) (Nov. 30, 2007) in U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Forty-Ninth, Fiftieth Session, and Fifty-First Sessions, at 71, ¶¶ 16–18, U.N. Doc. A/HRC/10/21/Add.1 (Feb. 4, 2009) (detention of a man for crossing a State border). *Cf.* UDHR, *supra* note 18, art. 13; ICCPR, *supra* note 18, art. 12.

186. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session (13–22 November 2013): Op. No. 36/2013 concerning Choi Sang Soo et al. (Democratic People’s Republic of Korea), ¶¶ 3, 35, U.N. Doc. A/HRC/WGAD/2013/36 (Apr. 4, 2014) (detention of five individuals who were attempting to seek asylum in another State). *Cf.* UDHR, *supra* note 18, art. 14.

187. *See, e.g.*, Op. No. 16/2008 concerning Halil Savda (Turkey) (May 9, 2008) in U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Forty-Ninth, Fiftieth, and Fifty-First Sessions, at 145, ¶ 38, U.N. Doc. A/HRC/10/21/Add.1 (Feb. 4, 2009) (detention of a conscientious objector). *Cf.* UDHR, *supra* note 18, art. 18; ICCPR, *supra* note 18, art. 18.

188. *See, e.g.*, Decision No. 39/1996 concerning Andala Cheikh Abilil et al. (Morocco) (Dec. 3, 1996) in U.N. Comm’n on Human Rights, Decisions and Ops. Adopted by the Working Grp. on Arbitrary Det., at Its Seventeenth, Eighteenth, and Nineteenth Sessions, at 9, ¶¶ 9–11, U.N. Doc. E/CN.4/1998/44/Add.1 (Nov. 3,

peaceful assembly and association,<sup>189</sup> to take part in the conduct of public affairs<sup>190</sup> and, in the case of members of ethnic, religious or linguistic minorities, to enjoy their own culture, religion, and language.<sup>191</sup> However, when the Working Group added Category V to its Methods of Work in 2010, it introduced a degree of overlap with Category II. The rights and freedoms found in Category II include Article 7 of the UDHR and Article 26 of the ICCPR, provisions that enshrine the principles of equality and non-discrimination. These provisions are not usually invoked by themselves when the Working Group considers Category II violations, but in support of other rights found in Category II.<sup>192</sup> That is, if an individual is discriminated against because of his or her exercise of another right, such as freedom of expression, the Working Group may find that the detention was arbitrary under Category II because the individual was detained in violation of Articles 19 and 26 of the ICCPR.<sup>193</sup> This situation could

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1997) (detention of young people for distributing leaflets and carrying flags during a demonstration). *Cf.* UDHR, *supra* note 18, art. 19; ICCPR, *supra* note 18, art. 19.

189. *See* Decision No. 25/1996 concerning Kwon Young-Kil and Yang Kyuhun (Republic of Korea) (Sept. 17, 1996) *in* U.N. Comm'n on Human Rights, Decisions Adopted by the Working Grp. on Arbitrary Det. at Its Fourteenth, Fifteenth and Sixteenth Sessions, at 97, 99, ¶¶ 5(b), 12(b), U.N. Doc. E/CN.4/1997/4/Add.1 (Oct. 29, 1996) (detention of trade unionists for participating in labor rallies). *Cf.* UDHR, *supra* note 18, art. 20; ICCPR, *supra* note 18, arts. 21–22.

190. *See* Op. No. 2/2004 concerning Giorgi Mshvenieradze (Georgia) (May 25, 2004) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Thirty-eighth, Thirty-ninth, and Fortieth Sessions, at 28–29, ¶¶ 5–6, 10, U.N. Doc. E/CN.4/2005/6/Add.1 (Nov. 19, 2004) (detention of election monitor for attempting to stop electoral fraud). *Cf.* UDHR, *supra* note 18, art. 21; ICCPR, *supra* note 18, art. 25.

191. *See* Op. No. 41/2008 concerning Johan Teterisa et al. (Indonesia) (Nov. 25, 2008) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Fifty-Fourth, Fifty-Fifth, and Fifty-Sixth Sessions, at 105, 108, ¶¶ 6, 22, U.N. Doc. A/HRC/13/30/Add.1 (Mar. 4, 2010) (detention of members of a minority group based on their performance of a traditional dance and showing a banned flag at a public meeting). *Cf.* ICCPR, *supra* note 18, art. 27.

192. The principle of non-discrimination found in Article 26 of the ICCPR provides an autonomous right. That is, the application of Article 26 is not limited to rights which are provided for in the ICCPR. Article 26 need not be applied in support of other ICCPR rights under Category II, even though this occurs in practice. *See* Human Rights Comm., General Comment No. 18, *supra* note 142, 198, ¶ 12.

193. *See, e.g.,* Op. No. 1/2016 (Islamic Republic of Iran), *supra* note 107, ¶¶ 4, 38 (finding that the targeting of an individual for her activism in support of Kurdish women violated Articles 19, 21, 22, 25 and 26 of the ICCPR and her

arise, for example, if a person of a particular ethnic origin is detained for participating in a peaceful protest, when people of other ethnic backgrounds were not detained.

In this example of the peaceful protest, it is not clear whether there is a difference between being detained on discriminatory grounds for exercising rights (Category II), and being detained on a discriminatory ground under Category V.<sup>194</sup> In other words, the inclusion of Article 7 of the UDHR and Article 26 of the ICCPR in Category II, and the addition of Category V to the Methods of Work means that the Working Group now has two means of finding that an individual was detained on discriminatory grounds. In this author's experience, this overlap often arises when individuals are detained on the basis of their "political or other opinion", as they have usually expressed those views while exercising other rights enumerated in Category II.

In such cases, the question that members often pose is whether the detention is arbitrary under Category II, Category V, or both. One might argue that the answer to this question does not matter because, in practice, the detention will still be arbitrary if the Working Group finds a violation under either or both categories. The lack of clarity can, however, lead to inconsistency in the Working Group's jurisprudence and result in opinions that may not provide clear guidance to States as to how their detention practices are resulting in arbitrary detention. In the example of the peaceful protest above, would remedial action taken by a State involve changing the way that law enforcement services manage peaceful protests (Category II), or focus more on training to avoid discriminatory detention practices (Category V), or both? The overlap between both categories is also a cause of confusion among sources, particularly those who do not interact with the Working Group on a regular basis and may be less familiar with its jurisprudence and practice.

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detention was arbitrary under Category II); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 11/2017 concerning Salah Eddine Bassir (Morocco), ¶ 53, U.N. Doc. A/HRC/WGAD/2017/11 (July 27, 2017) [hereinafter Op. No. 11/2017 (Morocco)] (finding that the victimization of an individual for expressing an opinion on the situation in Western Sahara violated Articles 19 and 26 of the ICCPR and his detention was arbitrary under Category II).

194. The grounds of discrimination in Category V largely correspond to those found in Article 26 of the ICCPR. *See infra*, Part III.D.

## 2. Potential Distinctions between Categories II and V

The Working Group has attempted to make sense of, and distinguish between, arbitrary detention under Category II and Category V in two ways. First, the Working Group has recognized that, in general terms, Category II involves detention on the basis of action taken by the victim in exercising his or her rights, while Category V involves detention because of a characteristic or innate quality of the victim.<sup>195</sup> For example, in the last two years, the Working Group has received allegations involving discrimination against foreign nationals and dual nationals. In several cases, the Working Group found that the targeting of the victims was not linked to any action that they had taken in exercising a right under Category II, but that they had been detained on discriminatory grounds under Category V on the basis of their national or social origin.<sup>196</sup> Conversely, in the recent case of *Tashi Wangchuk v. China*, the Working Group considered that the victim, who had advocated for Tibetan language education in schools in Tibetan populated areas of China, had been arbitrarily detained under Category II.<sup>197</sup> In that case, the facts established that Mr. Wangchuk was targeted on the basis of his activities and work, including the exercise of his right to freedom of opinion and expression under Article 19 of the UDHR, rather than on the basis of any of his personal characteristics that would fall within Category V.<sup>198</sup> While this distinction serves a purpose in some opinions, it is less compelling when the Working Group is considering cases involving discrimination based on grounds such as “political or other opinion,” which is not an innate quality and may change over time.

The other distinction that the Working Group makes between detention under Category II and Category V relates to the existence of a pattern of discrimination. That is, the Working Group has found that Category II applies to cases in which the arrest and detention follows the single exercise of a right,<sup>199</sup> while Category V requires the existence

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195. See 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 47–48.

196. See Op. No. 28/2016 (Islamic Republic of Iran), *supra* note 103, ¶ 49; Op. No. 7/2017 (Islamic Republic of Iran), *supra* note 103, ¶ 40; Op. No. 49/2017 (Islamic Republic of Iran), *supra* note 103, ¶ 45.

197. Op. No. 69/2017 (China), *supra* note 63, ¶¶ 6, 35.

198. *Id.* ¶¶ 31–35.

199. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session, (20–24 November 2017): Op. No. 80/2017 concerning Il Joo et al. (Democratic People’s Republic of Korea), ¶ 45, U.N.

of a pattern of persecution of an individual or others belonging to his or her protected group.<sup>200</sup> For example, the Working Group has recently received allegations involving discrimination on the basis of national origin in the Occupied Palestinian Territories. The Working Group found that there is a pattern of detaining Palestinians for no other reason than their national origin and that this pattern supported a conclusion in each case that the Palestinian victims had been arbitrarily detained under Category V.<sup>201</sup> Similar findings have been made in other countries and detention contexts.<sup>202</sup> Again, this distinction works in some cases, though it may be that the existence of a pattern is more helpful in establishing differential treatment than in distinguishing Category V cases. Moreover, given that most cases of discrimination received by the Working Group involve a pattern of differential treatment of an individual or members of his or her group, this approach appears to envisage limited use of Category II when the allegations involve differential treatment. This approach might also result in single acts of discrimination or cases where the source cannot demonstrate a pattern being excluded when they would otherwise qualify as arbitrary detention under Category V.

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Doc. A/HRC/WGAD/2017/80 (Dec. 27, 2017) (finding that five individuals were detained for having exercised their freedom of opinion and expression).

200. See, e.g., Op. No. 79/2017 (Viet Nam), *supra* note 174, ¶¶ 67–68 (finding a pattern of persecution of a human rights defender); Op. No. 89/2017 (United States of America), *supra* note 32, ¶ 62 (finding pattern of prosecuting foreign nationals and Muslim men before Guantánamo Bay military commissions); see also *supra* notes 114–115 and accompanying text (providing additional examples of patterns of discrimination).

201. See Op. No. 3/2017 (Israel), *supra* note 132, ¶¶ 36–38; Op. No. 31/2017 (Israel), *supra* note 78, ¶¶ 35–37; Op. No. 44/2017 (Israel), *supra* note 78, ¶ 38; Op. No. 86/2017 (Israel), *supra* note 78, ¶ 43.

202. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Seventy-Eight Session (19–28 April 2017): Op. No. 15/2017 concerning Ahmed Maloof (Maldives), ¶¶ 32, 92, U.N. Doc. A/HRC/WGAD/2017/15 (June 16, 2017) (finding pattern of politically-motivated harassment of an individual in the Maldives); Op. No. 29/2017 (Uzbekistan), *supra* note 114, ¶¶ 70–71 (finding a pattern in Uzbekistan of arbitrary arrests targeting Christians); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session, (21–25 August 2017): Op. No. 48/2017 concerning Narges Mohammadi (Islamic Republic of Iran), ¶ 49, U.N. Doc. A/HRC/WGAD/2017/48 (Sept. 22, 2017) [hereinafter Op. No. 48/2017 (Islamic Republic of Iran)] (finding a pattern of harassment of a human rights defender in Iran); Op. No. 62/2017 (Kazakhstan), *supra* note 117, ¶¶ 48–49 (finding a pattern in Kazakhstan of targeting Jehovah's Witnesses for prosecution).

The Working Group needs to develop a consistent approach in determining whether detention is arbitrary under Categories II and V of its Methods of Work and communicate that approach to States and civil society. The pragmatic way forward would be to regard Category II as applicable to detention resulting from the exercise of rights, while Category V applies to detention on discriminatory grounds, with findings falling into either or both categories, as appropriate,<sup>203</sup> without excessive attention to the overlap between categories. This approach would provide certainty to all parties, avoid overcomplicating the already difficult task of determining when detention is arbitrary, and ensure that the Working Group can focus on the bigger picture of upholding the right to liberty.<sup>204</sup>

#### D. Other Protected Groups

An important question remains as to whether the grounds of discrimination enumerated in Category V of the Methods of Work should be expanded to offer protection to a broader range of individuals and groups. This section examines this question, commencing with an analysis of the current grounds of discrimination in Category V compared to those in various international human rights instruments. It then considers whether the grounds of discrimination under Category V might be applied to other individuals and groups, suggesting that this is likely given the progressive approach that the Working Group has taken so far.

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203. This approach worked well in previous cases involving Categories II and V. *See, e.g.*, Opinion Op. No. 4/2013 (Uzbekistan), *supra* note 105, ¶¶ 69–76 (finding detention arbitrary under both Category II and Category V); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 15/2016 concerning Khalida Jarrar (Israel), ¶ 28, U.N. Doc. A/HRC/WGAD/2016/15 (June 22, 2016) (same); Op. No. 46/2016 (China), *supra* note 30, ¶¶ 60–63 (same).

204. Another approach to distinguishing between Categories II and V might be to regard the inclusion of Article 26 of the ICCPR in Category II as referring to the rights to equality before the law and equal protection of the law, while the prohibition of discrimination in Article 26 is effectively covered by Category V. This would be consistent with the Human Rights Committee's statement that the principle of non-discrimination in Article 26 is an autonomous right (*see supra* note 192 and accompanying text). It is not clear whether this would make any practical difference to the Working Group's findings under either category.

### 1. Grounds of Discrimination Under Category V

In determining whether the detention of an individual is arbitrary because it is motivated by a discriminatory purpose, the Working Group considers the prohibited grounds of discrimination described in Category V of its Methods of Work, which provides:

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.<sup>205</sup>

As noted earlier, the Working Group added Category V to its Methods of Work in 2010.<sup>206</sup> In doing so, the Working Group included a broader range of grounds of discrimination than those found in Article 2 of the UDHR and in Articles 2(1), 3 and 26 of the ICCPR. Notably, Category V refers explicitly to discrimination on the grounds of ethnic origin,<sup>207</sup> economic condition,<sup>208</sup> gender,<sup>209</sup> sexual

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205. *Methods of Work*, *supra* note 5, ¶ 8(e).

206. *See supra* Part I.B.

207. However, the Human Rights Committee has found ethnicity to be a ground of discrimination under Article 26 of the ICCPR. *See, e.g.*, U.N. Human Rights Comm., Views Adopted by the Comm. Under Article 5(4) of the Optional Protocol: Commc'n No. 2256/2013, ¶¶ 7.5–7.6, U.N. Doc. CCPR/C/120/D/2256/2013 (Aug. 22, 2017) (finding discrimination based on ethnicity and gender in violation of Article 26).

208. The Committee on Economic, Social and Cultural Rights recognizes that a person's economic situation may result in pervasive discrimination, and that economic condition is a ground of discrimination that falls within "other status" in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (this provision contains the same wording as Article 2 of the UDHR and Articles 2(1) and 26 of the ICCPR). *See* Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20, *supra* note 146, ¶¶ 27, 35.

209. *See* Comm. on the Elimination of Discrimination against Women, General Recommendation No. 33, *supra* note 119, ¶ 7 (defining gender as "socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on to biological differences, which are consistently reflected within the justice system and its institutions").

orientation,<sup>210</sup> and disability,<sup>211</sup> while the UDHR and ICCPR do not. A series of cases brought before the Working Group may have served as the catalyst for including a broader range of grounds of discrimination in Category V,<sup>212</sup> as the Working Group's jurisprudence continues to evolve to reflect a more contemporary understanding of disadvantage. Unlike the UDHR and ICCPR, however, Category V

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210. However, the Human Rights Committee stated in *Toonen* that the reference to "sex" in Articles 2(1) and 26 of the ICCPR includes sexual orientation. Commc'n No. 488/1992 (Australia), *supra* note 157, at ¶ 8.7.

211. However, in one case, the mother of a child with a disability presented an argument that her son was discriminated against due to his disability, citing a violation of Article 26 of the ICCPR. The Committee decided that this claim had not been substantiated on the facts in this case. U.N. Human Rights Comm., Decision of the U.N. Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights in its Seventy-Second Session, Commc'n No. 832/1998, ¶ 6.2, U.N. Doc. CCPR/C/72/D/832/1998 (July 31, 2001).

212. *See, e.g.*, Op. No. 24/2001 concerning Edward Anton Amaradas et al. (Sri Lanka) (Nov. 29, 2001) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Thirty-Second, Thirty-Third, and Thirty-Fourth Sessions, at 17–18, ¶¶ 5, 8, U.N. Doc. E/CN.4/2003/8/Add.1 (Jan. 24, 2003) (noting that, under applicable anti-terrorism legislation, Sri Lankan citizens of Tamil ethnic origin could be held without a warrant and indefinitely until completion of trial); Op. No. 8/2005 concerning Maxilan Anthonypillai Robert et al. (Sri Lanka) (May 25, 2005) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Forty-First, Forty-Second, and Forty-Third Sessions, at 35, ¶ 7, U.N. Doc. E/CN.4/2006/7/Add.1 (Oct. 19, 2005) (finding that the thirteen persons of interest were arrested for being ethnic Tamils); Op. No. 26/2008 concerning Hkun Htun Oo et al. (Myanmar) (Sept. 12, 2009) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Fifty-Fourth, Fifty-Fifth, and Fifty-Sixth Sessions, at 43, ¶ 32, U.N. Doc. A/HRC/13/30/Add.1 (Mar. 4, 2010) (discussing the right of the individuals in question from certain ethnic groups to pursue political goals peacefully); Op. No. 30/2008 concerning Gunasundaram Jayasundaram (Sri Lanka) (Sept. 12, 2008) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Fifty-Fourth, Fifty at 66, ¶ 22, U.N. Doc. A/HRC/13/30/Add.1 (Mar. 4, 2010) (testimony that an individual had been detained discriminatorily as a member of the Tamil ethnic group). When this case was brought again to the Working Group, the detention was found to be based on ethnic origin and thus arbitrary under Category V. *See* Op. No. 38/2012 (Sri Lanka), *supra* note 104, ¶ 31 (2012). *See also* Op. No. 4/2008 concerning Shamila Darabi Haghighi (Islamic Republic of Iran) (May 7, 2008) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Forty-Ninth, Fiftieth, and Fifty-First Sessions, at 95, ¶ 26, U.N. Doc. A/HRC/10/21/Add.1 (Feb. 4, 2009) (arguing, though not decided by the Working Group, that the detention was the result of gender bias). *See also* the cases cited at *supra* note 91 involving discrimination on the grounds of sexual orientation.

does not expressly refer to race, color, sex or property as prohibited grounds of discrimination.

## 2. Application of Category V to Other Individuals and Groups

While the protection afforded by Category V against arbitrary detention is already significant, the Working Group has not yet fully resolved in its jurisprudence whether protection should be extended to individuals and groups whose characteristics may lead to discrimination on one or more grounds not specifically mentioned in Category V. There are, however, early indications that the Working Group will expand its interpretation of the grounds of discrimination in Category V, having recently confirmed its broad approach to the prohibition on arbitrary detention,<sup>213</sup> and having determined in 2016 that human rights defenders are a protected group entitled to equality before the law and equal protection of the law under Article 26 of the ICCPR.<sup>214</sup>

First, the Working Group recognizes that the prohibition of arbitrary detention has an important status because it is part of treaty law and customary international law, and that this prohibition should therefore be interpreted broadly to provide the greatest protection against arbitrary detention.<sup>215</sup> In addition, both the Human Rights Committee and the Working Group have recently reaffirmed that the prohibition of arbitrary arrest and detention—and, indeed, the right to liberty—applies to “everyone” in the broadest sense, including individuals and groups that may be particularly vulnerable to detention on discriminatory grounds.<sup>216</sup> Similarly, in its Basic

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213. See discussion in the text accompanying *infra* notes 215–219.

214. U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session, (21–25 November 2016): Op. No. 45/2016 concerning Ny Sokha et al. (Cambodia), ¶¶ 43–44, U.N. Doc. A/HRC/WGAD/2016/45 (Jan. 17, 2017) [hereinafter Op. No. 45/2016 (Cambodia)].

215. See U.N. Human Rights Council, Rep. of the Working Grp. on Arbitrary Det.: U.N. Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, ¶ 11, U.N. Doc. A/HRC/30/37 (Jul. 6, 2015) [hereinafter *Basic Principles and Guidelines*]; Deliberation No. 9, *supra* note 163, ¶¶ 37–75. The Working Group also noted in Deliberation No. 9 that the prohibition of arbitrary detention constitutes a peremptory or *jus cogens* norm. *Id.* ¶¶ 51, 75.

216. Human Rights Comm., *General Comment No. 35*, *supra* note 148, ¶ 3 (defining “everyone” as including, among others, “girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees

Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (2015), the Working Group stated that the right to challenge the lawfulness of detention before a court in Article 9(4) of the ICCPR and under customary international law belongs to “every human being without discrimination.”<sup>217</sup> According to the Working Group, this includes, but is not limited to, the following persons:

girls and boys, soldiers, persons with disabilities, including psychosocial and intellectual disabilities, lesbian, gay, bisexual, transgender and intersex persons, non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, internally displaced persons, stateless persons and trafficked persons and persons at risk of being trafficked, persons accused or convicted of a crime, persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism, drug users, persons with dementia, human rights defenders and activists, older persons, persons living with HIV/AIDS and other serious communicable or chronic diseases, indigenous peoples, sex workers and minorities based on national or ethnic, cultural, religious and linguistic identity.<sup>218</sup>

Moreover, like Article 2 of the UDHR and Articles 2(1) and 26 of the ICCPR, Category V includes a catch-all provision that allows the Working Group to determine that discrimination has taken place on the basis of “any other status.” The grounds of discrimination enumerated in Category V are therefore clearly not exhaustive. Interestingly, this provision goes slightly further than the reference to “other status” in the UDHR and ICCPR,<sup>219</sup> by giving the Working

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and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity”).

217. *Basic Principles and Guidelines*, *supra* note 215, ¶ 8. The Human Rights Council requested the Working Group to prepare the Basic Principles and Guidelines. See H.R.C. Res. 20/16, *supra* note 17, ¶¶ 10–11.

218. *Basic Principles and Guidelines*, *supra* note 215, ¶ 8.

219. Article 2 of the UDHR and Articles 2(1) and 26 of the ICCPR recognize that no “distinction of any kind” should be made between persons, including on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” However, the Human Rights Committee has also stated that “other status” includes grounds of discrimination

Group the discretion to find that an individual or group has been discriminated against on the basis of “any” other status.

Second, as one might expect, given the breadth of Category V and the inclusive approach the Working Group has taken in its Basic Principles and Guidelines, the Working Group’s jurisprudence involving detention on discriminatory grounds has started to move beyond those grounds of discrimination explicitly mentioned in Category V. In November 2016, the Working Group adopted an opinion in the case of *Ny Sokha et al. v. Cambodia* (also known as the ‘ADHOC Five’ case),<sup>220</sup> which was described by the human rights community as a “landmark decision.”<sup>221</sup> In the ADHOC Five case, five human rights defenders were detained in lengthy pre-trial detention, having been accused of bribery. They had provided a small amount of money to a client of their NGO (ADHOC) to cover food and transportation costs so that she could meet with a lawyer at the ADHOC office and attend questioning by the authorities in relation to her alleged extramarital affair with a prominent politician. The source claimed that the detention of the five individuals constituted a violation of their right to equality before the law, as they had been discriminated against on the basis of their status as human rights defenders, contrary to Article 26 of the ICCPR.<sup>222</sup> The Working Group agreed, finding that human rights defenders are a protected group entitled to equality before the law and equal protection of the law under Article 7 of the UDHR and Article 26

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not enumerated in Article 26 of the ICCPR. *See, e.g.*, U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Committee at its 103rd Session: Commc’n Nos. 1637/2007, 1757/2008 and 1765/2008, at 9, ¶ 9.2, U.N. Doc. CCPR/C/103/D/1637/2007,1757&1765/2008 (Nov. 28, 2011) (confirming that age is included in the grounds of discrimination in Article 26); U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Committee at its 119th Session: Commc’n No. 2172/2012, at 16, ¶ 7.12, U.N. Doc. CCPR/C/119/D/2172/2012 (June 28, 2017) (finding that the prohibition of discrimination under Article 26 includes discrimination on the basis of marital status and gender identity, including transgender status).

220. Op. No. 45/2016 (Cambodia), *supra* note 214. The case involved four current and one former staff member of an NGO, the Cambodian Human Rights and Development Association (known as ADHOC).

221. *See, e.g., Cambodia: In Landmark Decision, UN Body Declares the Detention of Five Human Rights Defenders Arbitrary #FreeThe5KH*, WORLD ORG. AGAINST TORTURE (Dec. 18, 2016), <http://www.omct.org/human-rights-defenders/urgent-interventions/cambodia/2016/12/d24122/> [<https://perma.cc/LK5D-JCPR>] (quoting human rights organizations’ characterization of *Ny Sokha et al. v. Cambodia* as a “landmark decision”).

222. Opinion No. 45/2016 (Cambodia), *supra* note 214, ¶¶ 27–28.

of the ICCPR, and that there was a sufficient factual basis to conclude that the five individuals had been discriminated against on the basis of their status as human rights defenders.<sup>223</sup> As a result, the Working Group found that their detention was arbitrary according to Category II of its Methods of Work.<sup>224</sup>

The contribution of the ADHOC Five case to the Working Group's jurisprudence does not lie in the fact that the Working Group found that human rights defenders had been targeted for their work. Allegations relating to the arbitrary detention of human rights defenders are frequently brought to the Working Group. In fact, the Working Group had, on several occasions, previously considered that the detention of human rights defenders was arbitrary because the detention resulted from the exercise of their rights under the UDHR or ICCPR (e.g., freedom of expression, peaceful assembly etc.)<sup>225</sup> or from discrimination on the basis of "political or other opinion" in violation of Article 26 of the ICCPR.<sup>226</sup> Rather, the real significance of the ADHOC Five case is the finding that human rights defenders fall within their

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223. *Id.*, ¶¶ 43–47. The Working Group considered that the references to "political or other opinion" and "other status" in Article 26 of the ICCPR include a person's status as a human rights defender.

224. 2016 Rep. of the Working Grp. on Arbitrary Det., *supra* note 8, ¶ 12. The Working Group understands that the 'ADHOC Five' were subsequently released on bail after spending more than a year in pre-trial detention.

225. *See, e.g.*, U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventieth Session (25–29 August 2014): Op. No. 23/2014 concerning *Damián Gallardo Martínez* (Mexico), ¶ 24, U.N. Doc. A/HRC/WGAD/2014/23 (Nov. 3, 2014) (finding that the detention of a human rights defender who was exercising rights under the UDHR and falls within Category II); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventieth Session (25–29 August 2014): Op. No. 34/2014 concerning *Mohammed Hassan Sedif and Abdul Aziz Moussa* (Bahrain), ¶¶ 29–30, U.N. Doc. A/HRC/WGAD/2014/34, (Nov. 21, 2014) (finding that the detention related to the work of the two individuals in support of human rights and therefore falls within Category II).

226. *See, e.g.*, Op. No. 7/2015 (Venezuela), *supra* note 122, ¶ 27 (finding that the detention was motivated by discrimination based on political opinion); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 19/2015 concerning *Librado Jacinto Baños Rodríguez* (Mexico), ¶ 19, U.N. Doc. A/HRC/WGAD/2015/19 (July 13, 2015) (finding that a human rights defender's case falls within Categories II and V); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 23/2016 concerning *Rebecca Kabuo et al.* (Democratic Republic of the Congo), ¶¶ 29–30, U.N. Doc. A/HRC/WGAD/2016/23 (Dec. 29, 2016) (concluding there was arbitrary detention under category V because of the expression of a political opinion).

own protected class, either because of their “political or other opinion” or “other status” under Articles 2(1) and 26 of the ICCPR, and the recognition of the importance of human rights defenders that this finding entails. The Working Group has extended this line of reasoning in subsequent cases, finding that the detention of human rights defenders was arbitrary under Category V of its Methods of Work.<sup>227</sup> It remains to be seen whether the Working Group will find in the future that other individuals or groups have been discriminated against on the basis of “any other status” and whether such persons would need to be part of an identifiable group,<sup>228</sup> such as human rights defenders, or could simply be persons claiming to hold another status.<sup>229</sup>

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227. See, e.g., Op. No. 16/2017 (Kazakhstan), *supra* note 132, ¶ 56 (concluding the detention was based on the detainees’ activities as human rights defenders and falls within category V); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 23/2017 concerning Pablo López Alavéz (Mexico), ¶ 24, U.N. Doc. A/HRC/WGAD/2017/23 (June 13, 2017) (finding the detention of a social leader arbitrary under Category V); Op. No. 26/2017 (Viet Nam), *supra* note 156, ¶ 57 (determining that there was a pattern of persecution of a human rights defender under category V); Op. No. 48/2017 (Islamic Republic of Iran), *supra* note 202, ¶ 50 (concluding that the detention was on the basis of the detainee’s status as a human rights defender); Op. No. 50/2017 (Malaysia), *supra* note 28, ¶ 74 (finding that the detention was the direct result of human rights work and thus a Category V violation); Op. No. 67/2017 (Malaysia), *supra* note 71, ¶ 30 (concluding that the detainee was deprived of his liberty because of his “status as a human rights defender”); Op. No. 75/2017 (Viet Nam), *supra* note 167, ¶ 56 (noting the systematic harassment of a human rights defender); Op. No. 79/2017 (Viet Nam), *supra* note 174, ¶ 69 (finding that the detention was intended to impede the work of a human rights defender); Op. No. 88/2017 (India), *supra* note 132, ¶¶ 45–46 (finding that the authorities displayed a discriminatory attitude toward Mr. Gandhi’s political views and as a human rights defender).

228. The Human Rights Committee has stated that differential treatment must be attributable to the victim belonging to an identifiably distinct category which could have exposed him or her to discrimination on account of any of the grounds or “other status” referred to in Article 26. See, e.g., U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Committee at its Eighty-Fifth Session: Commc’n No. 1238/2004, ¶ 7.2, U.N. Doc. CCPR/C/85/D/1238/2004 (Nov. 21, 2005) (finding that there is no identifiable group of widows of particular public servants); see also U.N. Human Rights Comm., Views Adopted by the U.N. Human Rights Committee at its Thirty-Fifth Session: Commc’n No. 273/1988, ¶ 6.7, U.N. Doc. CCPR/C/35/D/273/1988 (Mar. 30, 1989) (finding no identifiable group of physiotherapy practitioners).

229. The Working Group also has the option to find that there was discrimination on the basis of another ground contained in Category V. In a recent case, the source claimed that the arrest and detention of an individual amounted to discrimination because of his protected status as a journalist, but the Working

One might argue that, by starting to expand the protected groups under Category V, the Working Group will be inundated by allegations of detention on discriminatory grounds and risks overusing Category V, rendering the concepts of equality and non-discrimination meaningless. While there has been a sharp increase over the last year in cases in which detention was determined to be arbitrary under Category V, so far, such concerns have proven to be unfounded. The Working Group has demonstrated in its jurisprudence that it will only find a violation of Category V if the source has presented a credible *prima facie* case of discrimination that has not been refuted by the State.<sup>230</sup> This includes a requirement for the source to establish a factual basis for the alleged discrimination (*e.g.*, evidence of unequal treatment or a pattern of persecution),<sup>231</sup> as well as demonstrating that the victim falls within a protected group under Category V (*e.g.*, demonstrating that a person is in fact a human rights defender with a professional or personal history of defending human rights).<sup>232</sup> Continuing this approach will allow the Working Group to maintain a balance between protecting as many people as possible and using Category V strategically to highlight discriminatory practices against the most vulnerable individuals and groups.

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Group considered that the discrimination was on the basis of his political or other opinion (through his association with a major news outlet that was being punished for its political opinion). *See* Op. No. 83/2017 (Egypt), *supra* note 175, ¶¶ 39, 87.

230. *See, e.g.*, Op. No. 67/2017 (Malaysia), *supra* note 71, ¶¶ 27–30 (finding that the detention of a human rights defender was arbitrary in the absence of an explanation from the Government). *See also* Op. No. 68/2017 (Trinidad and Tobago), *supra* note 75, ¶¶ 31–33 (noting “the absence of any reply from the Government in relation to that allegation” and concluding that Mr. Seepersad’s deprivation of liberty was discriminatory and falls under category V); Op. No. 88/2017 (India), *supra* note 132, ¶¶ 42–46 (concluding that Mr. Gandhi’s deprivation of liberty from his active exercise of civil and political rights falls under category V). In each of these cases, the Government did not respond to the source’s submission and did not attempt to refute the *prima facie* credible cases of discrimination.

231. For example, in a recent case, the victim was one of fifty people who participated in a protest, but was the only person prosecuted for doing so. Seventy police officers were sent to arrest her, and her trial was carried out under maximum security for a charge that involved obstructing traffic. In the indictment, the investigating police concluded that she must be harshly punished to make an example of her and similar wording was repeated by the court in its judgment. *See* Op. No. 79/2017 (Viet Nam), *supra* note 174, ¶ 68.

232. *See, e.g.*, Op. No. 67/2017 (Malaysia), *supra* note 71, ¶¶ 28–29 (referring to a previous Working Group opinion finding that the victim’s profile as a prominent human rights activist was a contributing factor to his detention).

### E. People living in Poverty

People living in poverty are particularly vulnerable to arbitrary arrest and detention and clearly fall within a protected group under Category V that may experience discrimination on the basis of “economic condition” or “any other status.” In his report to the U.N. General Assembly in October 2017, the U.N. Special Rapporteur on extreme poverty and human rights argued that the poor are significantly more likely to experience violations of their civil and political rights, including the right to liberty, in both developed and developing countries.<sup>233</sup>

These violations include profiling and excessive use of force during arrest; lengthy pre-trial detention due to high bonds or bail; limited or no access to a lawyer or free legal assistance of low quality; denial of equality of arms in procuring expert evidence and tracing witnesses; torture and other ill-treatment by guards and other inmates (sometimes without an effective complaints mechanism, due to complaints being taken less seriously);<sup>234</sup> denial of an independent tribunal (revealed by harsher judicial attitudes or rulings); sentencing disparities; difficulties in accessing food, medical care and other services while in custody; lack of contact with relatives who may themselves live in poverty and be unable to visit, and discrimination in decisions on early release.<sup>235</sup> Yet, despite mounting evidence of the

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233. Philip Alston (U.N. Special Rapporteur on Extreme Poverty & Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 4, U.N. Doc. A/72/502 (Oct. 4, 2017); *see also* Statement by Philip Alston (U.N. Special Rapporteur on Extreme Poverty & Human Rights), Seventy-Second Session of the G.A. (Oct. 23, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22302&LangID=E> [<https://perma.cc/4QBB-AGCM>] (finding that the poor’s civil and political rights are “more or less systematically neglected by mainstream human rights and development actors” resulting in disproportionate violations of human rights).

234. *See* Nigel Rodley (Special Rapporteur of the Comm’n on Human Rights), *Interim Rep. on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 14, 35–36, U.N. Doc. A/55/290 (Aug. 11, 2000).

235. Philip Alston (U.N. Special Rapporteur on Extreme Poverty & Human Rights), *supra* note 233, ¶¶ 9–10, 22–25. *See also* Rita Izsák (Special Rapporteur on Minority Issues), *Effective Promotion of the Declaration on the Rights of Persons Belonging to Nat’l or Ethnic, Religious & Linguistic Minorities*, ¶¶ 30, 53–54, U.N. Doc. A/70/212 (July 30, 2015) (noting “minorities may face frequent or longer periods of pretrial detention” as well as discrimination in post-conviction imprisonment); Press Release, Office of the High Comm’r for Human Rights, *Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn* (Oct. 6 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2>

overwhelming impact of poverty on arrest and detention practices, this issue has not yet been given the attention it deserves in the Working Group's jurisprudence.<sup>236</sup> The situation of people living in poverty is of such importance as to merit separate consideration here, rather than in the preceding discussion of protected groups.<sup>237</sup> This section examines the approach that the Working Group has taken to poverty, arguing that more analysis is needed in identifying and addressing poverty and inequality as a cause and result of arbitrary detention.

### 1. Previous Jurisprudence

When the Working Group encountered poverty in its previous cases, it tended to consider the situation through a procedural lens, treating the detention that results from the inability to post bail, to afford a lawyer, or to pay a fine<sup>238</sup> as a violation of the right to fair trial

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2208&LangID=E [https://perma.cc/Y5Q3-LHFC] (noting the "difficulties in accessing food, medical care and other services" as well as the inability to stay in touch with families and friends while in prison).

236. The Working Group did, however, give this issue attention in its annual report for 2001, where it called upon States to reduce detention caused by extreme poverty. The Working Group recommended that States repeal laws providing for imprisonment for contractual debt (which is prohibited by Article 11 of the ICCPR), implement measures, including training, to ensure that judges take account of the income of persons who are released on bail in order to give full effect to Article 9(3) of the ICCPR, and ensure that fines are not disproportionate to the income of convicted persons. *See* U.N. Comm'n on Human Rights, Rep. of the Working Grp. on Arbitrary Det., ¶ 60, U.N. Doc. E/CN.4/2002/77 (Dec. 19, 2001).

237. Other groups, such as asylum seekers, migrants and stateless persons, also experience unique violations of their rights in terms of detention on discriminatory grounds. This includes inhumane conditions of detention, and lack of access to consular assistance, medical care, and interpretation services, which also deserve analysis. However, discrimination against asylum seekers, migrants and stateless persons appears to have been given more attention than the situation of the poor, particularly in recent years when migration has become the subject of global debate. *See generally* Stefanie Grant, *Immigration Detention: Some Issues of Inequality*, 7 THE EQUAL RTS. REV. 69, 73 (2011) (arguing discriminatory detention practices occur among asylum-seekers, refugees, and migrant workers as opposed to those with citizenship); U.N. HIGH COMM'R FOR REFUGEES, STATELESS PERSONS IN DETENTION: A TOOL FOR THEIR IDENTIFICATION AND ENHANCED PROTECTION 24–25 (June 2017), <http://www.refworld.org/docid/598adacd4.html> (offering guidelines to verify statelessness or nationality of detained individuals). The detention of asylum seekers and migrants has also been visible in the Working Group's opinions under Category IV. For these reasons, this group is not covered separately in this article.

238. Op. No. 10/2010 concerning Chee Siok Chin (Singapore) (May 7, 2010) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary

under Category III, and not as an example of discrimination under Category V.<sup>239</sup> For example, in the case of *Lenard Odillo et al. v. Malawi*, several men who had been charged with murder could not afford a lawyer and there was no legal aid assigned to their cases.<sup>240</sup> They were not able to challenge their detention or seek a judicial remedy for any of the multiple violations of their rights during their arrest and pre-trial detention. The Working Group held that their detention was arbitrary under Category III.<sup>241</sup> Similarly, in the case of *Anita Ngendahoruri v. Burundi*, a woman was charged with child abandonment (which carried a maximum sentence of twenty years' imprisonment) for placing the body of her child in the bush following the child's death from natural causes.<sup>242</sup> The woman spent part of her pre-trial detention without access to legal assistance because she could not afford a lawyer, and her detention was considered to be arbitrary under Category III.<sup>243</sup>

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Det. at Its Fifty-Sixth, Fifty-Seventh, and Fifty-Ninth Sessions, at 64, ¶ 9, U.N. Doc. A/HRC/16/47/Add.1 (Mar. 2, 2011). In that case, a bankrupt woman was convicted of distributing flyers critical of the Government without a permit and had to serve a short sentence because she could not afford to pay a fine. The Working Group filed the case because she had been released.

239. In one of the Working Group's early cases, a foreign national had completed a criminal sentence and was detained pending deportation because he could not afford to pay a bond. The Working Group found that the detention was arbitrary under Category III because the nature of the bond was harsh and inappropriate in view of the means and status of the individual. *See* Op. No. 32/1999 concerning Mohamed Bousloub (United States of America) (Dec. 1, 1999) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Twenty-Sixth, Twenty-Seventh, and Twenty-Eighth Sessions, at 37, ¶ 20, U.N. Doc. E/CN.4/2001/14/Add.1 (Nov. 9, 2000); Op. No. 18/2004 concerning Benamar Benatta (United States of America) (Sept. 16, 2004) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Thirty-Eighth, Thirty-Ninth, and Fortieth Sessions, at 69, ¶ 9(b), U.N. Doc. E/CN.4/2005/6/Add.1 (Nov. 19, 2004) (stating that holding a person in immigration detention could not be justified because of his inability to pay a bond and finding the detention to be arbitrary under Categories I and III). Both of these opinions were adopted before Category V was added to the *Methods of Work*.

240. U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Third Session (30 April–4 May 2012): Op. No. 15/2012 (Malawi), ¶ 51, U.N. Doc. A/HRC/WGAD/2012/15 (July 13, 2012).

241. *Id.* ¶¶ 50–53, 56.

242. U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Fifth Session (14–23 November 2012): Op. No. 57/2012 (Burundi), ¶¶ 4–6, U.N. Doc. A/HRC/WGAD/2012/57 (Aug. 9, 2013).

243. *Id.* ¶¶ 19, 24.

There may be several reasons why the Working Group took this approach in previous cases. Sources do not often raise economic disadvantage as a ground of discrimination, and the Working Group usually has little or no information on the situation of people living in poverty who have been detained. In addition, a finding that serious procedural defects have occurred under Category III readily lends itself to the accompanying recommendations for immediate release, compensation or retrial, whereas a finding of *de facto* or indirect discrimination is much harder to remedy. Given that detainees often experience multiple, intersecting forms of discrimination, there may also be an unspoken assumption among members that poverty is “largely coterminous with forms of discrimination against particular groups,”<sup>244</sup> so that a finding of discrimination on another ground will address the situation of people living in poverty.

## 2. Current Approach: Discrimination based on Economic Condition

Nevertheless, the Working Group is increasingly referring to poverty as a basis of discrimination in its jurisprudence and practice. In November 2017, the Working Group adopted an opinion in the case of *Marcos Antonio Aguilar-Rodríguez v. United States of America*.<sup>245</sup> In that case, a national of El Salvador spent nearly six years in immigration detention because he was not able to pay the bond required for his release, and he was forced to represent himself with limited access to legal and translation services.<sup>246</sup> The Working Group considered that this amounted to detention on discriminatory grounds, particularly economic condition, rendering his detention arbitrary under Category V.<sup>247</sup> Though this is but a single opinion, the jurisprudence of the Working Group can only be developed by engaging with this issue.

Accordingly, whenever possible, it would be beneficial for the Working Group to accept cases that raise issues of economic discrimination under its regular procedure, including through the power under its Methods of Work to take up cases of its own initiative, so that it can continue to utilize Category V to highlight the marginalization experienced by the poor.

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244. Philip Alston (Report of the Special Rapporteur on Extreme Poverty & Human Rights, *supra* note 233, ¶ 3.

245. Op. No. 72/2017 (United States of America), *supra* note 79.

246. *Id.* ¶¶ 4, 66–68.

247. *Id.* ¶¶ 67–68.

Furthermore, recent country visits have proven to be fertile ground for the Working Group to draw attention to the relationship between being poor and being held arbitrarily in either administrative detention or within the criminal justice system. During its visit to the United States in October of 2016, the Working Group heard firsthand accounts from people deprived of their liberty and from civil society about the excessive bond and bail amounts being set in immigration proceedings and criminal cases, and often administered by private companies.<sup>248</sup> In many cases, these amounts are determined without an individualized assessment of the necessity of detention and without consideration of alternatives to detention,<sup>249</sup> such as community-based supervision. The Working Group also received reports of a disturbing tendency among people from low-income backgrounds to plead guilty to minor criminal charges because they cannot afford to pay the bond.<sup>250</sup> Although pleading guilty secured release in many of these cases, it also often results in a criminal record, including the potential loss of employment, educational opportunities, housing, and custody of children, as the cycle of poverty continues.<sup>251</sup>

In addition, the Working Group was informed that the ability to afford a private attorney has a significant impact on the quality of justice received and the likelihood of being detained.<sup>252</sup> For example, a study at the Central Bond Court in Cook County, Illinois in April 2016 revealed that defendants who were represented by a private attorney spent three times longer in front of the bench during bond hearings than defendants represented by a public defender,<sup>253</sup> whose cases were dealt with in greater haste. Finally, the Working Group learned that some poor people had been imprisoned for failure to pay court-ordered fines and fees, including traffic tickets. This practice is referred to as “debtors’ prison,” as it involves incarcerating people without determining their ability to pay and without offering

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248. USA Visit Rep., *supra* note 86, ¶ 51.

249. *Id.* ¶¶ 28–32, 51 (referring to the “criminalization of poverty”).

250. *Id.* ¶ 52.

251. A University of Pennsylvania study in July 2016 of misdemeanor cases in Harris County, Texas found that even if defendants do not plead guilty, those defendants who cannot make bail are 25 percent more likely to be convicted, 43 percent more likely to be sentenced to jail rather than probation, and 30 percent more likely to be charged with a felony in the 18 months after they have been released from prison. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (Mar. 2017).

252. See USA Visit Rep., *supra* note 86, ¶¶ 54–56.

253. See *id.* at ¶ 55.

alternative measures, such as community service, a reduced payment, or a reasonable payment schedule.<sup>254</sup> There is no shortage of companies offering loans with high interest rates to people in this situation. As others have correctly observed, poverty is both a cause and a consequence of discrimination,<sup>255</sup> including detention on discriminatory grounds.

Following its visit to Sri Lanka in December 2017, the Working Group stated in its preliminary findings that “poverty appears to be a major determinant of whether a person will be taken into custody throughout Sri Lanka, and how long he or she will be deprived of liberty.”<sup>256</sup> The Working Group received testimony from people currently in detention indicating that those who could afford quality legal representation were likely to receive a significantly better outcome.<sup>257</sup> The Working Group also referred, in its preliminary findings, to reports that between twenty-five to thirty beggars, homeless, and street people were being detained at a particular detention center each month, including anyone defined as a vagrant under the Vagrants Ordinance of 1841, such as female prostitutes, elderly people, and individuals with psychosocial impairments or alcohol addiction.<sup>258</sup>

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254. *See id.* at ¶ 57.

255. *See* EQUAL RIGHTS TRUST, ECONOMIC AND SOCIAL RIGHTS IN THE COURTROOM: A LITIGATOR’S GUIDE TO USING EQUALITY AND NON-DISCRIMINATION STRATEGIES TO ADVANCE ECONOMIC AND SOCIAL RIGHTS, at III (2014). *See generally* Philip Alston (Special Rapporteur on Extreme Poverty & Human Rights), *supra* note 233 (arguing that the realization of economic and social rights requires the evaluation of poverty levels and the discrimination experienced by those affected).

256. Office of the U.N. High Comm’r on Human Rights, Working Group on Arbitrary Detention: Preliminary Findings from Its Visit to Sri Lanka (4-15 December 2017) (Dec. 15, 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22541&LangID=E> [<https://perma.cc/GF8F-ED27>].

257. *Id.*

258. *Id.* *See also* Press Release, Office of the U.N. High Comm’r on Human Rights, Working Group on Arbitrary Detention: from Its Visit to Argentina (8-18 May 2017) (May 18, 2017), <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21636&LangID=E> [<https://perma.cc/KSE9-DRTV>] (noting the selectivity of the Argentinian criminal justice system in relation to persons from different socio-economic backgrounds, including street children, LGBTI and indigenous persons and migrants, who are more likely to be arrested by police on suspicion of committing a crime or withheld for verification of identity). The Working Group presented its reports on the visits to Sri Lanka and Argentina to the Human Rights Council in September 2018.

While these findings represent no more than an initial consideration of the impact of poverty on the right to liberty, there is ample scope for the Working Group to conduct further analysis of the factors that make poor people vulnerable to detention, and what solutions could be proposed. In addition to its opinions and country visit reports, the Working Group has other means of raising this issue, including: (i) in its deliberations, annual reports, and other analytical work;<sup>259</sup> (ii) in urgent action initiated by the Working Group or with other Special Procedures mandate holders; (iii) during the Working Group's interactive dialogue at the Human Rights Council; (iv) by providing information on discriminatory detention practices as part of a State's Universal Periodic Review; (v) by gathering data from States through surveys and requests for information;<sup>260</sup> (vi) through its annual meeting and side events with civil society in Geneva, and (vii) by requesting States to provide information under the Working Group's new follow-up procedure, discussed further below.

#### F. The Nature of the Working Group's Recommendations and Its Follow-Up

The central argument of this article is that the Working Group can and must make more effective use of Category V in its jurisprudence to highlight cases of detention on discriminatory grounds. This itself is a valuable role. Yet opinions adopted by the Working Group only consider the situation of detainees whose specific circumstances have been brought before it and, as such, are a blunt

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259. See, e.g., *Basic Principles and Guidelines*, *supra* note 215, ¶¶ 12–15, 67–71 (relating to the obligation of States to provide free and effective legal assistance for detained persons to challenge the lawfulness of their detention). See also Joint Open Letter by the U.N. Working Grp. on Arbitrary Det.; the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions; Torture and Other Cruel, Inhuman or Degrading treatment or Punishment; the Right of Everyone to the Highest Attainable Standard of Mental & Physical Health; and the Comm. on the Rights of the Child, on the Occasion of the United Nations G.A. Special Session on Drugs (Apr. 15, 2016), [http://www.ohchr.org/Documents/Issues/Health/UNGASS-joint\\_OL\\_HR\\_mechanisms\\_April2016.pdf](http://www.ohchr.org/Documents/Issues/Health/UNGASS-joint_OL_HR_mechanisms_April2016.pdf) [<https://perma.cc/E64D-K5RK>] (noting that the criminalization of drug possession and consumption has been used to police poor, racial and ethnic minority communities).

260. The Working Group has previously sent requests to States for information. In 2009, the Working Group conducted a joint study with several other Special Procedures mandate holders on global practices in relation to secret detention, including sending a questionnaire to States. The Human Rights Council also requested the Working Group to seek the views of States and other stakeholders in the development of its *Basic Principles and Guidelines*. See H.R.C. Res. 20/16, *supra* note 17, ¶ 11(a).

tool in achieving the type of broader societal change needed to prevent and address discrimination. It may be possible, however, to improve upon the recommendations that the Working Group makes in its opinions to offer better guidance to States on how to address discrimination. It might also be feasible to collaborate with a wider array of groups, including other Special Procedures mandate holders, in addressing discrimination as part of the Working Group's follow-up mechanisms. This section offers practical suggestions on how the Working Group might tailor its recommendations and its approach to follow-up, including referral of its opinions to other mandate holders and managing the risk of reprisals, in cases involving discrimination.

### 1. Recommendations made by the Working Group

At present, when a detention is determined to be arbitrary, most of the Working Group's opinions contain standard wording that the appropriate remedy would be to release the detainee immediately (if he or she is still detained when the opinion is adopted), and to accord the detainee an enforceable right to compensation and other reparations in accordance with international law.<sup>261</sup> However, given that discrimination is usually an entrenched and recurring problem within a society, it may be useful for the Working Group to make recommendations aimed at securing guarantees of non-repetition<sup>262</sup> and to specify what those guarantees would be.<sup>263</sup>

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261. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session (21-25 November 2016): Op. No. 59/2016 concerning Mohamed Nazim (Maldives), ¶ 72, U.N. Doc. A/HRC/WGAD/2016/59 (Feb. 1, 2017) (“an adequate remedy would be to release Mr. Nazim immediately and accord him an enforceable right to reparations, in accordance with international law”); Op. No. 58/2017 (United Arab Emirates), *supra* note 32, ¶ 71 (“the appropriate remedy would be to release Mr. Salman immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.”).

262. The Working Group recognized this in Op. No. 36/2016 (Mauritania), *supra* note 117, at 7, ¶ 38. The Working Group requested a guarantee of non-repetition because of the ongoing persecution of slavery abolitionists in Mauritania.

263. In some cases, the Working Group has mentioned guarantees of non-repetition, without specifically stating what those guarantees would entail. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Sixth Session (22–26 August 2016): Op. No. 31/2016 concerning Milagro Amalia Ángela Sala (Argentina), ¶ 117, U.N. Doc. A/HRC/WGAD/2016/31 (Nov. 2, 2016) (noting the right of victims of arbitrary detention under international law to seek and obtain reparation, including restitution, compensation,

In its recent Guidelines on measures of reparation, the Human Rights Committee notes that recommendations should be specific in identifying measures for a State to take in providing guarantees of non-repetition.<sup>264</sup> The Committee gives the example of laws or regulations in the State that are found to be at variance with ICCPR obligations. In those cases, the recommendation should request the repeal or amendment of the State's laws, specifying which laws or provisions of a law require change, and identifying the applicable international legal standards.<sup>265</sup> The Working Group has recently added similar wording to its recommendations, though it usually requests the repeal or amendment of a particular provision of a law, rather than the entire law, as this is likely to be more realistic and politically achievable.<sup>266</sup> For example, in the case of *Cornelius Fonya v. Cameroon*, the Working Group urged Cameroon to bring its law, particularly the section of its Penal Code that criminalizes consensual same-sex relations between adults, into conformity with the recommendations in the opinion.<sup>267</sup> In other recent cases, the Working Group has urged States to bring legislative provisions that are overly broad and vague, or that allow for the restriction of rights and freedoms, into conformity with the

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rehabilitation, satisfaction and guarantees of non-repetition). *See also* Op. No. 13/2016 (Israel), *supra* note 132, ¶ 31.

264. U.N. Human Rights Comm., Guidelines on Measures of Reparation Under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 12, U.N. Doc. CCPR/C/158 (Nov. 30, 2016).

265. *Id.* ¶ 13(a).

266. In some of its previous opinions, the Working Group called upon the State to examine the possibility of amending its laws, though it did not always refer to the specific provisions that required an amendment. *See, e.g.*, Opinion 19/2002 (Peru) (Dec. 2, 2002) *in* U.N. Comm'n on Human Rights, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Thirty-Fifth, Thirty-Sixth, and Thirty-Seventh Sessions, at 18, ¶ 20, U.N. Doc. E/CN.4/2004/3/Add.1 (Nov. 26, 2003) (requesting that the Peruvian Government "study the possibility of amending its military legislation so as to bring it into conformity with the Universal Declaration of Human Rights"); Op. No. 8/2008 (Colombia) (May 8, 2008) *in* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Forty-Ninth, Fiftieth, and Fifty-First Sessions, 114, ¶ 25, U.N. Doc. A/HRC/10/21/Add.1 (Feb. 4, 2009) (requesting that the Colombian Government "examine the possibility of amending its legislation with regard to conscientious objection"); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Fifth Session (14–23 November 2012): Op. No. 69/2012 (Cuba), ¶ 57(d), U.N. Doc. A/HRC/WGAD/2012/69 (Feb. 19, 2013) (recommending that the Cuban Government "consider amending the Criminal Code to define offences and describe criminal conduct precisely and unequivocally").

267. Opinion No. 14/2017 (Cameroon), *supra* note 119, ¶ 64.

State's commitments under international human rights law.<sup>268</sup> These recommendations are often accompanied by a statement that the Working Group would welcome an invitation to undertake a country visit to provide any technical assistance that may be needed.

In addition, the Working Group has started to urge States to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of the victim, and to take appropriate measures against those responsible for the violation of the victim's rights.<sup>269</sup> While this recommendation is not confined to cases involving discrimination and is usually recommended as a measure of satisfaction when there have been allegations of torture or other ill-treatment, it might prompt States to investigate the root causes of discrimination and thus serve as a useful tool in combating detention on discriminatory grounds.

The Methods of Work give the Working Group broad discretion to "make recommendations to the Government" when it finds that an individual has been arbitrarily detained.<sup>270</sup> However, the Working Group has not yet taken full advantage of this provision.<sup>271</sup> Specific recommendations concerning guarantees of non-repetition are not included as a matter of standard practice across Working Group opinions, including those involving findings under Category V, and

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268. See, e.g., U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session, (21–25 November 2016): Op. No. 48/2016 concerning Mohammed Rashid Hassan Nasser al-Ajami (Qatar), ¶ 62, U.N. Doc. A/HRC/WGAD/2016/48 (Jan. 31, 2017) (requesting that the Qatari Government bring specific provisions of its Penal Code into conformity with international human rights law); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Eightieth Session (20–24 November 2017): Op. No. 82/2017 concerning Evan Mawarire (Zimbabwe), ¶ 50, U.N. Doc. A/HRC/WGAD/2017/82 (Dec. 15, 2017) [hereinafter Op. No. 82/2017 (Zimbabwe)] (requesting the Zimbabwean Government to bring its Criminal Law Act and Flag of Zimbabwe Act into conformity with commitments made by Zimbabwe under international human rights law).

269. See, e.g., Op. No. 28/2016 (Islamic Republic of Iran), *supra* note 103, ¶ 59 (urging the Iranian Government to fully investigate the circumstances surrounding an arbitrary detention); Op. No. 7/2017 (Islamic Republic of Iran), *supra* note 103, ¶ 50 (urging the Iranian Government to "ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty").

270. *Methods of Work*, *supra* note 5, ¶ 17(d).

271. The Working Group is moving toward broader recommendations that recognize the implications of arbitrary detention on the victim and his or her family. See, e.g., Op. No. 83/2017 (Egypt), *supra* note 175, ¶ 94 (recommending reinstatement of the victim's relatives to their former positions).

consistent recommendations could be developed in the future. The Working Group could also consider expanding its recommendations to include, in appropriate cases, specific changes in discriminatory procedures and practices, improvement of conditions in places of detention,<sup>272</sup> and training and awareness-raising of law enforcement officials and members of the judiciary<sup>273</sup> on how to recognize disadvantage and ensure that it does not become a factor in detention.

Furthermore, the Working Group could encourage sources to include in their submissions an indication of the type of reparation or guarantee of non-repetition that would be most useful both in remedying their situation and in preventing further detention.<sup>274</sup> If the detention resulted from, or was enabled by, the absence of certain legal provisions (such as civil and criminal penalties for discrimination, adequate bail provisions, and provisions ensuring a prompt and regular judicial review of detention), the source could request that the Working Group recommend that the State adopt the necessary laws and regulations.<sup>275</sup> Submissions could also draw upon the specific

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272. Although its mandate does not explicitly cover conditions of detention, the Working Group has stated that it must consider whether those conditions negatively affect the ability of detainees to challenge their detention, prepare their defense, and obtain a fair trial. *See* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Ninth Session (21–25 August 2017): Op. No. 47/2017 concerning Ahmad Ali Mekkaoui (United Arab Emirates), ¶ 28, U.N. Doc. A/HRC/WGAD/2017/47 (Sept. 15, 2017). *See also* H.R.C Res. 33/30, *supra* note 17, ¶ 5(g) (encouraging States to ensure that the conditions of pre-trial detention do not undermine the fairness of the trial). Discrimination in conditions of detention might arise, for example, if asylum seekers are detained in inhumane conditions because of their national origin, and could be the subject of guarantees of non-repetition.

273. Human Rights Comm., *Guidelines on Measures of Reparation Under the Optional Protocol to the International Covenant on Civil and Political Rights*, *supra* note 264, ¶ 13(d).

274. This is the process adopted by the Human Rights Committee, which shares any submissions on remedies with the State for comment. The Human Rights Committee requests the information for reference only and is not obligated or limited by any submissions made. *Id.* at 1-2, ¶¶ 4–5. Some sources already state what relief is being sought in their submissions to the Working Group, including guarantees of non-repetition and measures of satisfaction. *See, e.g.*, Opinion No. 19/2013 (Morocco), *supra* note 34, ¶ 19. (requesting immediate release, compensation, an official apology, and “adequate guarantees of non-repetition”).

275. In recent cases involving human rights defenders, the Working Group included a recommendation that the State incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and ensure its implementation. INT’L SERV. FOR HUMAN RIGHTS, THE MODEL LAW (2017), <https://www.ishr.ch/news/model-law> [<https://perma.cc/8XH3-J7JM>]. *See*

measures recommended by the Working Group in its Basic Principles and Guidelines for protecting disadvantaged individuals and groups who have been detained and facilitating their ability to challenge the lawfulness of their detention.<sup>276</sup>

## 2. Follow Up, Referrals and Reprisals

Since August 2016, the Working Group's opinions have included a follow-up procedure in the concluding paragraphs.<sup>277</sup> The new procedure is based on paragraph 20 of the Methods of Work, which provides that "[g]overnments, sources and other parties should inform the Working Group of the follow-up action taken on the recommendations made by the Working Group in its opinion[s]."<sup>278</sup> As part of this procedure, the Working Group requests both the source and the State to provide it with information on the implementation of the opinion including, as appropriate, whether the victim has been released, whether compensation or other reparations have been made to the victim, whether the violation of the victim's rights has been investigated, whether changes have been made to harmonize the State's laws and practices with its international obligations, and whether any other action has been taken to implement the opinion.<sup>279</sup> Both parties are requested to provide that information within six months of the date of transmission of the opinion. If no information is received at the end of six months, the Working Group contacts

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*also* Op. No. 67/2017 (Malaysia), *supra* note 71, ¶ 36 (encouraging incorporation and subsequent implementation of the Model Law into the party's domestic legislation); Op. No. 82/2017 (Zimbabwe), *supra* note 268, ¶ 52 (same).

276. *Basic Principles and Guidelines*, *supra* note 215, at 10–12, 22–27. In the future, the Working Group might also consider developing principles of specific or special measures to be applied more generally to people facing detention—such as court interpretation for linguistic minorities—to minimize factors that perpetuate discrimination against disadvantaged and vulnerable groups.

277. The follow-up procedure is only utilized when the Working Group finds that the detention was arbitrary, but not when a case is filed, kept pending, or the detention is not found to be arbitrary. *See, e.g.*, Op. No. 28/2016 (Islamic Republic of Iran), *supra* note 103, ¶¶ 61–64 (the Working Group requests specific information regarding the release and reparations affecting the arbitrarily detained individual).

278. *Methods of Work*, *supra* note 5, ¶ 20.

279. *See* 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 10–11; *see also* U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at its Seventy-Seventh Session, (21–25 November 2016): Op. No. 53/2016 concerning Laçin Akhmadjanov (Afghanistan and the United States of America), ¶¶ 69–72, U.N. Doc. A/HRC/WGAD/2016/53 (Jan. 13, 2017) (requesting specific actions to be taken in follow-up to the recommendations contained therein).

the parties to seek further information. The Working Group briefly summarizes all information received in its annual reports to the Human Rights Council. The Vice-Chair on Follow-Up also raises the implementation of opinions with relevant Permanent Missions in Geneva.

It is still early days for the new procedure, but the response so far has been mixed,<sup>280</sup> with some sources and States sending detailed information on the implementation of opinions while others have not responded.<sup>281</sup> The sources are generally more likely than States to provide updates to the Working Group.<sup>282</sup> Not surprisingly, the follow-up information submitted by the sources tends to focus on topics of immediate relevance to victims, namely release and compensation, rather than more systemic issues relevant to detention on discriminatory grounds. So too, States that provide follow-up information tend to focus on release, rather than taking the opportunity to share positive developments or good practices in terms of longer-term changes to laws and practices.<sup>283</sup>

Going forward, the Working Group might be able to involve other groups in its follow-up activities, as paragraph 20 of the Methods of Work envisages the receipt of follow-up information from “other parties.”<sup>284</sup> Groups with an interest in the implementation of the opinion itself, and also its wider implications, may be able to assist the Working Group with additional updates on published opinions, by providing data relating to the case and to more general issues of detention and discrimination, and by conducting advocacy in support of the opinion and of broader change. These groups could include NGOs, NHRIs, U.N. country teams, U.N. agencies (particularly those that work with disadvantaged groups),<sup>285</sup> field presences and peacekeeping missions, as well as regional human rights mechanisms and National Preventive Mechanisms. Such broader engagement could

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280. There has been an increase in the reported number of releases of individuals who have been the subject of opinions adopted by the Working Group. It is difficult to know if this is directly related to the opinions, or indeed to the new follow-up procedure, but it is a positive development. *See* 2016 Rep. of the Working Grp., *supra* note 8, at 1, 12–13.

281. *Id.* at 5–12.

282. *Id.* at 5–11.

283. *Id.* at 5–11.

284. *Methods of Work*, *supra* note 5, ¶ 20.

285. For example, the U.N. Children’s Fund, U.N. High Commissioner for Refugees, U.N. Development Programme, U.N. Office on Drugs and Crime, UNAIDS and U.N. Women.

be achieved, for example, through the establishment of a database maintained by the Working Group's Secretariat of individuals and groups that register to receive Working Group opinions on certain thematic or country-specific issues once the opinions have been made public.

In addition, according to its Methods of Work, if the Working Group receives an allegation of a violation of human rights that falls within its competence as well as within the competence of another thematic mechanism, it may refer those allegations to the relevant working group or special rapporteur and consider taking joint action with them.<sup>286</sup> Many of the opinions contain a concluding paragraph referring allegations such as torture and other ill-treatment, the targeting of human rights defenders, or the detention of vulnerable groups (persons with disabilities, older persons, migrants, etc.) to the relevant Special Procedures mandate holders.<sup>287</sup> As part of the improvement of its follow-up mechanisms, the Working Group has taken steps over the last year to strengthen the sharing of its findings with other relevant thematic and country-specific mandate holders.<sup>288</sup> This process will continue to evolve over time and may include bringing multiple cases involving the same types of violations in a country (such as detention on discriminatory grounds) to the attention of the relevant mandate holder so that joint action can be taken on the cases. This could have a significant positive impact on follow-up of the Working Group's findings, including those made under Category V.<sup>289</sup>

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286. *Methods of Work*, *supra* note 5, ¶¶ 33(a)–(b).

287. *See, e.g.*, Op. No. 7/2017 (Islamic Republic of Iran), *supra* note 103, ¶ 51 (referring issues relating to the detention of an elderly man to the Independent Expert on the enjoyment of all human rights by older persons); Op. No. 68/2017 (Trinidad and Tobago), *supra* note 75, ¶ 40 (referring issues relating to a detainee with a physical impairment to the Special Rapporteurs on the rights of persons with disabilities and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).

288. The Working Group has strengthened its referral mechanism to transmit its opinions to the attention of other Special Procedures mandate holders when a particular issue raised in the opinion falls within the competence of another mandate (e.g., torture or other ill-treatment, lack of independence of judges and lawyers). Such referrals are made pursuant to paragraph 33(a) of the Methods of Work. *See Methods of Work*, *supra* note 5, ¶ 33(a). The Working Group also maintains records to track the number of referrals made.

289. The author's analysis of the discrimination jurisprudence reveals that, of the forty-one opinions adopted in 2017 in which a Category V violation was found, the Working Group referred sixteen of those cases to another mandate holder for his or her further action on issues of discrimination pertaining to the mandate.

Finally, like many human rights mechanisms, the Working Group receives information regarding reprisals against individuals who have cooperated with it, including those who have been the subject of urgent appeals, opinions and recommendations made during country visits.<sup>290</sup> This is a matter of grave concern to the Working Group, which only acts on communications with the explicit written consent of the victim or the victim's relatives, and has recently designated one of its members as the focal point on reprisals. The Working Group carefully considers how it approaches reprisals, both those that may occur as well as those that have been reported, as it attempts to do no harm in all cases. However, dealing with reprisals involving disadvantaged individuals, including those who have been detained on the basis of one or more discriminatory grounds, may require a tailored approach appropriate to their additional vulnerability to torture and ill-treatment while in custody. As the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has documented:

Many people think that torture is primarily the fate of political and other “high-ranking” prisoners. In reality, most of the victims of arbitrary detention, torture and inhuman conditions of detention are usually ordinary people who belong to the poorest and most disadvantaged sectors of society, including those belonging to the lowest classes, children, persons with disabilities and diseases, gays, lesbians, bisexuals, transgender persons, drug addicts, aliens and members of ethnic and religious minorities or indigenous communities.<sup>291</sup>

One option might be to take joint action with other Special Procedures mandate holders in referring multiple cases of reported reprisals in the same country, including those involving disadvantaged individuals, to the Assistant Secretary-General for Human Rights in

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290. See 2016 Rep. of the Working Grp., *supra* note 8, ¶¶ 29–31. See also H.R.C Res. 33/30, *supra* note 17, ¶ 10 (noting with “deep concern that the Working Group has received increasing information on reprisals suffered by individuals who were the subject of an urgent appeal or opinion or who applied a recommendation of the Working Group”).

291. Manfred Nowak, *Interim report of the Special Rapporteur of the Human Rights Council on torture & and other cruel, inhuman or degrading treatment or punishment*, ¶ 40, U.N. Doc. A/64/215 (Aug. 3, 2009).

New York who is leading the efforts of the United Nations to end intimidation and reprisals against those who cooperate with it on human rights.<sup>292</sup> Doing so might raise the political costs for a State so that it is not willing to retaliate against a larger number of individuals, and reduce the risk of one individual being singled out and subjected to further harm.

## CONCLUSION

The Working Group's broad and flexible mandate has allowed it to build a significant body of opinions and other analysis on discriminatory detention practices. In the short time since the Working Group added Category V to its Methods of Work in 2010, its jurisprudence has steadily evolved to address a range of differential treatment, recognizing that discrimination takes many forms, including in both criminal proceedings and administrative detention. Significant opportunities exist for the Working Group to continue to build upon this foundation, particularly if the Working Group is able to leverage the unique aspects of its competence, subject-matter jurisdiction, interpretation of its mandate and current membership, and minimize the constraints that it faces, to address issues of discrimination.

As the Working Group continues to refine its application of the principles of equality and non-discrimination to the detention context, there are several areas in which it could strengthen its analysis and provide further guidance to stakeholders on its interpretation of Category V. These include examining in greater detail what constitutes discrimination under international law, declaring detention under discriminatory laws to have no legal basis, and clarifying the circumstances in which it will apply Categories II and V of its Methods of Work. In the coming years, it will also be important for the Working Group to carefully consider which groups are protected by Category V, including people living in poverty, and how it can best tailor its remedies and follow-up to arbitrary detention on discriminatory

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292. At present, the Working Group refers cases of reprisals to the Assistant Secretary-General for Human Rights on an individual basis. See 2016 Rep. of the Working Grp., *supra* note 8, ¶ 30. See also Op. No. 68/2017 (Trinidad and Tobago), *supra* note 75, ¶ 41 (referring case to Assistant Secretary-General for Human Rights); U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at its Eightieth Session, (20-24 November 2017): Op. No. 78/2017 concerning a Minor (Whose Name is Known by the Working Group) et al. (Egypt), ¶ 93, U.N. Doc. A/HRC/WGAD/2017/78 (Dec. 28, 2017) (referring case to Assistant Secretary-General for Human Rights).

grounds. By addressing these issues under Category V, the Working Group will continue to hold a mirror in front of societies around the world, showing them what discrimination looks like, and how it affects the right to liberty of the most vulnerable individuals and groups.

APPENDIX A: EXAMPLES OF OPINIONS  
CONTAINING CATEGORY V VIOLATIONS

**Opinions  
Issued in  
2012:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Fourth Session, (27–31 August 2012): Op. No. 37/2012 concerning Adnam El Hadj (Spain), ¶¶ 3–11, U.N. Doc. A/HRC/WGAD/2012/37 (Nov. 26, 2012);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Sixty-Fourth Session (27–31 August 2012): Op. No. 38/2012 concerning Gunasundaram Jayasundaram (Sri Lanka), ¶ 34, U.N. Doc. A/HRC/WGAD/2012/38 (Nov. 26, 2012).

**Opinions  
Issued in  
2013:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. On Arbitrary Det. at Its Sixty-Sixth Session (29 April–3 May 2013): Op. No. 4/2013 concerning Gaybullo Jalilov (Uzbekistan), ¶ 76, U.N. Doc. A/HRC/WGAD/2013/4 (July 25, 2013);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Sixth Session, (29 April–3 May 2013): Op. No. 10/2013 concerning Obaidullah (United States of America), ¶ 43, U.N. Doc. A/HRC/WGAD/2013/10 (July 25, 2013);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Seventh Session (26–30 Aug. 2013): Op. No. 18/2013 concerning Saeed Abedinialangashi (Islamic Republic of Iran), ¶ 28, U.N. Doc. A/HRC/WGAD/2013/18 (Jan. 14, 2014);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Seventh Session, (26–30 Aug. 2013): Op. No. 26/2013 concerning Francis Xavier Dang Xuan Dieu et al. (Viet Nam), ¶ 71, U.N. Doc. A/HRC/WGAD/2013/26 (Jan. 14, 2014);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session, (13–22 November 2013): Op. No. 49/2013 concerning Tun Aung (Myanmar), U.N. Doc. A/HRC/WGAD/2013/49, ¶ 28 (Apr. 23, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Eighth Session, (13–22 November 2013): Op. No. 50/2013 concerning Laphai Gam (Myanmar), ¶ 41, U.N. Doc. A/HRC/WGAD/2013/50 (Apr. 2, 2014).

**Opinions  
Issued in  
2014:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Ninth Session (22 April–1 May 2014): Op. No. 4/2014 concerning Ma Chunling (China), ¶ 24, U.N. Doc. A/HRC/WGAD/2014/4 (July 1, 2014);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Sixty-Ninth Session (22 April–1 May 2014): Op. No. 6/2014 concerning Brang Yung (Myanmar), ¶ 22, U.N. Doc. A/HRC/WGAD/2014/6 (July 1, 2014);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventieth Session (25–29 August 2014): Op. No. 24/2014 concerning La Ring (Myanmar), ¶ 22(c), U.N. Doc. A/HRC/WGAD/2014/24 (Nov. 21, 2014);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-First Session (17–21 November 2014): Op. No. 39/2014 concerning Salem Lani et al. (Tunisia), ¶ 33, U.N. Doc. A/HRC/WGAD/2014/39 (Feb. 11, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-First Session (17–21 November 2014): Op. No. 50/2014 concerning Mustafa al Hawsawi (United States of America and Cuba), ¶ 83, U.N. Doc. A/HRC/WGAD/2014/50 (Feb. 13, 2015).

**Opinions  
Issued in  
2015:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No.

2/2015 concerning Andargachew Tsige (Ethiopia and Yemen), ¶ 25, U.N. Doc. A/HRC/WGAD/2015/2 (July 6, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 7/2015 concerning Rosmit Mantilla (Venezuela), ¶ 27, U.N. Doc. A/HRC/WGAD/2015/7 (July 13, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 18/2015 concerning Pedro Celestino Canché Herrera (Mexico), ¶ 25, U.N. Doc. A/HRC/WGAD/2015/18 (July 13, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session (20–29 April 2015): Op. No. 19/2015 concerning Librado Jacinto Baños Rodríguez (Mexico), ¶ 19, U.N. Doc. A/HRC/WGAD/2015/19 (July 13, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Second Session, (19–28 April 2015): Op. No. 21/2015 concerning A. (New Zealand), ¶ 27, U.N. Doc. A/HRC/WGAD/2015/21 (Aug. 5, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det., at Its Seventy-Third Session, (31 August–4 September 2015): Op. No. 24/2015 concerning Gloria Macapagal-Arroyo (Philippines), ¶ 44, U.N. Doc. A/HRC/WGAD/2015/24 (Nov. 16, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Seventy-Third Session, (31 August–4 September 2015): Op. No. 29/2015 concerning Song Hyeok Kim (Democratic People's Republic of Korea), ¶ 22, U.N. Doc. A/HRC/WGAD/2015/29 (Nov. 2, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its

Seventy-Third Session (31 August–4 September 2015): Op. No. 30/2015 concerning Frédéric Bamvuginyumvira (Burundi), ¶ 48, U.N. Doc. A/HRC/WGAD/2015/30 (Nov. 30, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Third Session (31 August–4 September 2015): Op. No. 33/2015 concerning Mohamed Nasheed (Maldives), ¶ 85, U.N. Doc. A/HRC/WGAD/2015/33 (Nov. 10, 2015);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fourth Session (30 November–4 December 2015): Op. No. 42/2015 concerning Irina Zakharchenko and Valida Jabrayilova (Azerbaijan), ¶ 44, U.N. Doc. A/HRC/WGAD/2015/42 (Mar. 15, 2016).

**Opinions  
Issued in  
2016:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 1/2016 concerning Zeinab Jalalian (Islamic Republic of Iran), ¶ 38, U.N. Doc. A/HRC/WGAD/2016/1 (June 13, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 13/2016, concerning a Minor (Whose Name is Known by the Working Group) (Israel), ¶ 29, U.N. Doc. A/HRC/WGAD/2016/13 (June 24, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Fifth Session, (18–27 April 2016): Op. No. 15/2016 concerning Khalida Jarrar (Israel), ¶ 28, U.N. Doc. A/HRC/WGAD/2016/15 (June 22, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 23/2016 concerning Rebecca Kabuo et al. (Democratic Republic of the Congo), ¶ 30, U.N. Doc. A/HRC/WGAD/2016/23 (Dec. 29, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 28/2016 concerning Nazanin Zaghari-Ratcliffe (Islamic Republic of Iran), ¶ 49, U.N. Doc. A/HRC/WGAD/2016/28 (Sept. 21, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. At Its Seventy-Sixth Session, (22–26 August 2016): Op. No. 36/2016 concerning Biram Dah Abeid, Brahim Bilal Ramdane and Djibril Sow (Mauritania), ¶ 35, U.N. Doc. A/HRC/WGAD/2016/36 (Dec. 28, 2016);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session (21–25 November 2016): Op. No. 46/2016 concerning Wu Zeheng and 18 others (China), ¶ 63, U.N. Doc. A/HRC/WGAD/2016/46 (Jan. 27, 2017);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Seventh Session, (21–25 November 2016): Op. No. 58/2016 concerning Paulo Jenaro Diez Gargari (Mexico), ¶ 20, U.N. Doc. A/HRC/WGAD/2016/58 (Jan. 30, 2017).

**Opinions  
Issued in  
2017:**

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 3/2017 concerning a Minor (Whose Name is Known by the Working Group) (Israel), ¶ 38, U.N. Doc. A/HRC/WGAD/2017/3 (June 16, 2017);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 4/2017 concerning Tsegon Gyal (China), ¶ 26, U.N. Doc. A/HRC/WGAD/2017/4 (Aug. 11, 2017);

U.N. Human Rights Council, Ops. Adopted by the Working Grp. on Arbitrary Det. at Its Seventy-Eighth Session, (19–28 April 2017): Op. No. 7/2017 concerning Kamal Foroughi (Islamic

Republic of Iran), ¶ 40, U.N. Doc. A/HRC/WGAD/2017/7 (May 30, 2017);

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