



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

Year 2019 Snapshot: Opinions and Cases

The United Nations Working Group on Arbitrary Detention (Working Group) released 85 opinions that were adopted during its 84th, 85th, and 86th sessions related to 171 individuals in detention in 42 countries.¹ Under its urgent action procedure, it transmitted 61 urgent appeals to 31 Governments and, in one case, to other actors.² It also transmitted 80 letters of allegations and other letters to 43 Governments concerning at least 377 individuals.³ The Working Group found that the detention of the individuals at issue were arbitrary in all of the 83 opinions it issued under its regular procedure, i.e., 100% of the time.⁴ Three communications did not result in an opinion: one that had pertained to a request for review and two communications that had been “filed,” meaning the Working Group did not reach a determination in these three instances.⁵ In the first filed case the Working Group was unable to reach a conclusion based on the information received by the source and government concerned.⁶ In the second filed case the Working Group found that the factual circumstances and information provided by Minors A, B, and C were sufficient to determine that their detention was arbitrary under Category 7.⁷ However, the Working Group considered it possible that the arrest of Minor D could have been legitimate under the exception of arrest in flagrante delicto.⁸ Further, it found the government’s reply-uu a910 p (determination) and Human Rights Council, United Nations Working Group on Arbitrary Detention, Communication No. 27/2019 (Cameroon) (requesting that the Working

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

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

⁸ Id. at ¶ 119.

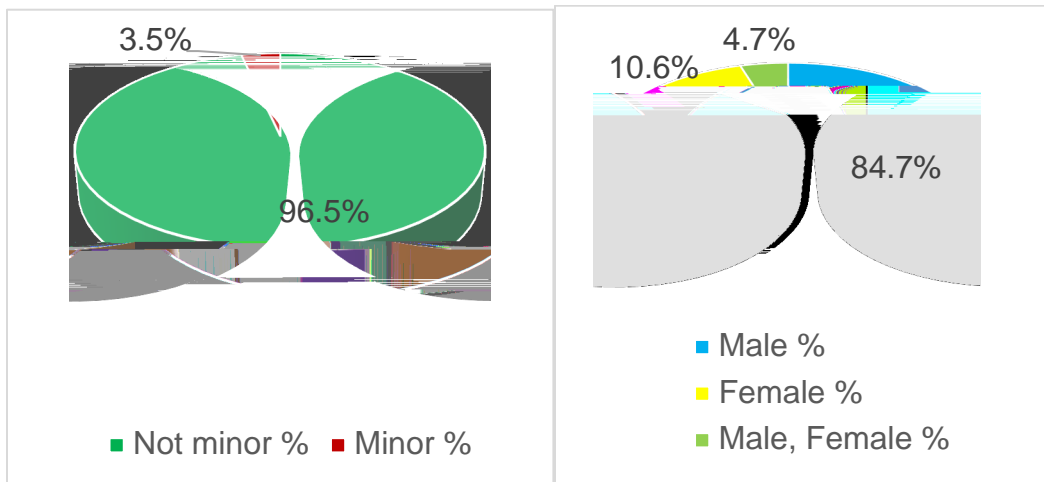
⁹ Id. at ¶¶ 110-118.

¹⁰ Id. at ¶ 133.

The Working Group referred 74 of 83 cases under its regular procedure to other Special Procedure mandate holders or Working Groups, 89.15% of the time.¹¹ The Government replied to the Working Group's request for information in 47 opinions (53%). It did not reply in 37 opinions (43.5%), and in an opinion pertaining to two States, one State replied, and one did not.¹²

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

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

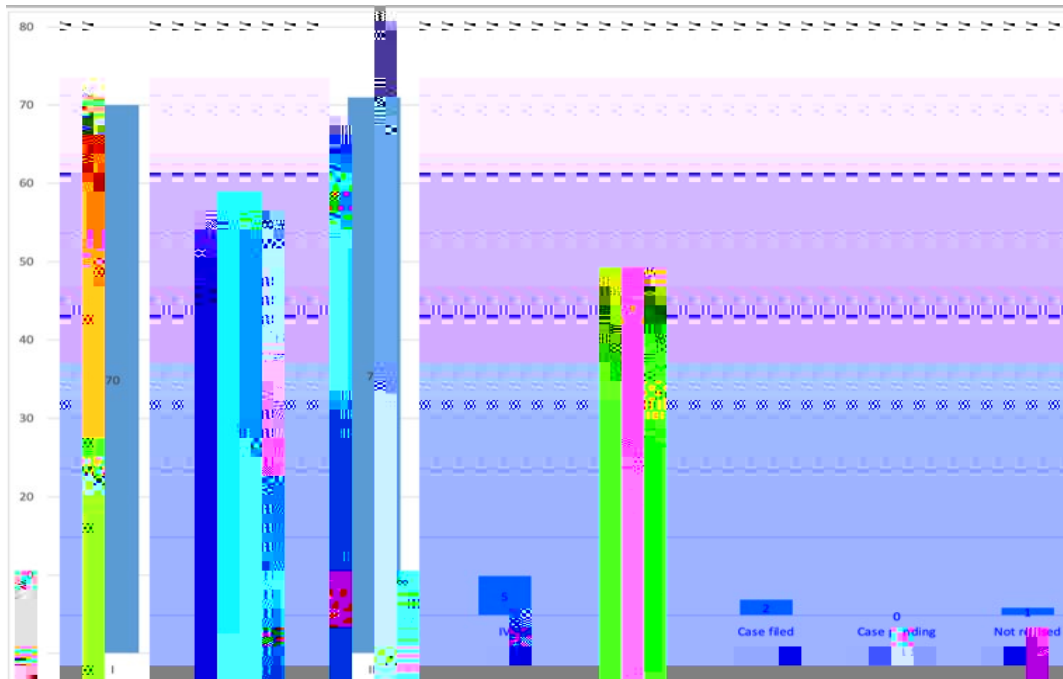


¹¹ The following opinions were not referred by the Working Group: 13/2019, 27/2019, 38/2019, 48/2019, 49/2019, 50/2019, 58/2019, 75/2019, and 79/2019.

¹² See, chart on page 2 for reference to case numbers

The charts below reflect what categories were identified by the Working Group in the 2019 cases it considered, i.e., in what manner the arbitrary deprivation of liberty occurred. In most cases, the Working Group determined there were violations of more than one category. As in other years, very few cases pertained to Category IV, which relates to the prolonged administrative detention of asylum seekers, refugees, and immigrants without judicial review or remedy. This may be an indication that this category is not well und

Instance of each category identified in the 2019 opinions



Instances of multiple categories identified in the 2019 opinions

The Working Group's 2019 opinions involve cases of arbitrary detention in: Australia¹⁵ (3); Azerbaijan¹⁶ (1); Bahrain¹⁷ (3); Belarus¹⁸ (1); Bolivarian Republic of Venezuela¹⁹ (6); Burundi²⁰ (1); Cambodia²¹ (1); Cameroon²² (2); Canada²³ (1); China²⁴ (6); Colombia²⁵ (1); Cuba²⁶ (1); Democratic People's Republic of Korea²⁷ (1); Eritrea²⁸ (1); Georgia²⁹ (1); Guatemala³⁰ (1); Hong Kong³¹ (1); India³² (1); Indonesia³³ (1); Iran³⁴ (1); Israel³⁵ (1); Italy³⁶ (1); Kazakhstan³⁷ (1); Kenya³⁸ (1); Kuwait³⁹ (1); Kyrgyzstan⁴⁰ (1); Lebanon⁴¹ (1); Liberia⁴² (1); Lithuania⁴³ (1); Luxembourg⁴⁴ (1); Malaysia⁴⁵ (1); Mexico⁴⁶ (1); Mongolia⁴⁷ (1); Myanmar⁴⁸ (1); Nepal⁴⁹ (1); Netherlands⁵⁰ (1); New Zealand⁵¹ (1); Nigeria⁵² (1); North Macedonia⁵³ (1); Norway⁵⁴ (1); Oman⁵⁵ (1); Pakistan⁵⁶ (1); Palau⁵⁷ (1); Panama⁵⁸ (1); Papua New Guinea⁵⁹ (1); Paraguay⁶⁰ (1); Peru⁶¹ (1); Philippines⁶² (1); Poland⁶³ (1); Portugal⁶⁴ (1); Romania⁶⁵ (1); Russia⁶⁶ (1); Saudi Arabia⁶⁷ (1); Serbia⁶⁸ (1); Singapore⁶⁹ (1); Slovakia⁷⁰ (1); South Africa⁷¹ (1); South Korea⁷² (1); Spain⁷³ (1); Sri Lanka⁷⁴ (1); Sweden⁷⁵ (1); Switzerland⁷⁶ (1); Taiwan⁷⁷ (1); Thailand⁷⁸ (1); Timor-Leste⁷⁹ (1); Turkey⁸⁰ (1); Ukraine⁸¹ (1); United Kingdom⁸² (1); United States of America⁸³ (1); Uzbekistan⁸⁴ (1); Vietnam⁸⁵ (1); West Bank and Gaza⁸⁶ (1); Yemen⁸⁷ (1); Zambia⁸⁸ (1); Zimbabwe⁸⁹ (1).

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

Observations and Developments

The Working Group issued two new deliberations to assist States and other stakeholders in preventing and addressing cases of arbitrary deprivation of liberty. Title – Deliberation No. 10, adopted in the 8th session – articulates the Working Group’s views on the reparations owed to victims of arbitrary deprivation of liberty.⁵⁸ In the deliberation, the Working Group notes that in cases where it recommends that a State issue reparations to a victim of arbitrary detention, the Working Group will inquire into the status of the implementation of its

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

Key Developments

Emerging Trends

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

The Working Group also examined the impact of mental health conditions, both preexisting and developed within the context of detention, on an individual's ability to exercise their due process rights.⁸⁸ In opinion No. 1/2019, the source communicated that his precapture and torture by the Sri Lankan Army caused him to "develop psychotic symptoms" and he was later diagnosed with schizophrenia which made it difficult for him to understand the "pathways" available to him regarding his ongoing detention and the necessity of his adverse security designation.⁸⁹ Further, while the Government found him unfit to plea, the Working Group noted that no accommodations had been made to empower him to challenge the legality of his detention in keeping with his rights under article 9 of the ICCPR.⁹⁰ Accordingly, the Working Group rejected the Government's argument that the detainee's detention was arbitrary because it failed to explain how a detainee who is unfit to plea could have effectively challenged the necessity of his own detention.⁹¹

The Working Group's 2019 jurisprudence on mental health also explored the effects of extended prison sentences on minors.⁹²

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

ii. Australia: Mandatory Immigration Detention

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

iii. Egypt: Detention of Muslim Brotherhood Members

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

iv. Turkey Detention of Actual and Suspected Gülenists

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

¹⁰⁴ See opinion No. 70/2019 ¶ 84.

¹⁰⁵ See opinion No. 70/2019 ¶ 78.

¹⁰⁶ See opinion No. 70/2019 ¶ 85.

¹⁰⁷ See opinion No. 74/2019 ¶ 73.

¹⁰⁸ Id. at ¶ 74.

¹⁰⁹ Id.

¹¹⁰ See opinion No. 65/2019 ¶ 82.

¹¹¹ Id.

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

v. Venezuela Detention of Opposition Members

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

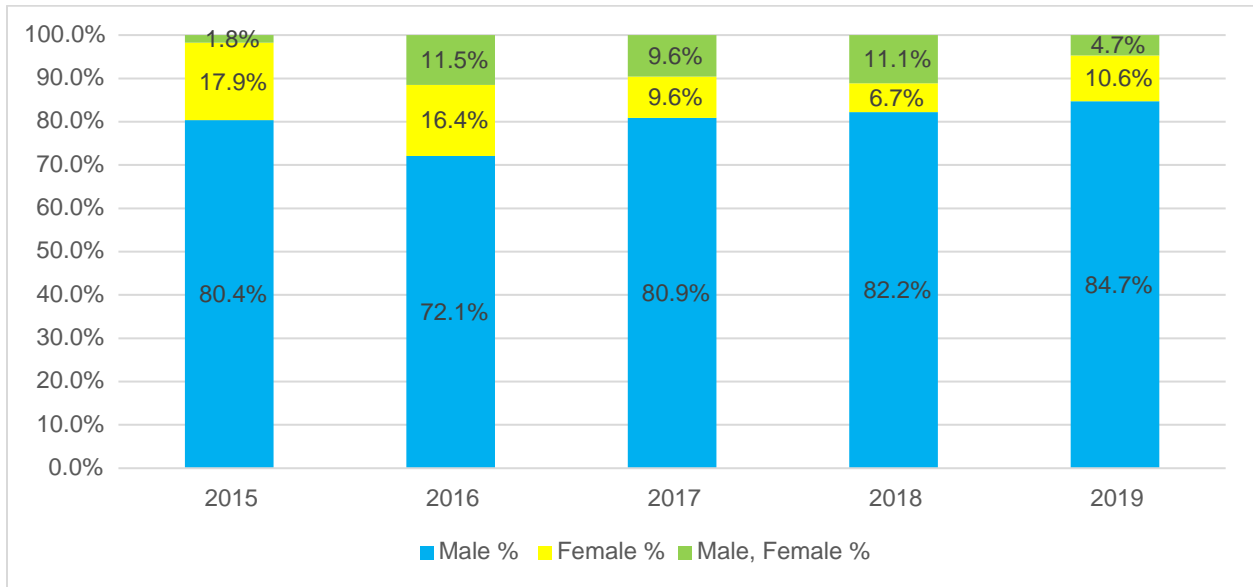
vi. Russian Federation Detention of Jehovah’s Witnesses

In 2019,

Working Group on Arbitrary Detention (2018)¹²⁷ The trends identified within, and information contained in the included charts and graphs,

Comparisons between data gathered from years 2015-2019

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



Percentage of cases pertaining to minors and adults

Comparison between categories identified in opinions issued from 2019

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

