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Arbitrary Detention in the Counter-Terrorism Context: Standards for the UN Working Group on Arbitrary Detention

BY ALEENA NASIR*

Abstract: Administrative detention is a phenomenon increasingly used in the name of national security and counter-terrorism, but alongside a dangerous trend of arbitrary detentions at odds with human rights and international law. States use broad and vague definitions of terrorism as justifications for detentions that happen outside the confines of the law both domestically and internationally. States of emergency and military occupations further derogate dramatically from human rights and the freedom from arbitrary detention, resulting in a campaign against opposition under the guise of counter-terrorism. The current trend of arbitrary detention evinces a need for stronger standards protecting human rights in all areas of the world and the application of those standards in cases before the UN Working Group on Arbitrary Detention. This Note proposes substantive and procedural standards to codify and strengthen the Working Group's jurisprudence on arbitrary detentions in the counter-terrorism context, especially during states of emergency.

I. INTRODUCTION

Around 4:00 a.m. on May 14, 2017, some forty to fifty Israeli soldiers broke down the front door of Ahmad Qatamesh's home in the al-Bireh neighborhood of Ramallah, Palestine.¹ The house was empty, so the soldiers went over to Ahmad's brother's house, broke down his door, and forced him to walk them to Ahmad in a nearby home at gunpoint.² Three days after arresting Ahmad, a military commander signed an

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1. *Israel: Release Palestinian Prisoner of Conscience Detained Without Charge or Trial*, AMNESTY INT'L (May 24, 2017, 9:39 AM), <https://www.amnesty.org/en/latest/news/2017/05/israel-release-palestinian-prisoner-of-conscience-detained-without-charge-or-trial/>.

2. *Id.*

administrative order authorizing his three-month detention with no listed criminal offense.³ Neither Ahmad nor his family are strangers to this proceeding—it marks Ahmad’s fourth arbitrary detention since the 1970’s. A prominent writer, professor, and activist, Ahmad was first imprisoned in the 1970’s for over four years after he was accused by the Israeli government of being a leader in the Popular Front for the Liberation of Palestine, a designated terrorist organization.⁴ In 1992, he was arrested again and spent the next six years in administrative detention until his release in 1998—the longest ever detention without trial of a Palestinian prisoner.⁵ His third detention was in April 2011, where Ahmad was interrogated for all of ten minutes before being detained for another two and a half years until December 2013.⁶ Ahmad spoke of Israel’s practice of arbitrary detention at his hearing at the Ofer military court in 2011: “You are destroying my life and I want to know why. As a human being I have my own mind and I am educated, and I want to know what I am detained for. The military prosecution talks of its professionalism, and meanwhile I have no rights?”⁷ Amnesty International has repeatedly called for Ahmad’s release from arbitrary detention in Israel as a prisoner of conscience.⁸ Ahmad Qatamesh is just one story of the over 800,000 Palestinians detained in Israel since 1967—constituting around 20% of the total Palestinian population.⁹

Arbitrary detention occurs outside the confines and the protections of the law. A person’s unjustified arrest and deprivation of liberty violates both domestic and international law. From surveillance and unlawful arrest to the often misled and corrupt trials, arbitrary detention violates a person’s and prisoner’s rights every step of the way. Arbitrary detention

3. *Id.*

4. Patrick Strickland, *Israel Jails Writer Ahmad Qatamesh Without Charges*, AL JAZEERA (May 21, 2017), <https://www.aljazeera.com/indepth/features/2017/05/israel-jails-writer-ahmad-qatamesh-charges-170521063552255.html>. The Popular Front for the Liberation of Palestine is a left-wing political party that has been designated by the U.S., E.U., Canada, Japan, and Australia as a terrorist organization. *Israel & Palestine*, CHARITY & SEC. NETWORK (Aug. 30, 2016), <https://charityandsecurity.org/country/palestine/>.

5. *Palestinian Writer Among Dozens Arrested by Israel*, MIDDLE E. EYE (Dec. 24, 2019), <https://www.middleeasteye.net/news/israel-detains-dozens-palestinians-including-renowned-professor>.

6. *Starved of Justice: Palestinians Detained Without Trial by Israel*, AMNESTY INT’L (June 2012), https://www.amnestyusa.org/wp-content/uploads/2017/04/israelopt_starved_of_justice_060612-final.pdf.

7. *Id.* at 5.

8. *Israel: Release Palestinian Prisoner of Conscience Detained Without Charge or Trial*, *supra* note 1.

9. *Administrative Detention*, ADDAMEER (July 2017), http://www.addameer.org/israeli_military_judicial_system/administrative_detention.

is often used as a tool of political suppression and intimidation. The nature of detention deprives a person of their liberties and human rights.¹⁰ The practice of administrative detention necessitates more stringent legal standards to ensure the protection of basic human rights. Pretrial detention under domestic and international legal standards can be lawful, but the nature of many conflicts creates a vacuum of due process that transforms an otherwise legal arrest into arbitrary detention. With every judicial system and criminal system comes the possibility of abuse of power and fear for security in times of crisis.¹¹ In these situations, arbitrary arrests persist regardless of the state's type of government or Freedom House ranking.¹² As the United Nations High Commissioner for Human Rights wrote, "All countries are confronted by the practice of arbitrary detention. It knows no boundaries . . ." ¹³

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone the right to liberty and the right to be free of arbitrary detention.¹⁴ Anyone who is arrested shall be afforded certain procedures, including being informed of the charges against them, promptly appearing before a judge, and having the right to take proceedings before a court.¹⁵ This codification of international law on arbitrary detention expands on the fundamental law established in Article 9 of the Universal Declaration of Human Rights (UDHR), which states, "No one shall be subjected to arbitrary arrest, detention or exile."¹⁶ Detention itself is not a violation of international law, but these instruments establish the parameters for states to identify what is arbitrary.¹⁷ Arbitrariness does not equate to illegality, but it is interpreted more broadly to include "inappropriateness, injustice, lack of predictability and due process of law," along

10. *Arbitrary Detention*, TRIAL INT'L, <https://trialinternational.org/topics-post/arbitrary-detention> (last visited Nov. 13, 2020).

11. Habeas Corpus in Emergency Situation (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. of H.R., (ser. A) No. 8, ¶¶ 20–21 (Jan. 30, 1987).

12. Freedom House publishes an annual report assessing the condition of political rights and civil liberties for countries across the world according to a numerical rating. It is the most widely used rating of its kind to assess the state of democracy and human freedom worldwide. *Freedom in the World*, FREEDOM HOUSE, <https://freedomhouse.org/report-types/freedom-world> (last visited Nov. 13, 2020).

13. U.N., Off. of the High Comm'r for Hum. Rts. [OHCHR], Fact Sheet No. 26, The Working Group on Arbitrary Detention, at 2 (May 2000), <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> [hereinafter Fact Sheet No. 26].

14. International Covenant on Civil and Political Rights, art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter 999 U.N.T.S. 171].

15. *Id.* art. 9(2)–(4).

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948).

17. See Fact Sheet No. 26, *supra* note 13, ¶ 4.

with unreasonableness and lack of necessity.¹⁸ When the procedures are ignored, the charges hidden, the hearings delayed, and the courts avoided, lawful detention can quickly become arbitrary.

The phenomenon of arbitrary detention is international, traditional, and perennial, yet easily transformed from a necessary security measure to an unlawful violation of human rights. States justify it as needed to protect against terrorism and ensure national security.¹⁹ However, those same states commonly abuse this rationale by jailing dissidents and innocents, such as Ahmad Qatamesh, without due process.²⁰ During the detention process, certain procedural and substantive standards must be met to ensure compliance with international law and justice, even for suspected terrorists. Any detention without a charge is unlawful but states often use terrorism as a vague catch-all ground for detention when a valid charge may not exist. Pretrial detention is legal in certain circumstances but tends to be abused by states who look to silence or intimidate opponents.²¹ As arbitrary detention becomes more commonplace in times of conflict or crisis, it is natural that fears of further terrorist activity or conflict lead to heightened levels of detention and arrests. States often use vague terrorism justifications to detain political dissidents, journalists, or opposing party members.²² In states of emergency these crackdowns escalate alongside dangerous levels of arbitrary detentions.²³ It is therefore imperative to set sufficient, unwavering standards around the arbitrary detention of innocent persons in domestic and international law.

When national judicial systems fail to provide adequate protections for persons in detention, there are few supra-national institutions with the competence and the authority to address these systemic human rights violations. The United Nations Working Group on Arbitrary Detention is one of the first working groups set up by the United Nations and has the specific mandate to consider cases of arbitrary detention. Its

18. OFF. OF THE HIGH COMM'R FOR HUM. RTS. IN COOPERATION WITH THE INT'L BAR ASS'N, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE 165 (2003) [hereinafter ADMINISTRATION OF JUSTICE].

19. OHCHR, Fact Sheet No. 32, Terrorism and Counter-terrorism, at 24, 36 (July 7, 2008), <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> [hereinafter Fact Sheet No. 32].

20. *Arbitrary Detention*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/human-rights-issues/arbitrary-detention/> (last visited Nov. 13, 2020).

21. U.N. Hum. Rts. Council [HRC], Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, 21-25 August 2017, ¶ 38, U.N. Doc. A/HRC/WGAD/2017/61 (Sept. 15, 2017).

22. HRC, Rep. of the Working Group on Arbitrary Detention, ¶ 52, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) [hereinafter A/HRC/10/21].

23. HRC, Rep. of the Working Group on Arbitrary Detention, ¶ 59, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) [hereinafter A/HRC/7/4].

jurisprudence thus far on terrorism and arbitrary detention has been sparse, although hinting at the need for further discussion on these issues. The frequency and brutality with which many arbitrary detentions occur today necessitate a codified international legal standard for the Working Group to use in its future case deliberations, especially in situations of military occupation and states of emergency.

This Note will analyze the Working Group’s jurisprudence on arbitrary detentions in the name of terrorism, including state justifications for terrorism charges and legal guarantees of substantive and procedural due process, especially in states of emergency. This Note will further propose a set of legal standards for states and the Working Group to use in cases of arbitrary detention on terrorism grounds.

II. BACKGROUND

A. International Law on Arbitrary Detention

The primary international legal principle on arbitrary detention comes from Article 9 of the ICCPR, which ensures the right to liberty and security of the person.²⁴ Article 9 also provides that arrestees shall be informed of the charges against them, be brought promptly before a judge to take proceedings before a court, and have an enforceable right to compensation.²⁵

Besides the principal document of the ICCPR, Article 9 of the UDHR is another germane instrument, providing that “no one shall be subjected to arbitrary arrest, detention or exile.”²⁶ As a right acknowledged in this cornerstone document, arbitrary detention is understood as illegal to almost every state that is a signatory to the UDHR.²⁷ While neither the ICCPR nor the UDHR are binding legal documents, their widespread ratifications and universal codification evidence *jus cogens*, or a customary international norm against arbitrary detention.²⁸

In addition to international agreements, there are several regional instruments that also ban arbitrary detention. Article 5 of the European

24. 999 U.N.T.S. 171, *supra* note 14, art. 9.

25. *Id.*

26. G.A. Res. 217 (III) A, *supra* note 16, arts. 9, 10.

27. Although the UDHR is not a binding legal document, it has inspired and given rise to multiple binding international legal documents and domestic legislation. *Universal Declaration of Human Rights*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited Nov. 13, 2020).

28. See Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law. HRC, Rep. of the Working Group on Arbitrary Detention, ¶ 43, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012) [hereinafter A/HRC/22/44].

Convention on Human Rights and Article 7(1) of the American Convention on Human Rights both provide that everyone has the right to liberty and security.²⁹ Article 6 of the African Charter on Human and Peoples' Rights also states more specifically, "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."³⁰

As a widely codified and accepted right, the right of protection from arbitrary detention is binding on states internationally and is mirrored in domestic legislation. In practice, however, states venture past the confines of international law and often bend their own domestic laws on administrative detention to allow for certain arrests, particularly in times of conflict.

29. The United Nations Convention for the Protection of Human Rights and Fundamental Freedoms provide:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222. *See also* Organization of American States, American Convention on Human Rights, art. 7(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (defining a similar right to personal liberty).

30. Org. of African Unity [OAU], African Charter on Human and Peoples' Rights, art. 6, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981).

B. *The UN Working Group on Arbitrary Detention*

The Commission on Human Rights established the UN Working Group on Arbitrary Detention in 1991 with the purpose “to investigate detention imposed arbitrarily and inconsistently with international standards in the UDHR and legal instruments accepted by the States concerned.”³¹ The Working Group is the only charter-based mechanism at the UN mandated to consider individual complaints from individuals around the world.³² It can also receive cases from governments, IGOS, NGOs, and individuals’ representatives.³³ Moreover, the Working Group is the sole UN body entrusted with a specific mandate to deal with cases of arbitrary detention.³⁴ The Working Group submits its opinions to the Human Rights Council and can investigate cases of arbitrary or unlawful detention, seek and receive information, and present reports to the Commission on Human Rights.³⁵ The five independent experts serving as members are appointed by the Chairman of the Human Rights Council and must carry out their tasks with “discretion, objectivity, and independence.”³⁶ The Working Group holds three sessions every year and its mandate is extended by the Commission on Human Rights every three years.³⁷

The procedure for submitting an application to the Working Group involves four stages.³⁸ First, the individual must bring the matter to the attention of the Working Group, usually through an optional questionnaire.³⁹ Second, the host government is given an opportunity to respond and refute the allegations within ninety days.⁴⁰ Third, the government’s reply is transmitted to the original petitioner for final comments.⁴¹ Finally, the Working Group issues its decision and recommendations on the case.⁴²

31. HRC, Rep. of the Working Group on Arbitrary Detention, ¶ 1, U.N. Doc. A/HRC/27/47 (June 30, 2014) [hereinafter A/HRC/27/47].

32. *Id.* Charter-based mechanisms are established pursuant to provisions in the United Nations Charter. See *U.N. Documentation: Human Rights*, U.N. DAG HAMMARSKJÖLD LIBR., <https://research.un.org/en/docs/humanrights/charter> (last visited Nov. 13, 2020).

33. See 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. 687, 695 (2008).

34. See *Deliberations of the Working Group on Arbitrary Detention*, ¶ 37 (Oct. 17, 2013), <https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>.

35. Fact Sheet No. 26, *supra* note 13, at 3.

36. *Id.*

37. *Id.*

38. *Id.* at 5.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 5–6.

Cases are considered arbitrary if they fall into one or more of five categories, including when there is (1) no possible legal basis for the detention; (2) the detention results from the exercise of certain protected freedoms; (3) non-observance of international norms on the right to a fair trial; (4) prolonged administrative custody of asylum seekers, immigrants, or refugees; and (5) the detention constitutes a violation of international law on the grounds of discrimination of certain protected categories.⁴³

The Working Group has written hundreds of decisions on cases submitted by several member states.⁴⁴ Working Group decisions are not legally binding but serve as an international quasi-judicial alternative to justice denied to petitioners in their own domestic courts that have failed them.⁴⁵ A decision in favor of the petitioner, as is usually the case, can have a shining light effect of holding the state government accountable for its actions.⁴⁶ Decisions also further arbitrary detention jurisprudence in international law, facilitating discussion and collaboration by member states on critical human rights issues.⁴⁷

C. Terrorism as a Justification for Detention

While the right to liberty and security is violated in cases of arbitrary detention, a state generally owes this same right to its population in preventing terrorist attacks and ensuring national security.⁴⁸ Human rights are at issue on both sides of preventing and prosecuting terrorism, but the problem arises with the latter when detaining persons accused of terrorist activity. Human Rights Watch notes that “[j]ust as terrorism targets innocent civilians, so too are innocent civilians becoming casualties in the international campaign against terrorism.”⁴⁹ The presumption of innocence until proven guilty is a guarantee that must be provided even in the counter-terrorist context.

43. OHCHR, Individual Complaints and Urgent Appeals, <https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx> (last visited Nov. 13, 2020).

44. See OHCHR, Opinions Adopted by the Working Group on Arbitrary Detention, <https://www.ohchr.org/en/issues/detention/pages/opinionsadoptedbythewgad.aspx> (last visited Nov. 13, 2020).

45. Genser & Winterkorn-Meikle, *supra* note 33, at 690, 704.

46. *Id.* at 690.

47. *Id.* at 698.

48. Fact Sheet No. 32, *supra* note 19, at 1.

49. *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, HUM. RTS. WATCH, at 2 (Mar. 25, 2003), <https://www.hrw.org/legacy/un/chr59/counter-terrorism-bck.pdf>.

The universal consensus and war against terror creates almost a zone of safety around any state action taken in the name of counter-terrorism.⁵⁰ The vague definition of terrorism enlarges that zone of safety to dangerous levels where a state's actions go unquestioned, heightening the possibility of derogation of human rights and personal liberty, often with a state labeling any and all opponents as terrorists to allow such derogation.⁵¹ Such zones of safety “strengthen the state's hand to justify breaches of non-derogable rights... and are clearly instrumental in validating a broad range of limitations on derogable rights.”⁵² The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ni Aolain, notes, “[T]he vocabulary of terrorism and counterterrorism remains ubiquitous in state positioning and continues to provide a justificatory and legitimizing rationale for legislative and executive action.”⁵³ The global war on terror has created a worldwide sense of panic forcing state governments to react with a form of threat management that results in higher rates of arbitrary detentions.

The misuse and abuse of national security and counter-terrorism laws directly conflicts with international law on arbitrary detention. The Working Group has historically expressed its concerns regarding arbitrary detention in counter-terrorism contexts, including the extreme length of detentions and deprivation of due process of the detainees.⁵⁴ The Working Group has noted multiple times that vague and broad definitions of terrorism “bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention.”⁵⁵ In 2009, given the growing trend in terrorism allegations, the Working Group outlined certain principles to “be used in relation to deprivation of liberty of persons accused of acts of terrorism.”⁵⁶ The principles closely followed the established rights in the ICCPR and UDHR, and the Working Group has previously recommended the Human Rights Council consider setting up a special forum to work on arbitrary detention in the counter-terrorism

50. Fionnuala Ní Aoláin, *The Cloak and Dagger Game of Derogation*, in HUMAN RIGHTS IN EMERGENCIES 124, 134 (Evan J. Criddle, ed., 2016).

51. *Derogation in Times of Public Emergency*, U.N. OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/derogation-during-public-emergency.html> (last visited Nov. 13, 2020).

52. Ní Aoláin, *supra* note 50, at 135.

53. *Id.* at 129.

54. A/HRC/7/4, *supra* note 23, ¶¶ 60–61.

55. U.N. Comm'n on Hum. Rts. [CHR], Rep. of the Working Group on Arbitrary Detention, ¶ 64, U.N. Doc. E/CN.4/2004/3/Add.3 (Dec. 15, 2003).

56. A/HRC/10/21, *supra* note 22, ¶ 53.

context, highlighting the uniqueness and importance of the issue.⁵⁷ Given the Working Group's heightened awareness of the unique question of arbitrary detentions in the counter-terrorism context, there is a high need for stronger codified standards in its jurisprudence.

There is no official definition of terrorism in international humanitarian law, therefore, states have established their own varying degrees of terrorism legislation.⁵⁸ States are often afforded broad latitude to determine threats and responses without serious oversight. In some cases, this exercise of power can, intentionally or not, increase panic, chaos, and insecurity. The UN Counter-Terrorism Task Force states that “[a]ll counter-terrorism measures, including those involving the deprivation of liberty, must comply fully with States’ international human rights obligations.”⁵⁹ Certain international legal instruments provide guidance to states in defining terrorism in their national laws, although states are given considerable deference in drafting their own terrorism legislation.⁶⁰ This flexibility can lead to dangerous derogations of human rights on a national level.

D. States of Emergency

The Working Group recognizes that the main causes of arbitrary detention are related to states of emergency.⁶¹ While fundamental human rights are codified in international treaties, these treaties also allow for derogations, or “‘extraordinary limitations’ on the exercise of human rights,” in extraordinary circumstances, such as public emergency.⁶² Although Article 9 is not expressly listed in Article 4(2) of the ICCPR as a non-derogable right, it nonetheless takes on the principle of non-derogation.⁶³ Article 4 of the ICCPR says that in times of public emergency, states may take measures derogating from their obligations under the ICCPR.⁶⁴ However, such measures must be consistent with states’ other obligations under international law.⁶⁵

57. *Id.* ¶ 55.

58. Fact Sheet No. 32, *supra* note 19, at 8–9, 11.

59. U.N., Counter-Terrorism Implementation Task Force [CTITF], Basic Human Rights Reference Guide: Detention in the Context of Countering Terrorism, ¶ 11 (Oct. 2014), <https://www.ohchr.org/EN/newyork/Documents/DetentionCounteringTerrorism.pdf>.

60. Fact Sheet No. 32, *supra* note 19, at 5–7.

61. CHR, Rep. of the Working Group on Arbitrary Detention, ¶ 106, U.N. Doc. E/CN.4/1996/40 (Dec. 15, 1996).

62. ADMINISTRATION OF JUSTICE, *supra* note 18, at 16, 814–15.

63. See 999 U.N.T.S. 171, *supra* note 14, arts. 4(2), 9.

64. *Id.* art. 4(1).

65. *Id.*

The Human Rights Committee has interpreted Article 4 of the ICCPR to read that although certain rights are derogable, states must still follow the principle of proportionality and measures taken in derogation must be “required by the exigencies of the situation.”⁶⁶ The Human Rights Committee further states that the specific inclusion of certain fundamental rights in Article 4 as non-derogable recognizes the preemptory nature of those fundamental rights, but the list of preemptory norms extends beyond the scope of Article 2 as well.⁶⁷ The Committee stated:

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or preemptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.⁶⁸

The Human Rights Committee therefore recognizes the fundamental guarantee against arbitrary detention as non-derogable.⁶⁹ The Working Group has also stated that the prohibition of arbitrary deprivation of liberty constitutes *jus cogens* as a fundamental, overriding principle in international law and is “fully applicable in all situations.”⁷⁰ Several UN bodies and international organizations thus hold that Article 9 is a non-derogable right and cannot be suspended, even in a state of emergency.

In a state of war, the standards for arbitrary detention change, allowing states to take measures as required by the exigencies of the situation for national security. General Comment No. 29 on states of emergency notes the importance of states not abusing their emergency powers by declaring unnecessary states of emergency.⁷¹ The Human Rights Committee cautions against derogations from human rights during states of emergency and limits any derogations to “those strictly required by the exigencies of the situation.”⁷² Furthermore, General Comment 35 on Article 9 of the ICCPR emphasizes that Article 9 against arbitrary detention

66. Human Rights Committee, CCPR General Comment No. 29, Article 4: States of Emergency, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment 29].

67. *Id.* ¶ 11.

68. *Id.*

69. Human Rights Committee, CCPR General Comment No. 35, Article 9: Liberty and Security of Person, ¶ 66, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter General Comment 35] (“[I]nsofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.”).

70. A/HRC/22/44, *supra* note 28, ¶ 51.

71. General Comment 29, *supra* note 66, ¶ 3.

72. *Id.* ¶ 4.

should be read complementarily with other rules of international humanitarian law in armed conflict and should not be derogated from even in times of war.⁷³ The Working Group thus heavily scrutinizes states of emergency when used as a justification by states to derogate from the guarantee against arbitrary detention.⁷⁴

E. Relevant Thematic Areas in the Working Group's Case Law

This Section lays out several growing thematic areas in the Working Group's jurisprudence on terrorism, including how to analyze a sufficient justification for administrative detention, particularly in states of emergency. First, the Working Group has exhibited a pattern of expressing concern for state laws on terrorism and the broad definitions of terrorism within them. Second, the Working Group's jurisprudence contains a theme of caution for the reasons for arrest, primarily regarding charges of membership in a terrorist organization and violations of free speech. Third, the procedural guarantees of prompt and proper legal process and due process rights are acknowledged consistently and through a focused lens in states of emergency.

1. State Definitions of Terrorism

With no international definition of terrorism, states are free to place their own limits on the definition of a crime of terrorist involvement such as the crime of an act of terror or membership in a terrorist organization.⁷⁵ The Working Group has persistently highlighted the dangers of such varying and vague definitions, although it could more strongly call upon states to reform their domestic legislations.

Turkey presents a prime example of Working Group jurisprudence of cases during states of emergency. Following the failed coup in 2016, President Erdogan declared a state of emergency lasting for two years.⁷⁶ Mass arrests of journalists, political dissidents, opponents, human rights defenders, and lawyers on terrorism charges ensued, with the government often claiming a terrorist connection with the Fethullah Terror Organization (FETO), who were associated with the 2016 coup.⁷⁷ A seminal

73. General Comment 35, *supra* note 69, ¶¶ 64–65.

74. See El Hadji Malick Sow (Chairperson-Rapporteur), Rep. of the Working Group on Arbitrary Detention, ¶¶ 72–73, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010).

75. Fact Sheet No. 32, *supra* note 19, at 39.

76. Peter Kenyon, *Turkey's State of Emergency Ends, While Erdogan's Power Grows and "Purge" Continues*, NPR (July 26, 2018, 10:11 AM), <https://www.npr.org/2018/07/26/63230775/5/turkeys-state-of-emergency-ends-while-erdogans-power-grows-and-purge-continues>.

77. *Lawyers On Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey*, HUM. RTS. WATCH (April 2019), <https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive->

Working Group case on Turkish terrorist designations is the case of Hamza Yaman. In the Working Group’s recent Opinion No. 78/2018 from Turkey concerning Hamza Yaman, the Court found the Turkish authorities had failed to establish a legal basis for Yaman’s detention, rendering the detention arbitrary.⁷⁸ Yaman was a human rights defender and charged under the Turkish Criminal Code for membership in a terrorist organization.⁷⁹ During Stage 2 of the Working Group process, the government of Turkey responded to Yaman’s complaint by pointing to the nationwide state of emergency and its notification of derogation under the ICCPR.⁸⁰ While the Working Group acknowledged the legal sufficiency of the notification, it stated in its decision that “in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorize the arrest.”⁸¹ The Working Group thus focused on the specific domestic terrorism legislation and its unlawful application in detaining suspected terrorists.

Additionally, the Working Group regularly expresses concern over vague and broad state definitions of terrorism and the dangers they pose. For example, in Opinion No. 42/2019 concerning Essam El-Haddad and Gehad El-Haddad of Egypt, the Working Group considered the vague provisions of Egypt’s antiterrorism law and highlighted that it “could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law.”⁸² In Opinion No. 10/2018 concerning Walled Abulkhair of Saudi Arabia, the Working Group reiterated its concern “that antiterrorism laws ‘by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention.”⁸³ The Working

prosecutions-and-erosion-fair-trial-rights-turkey. The U.S. State Department 2018 Human Rights Report on Turkey noted, Prosecutors used a broad definition of terrorism and threats to national security, and in some cases, according to defense lawyers and opposition groups, used what appeared to be legally questionable evidence to file criminal charges against and prosecute a broad range of individuals, including journalists, opposition politicians (primarily of the pro-Kurdish HDP), activists, and others critical of the government. *See* U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Turkey 2018 Human Rights Report 15–16 (2018).

78. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Third Session, 19-23 November 2018, U.N. Doc. A/HRC/WGAD/2018/78 (Jan. 31, 2019) [hereinafter WGAD 2018/78].

79. *Id.* ¶ 7.

80. *Id.* ¶¶ 39–40.

81. *Id.* ¶ 69.

82. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Fifth Session, 12-16 August 2019, ¶ 60, U.N. Doc. A/HRC/WGAD/2019/42 (Oct. 3, 2019).

83. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-First Session, 17-26 April 2018, ¶ 56, U.N. Doc. A/HRC/WGAD/2018/10 (July 4, 2018) [hereinafter WGAD 2018/10].

Group often reiterates that “the prohibition of terrorist conduct must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct.”⁸⁴ While such concerns about state terrorism definitions take up no more than a few paragraphs in the Working Group’s opinions, they have far-reaching consequences in every state’s judicial system and require significant reform and attention to prevent future human rights abuses.

2. Specificity of Warrant and Reason for Arrest

A second thematic area in the counter-terrorism context is the reason for the arrest and specificity of allegations in the warrant. The Working Group will look to the language of the arresting document and evidence cited in determining whether a detainee’s rights were violated in contravention of international human rights law in accordance with the five categories of cases.⁸⁵

In Opinion No. 60/2017 concerning Andualem Aragie Walle, the Working Group addressed Ethiopia’s Anti-Terrorism Proclamation, which Aragie was arrested for criticizing.⁸⁶ Ethiopian authorities accused Aragie of spying for “foreign forces” and being involved in staging terrorist attacks.⁸⁷ Aragie’s petition noted the vagueness of his charge document and insufficient information for his arrest under the Criminal Code and Anti-Terrorism Proclamation.⁸⁸ In its decision, the Working Group cited the African Commission on Human and Peoples’ Rights’ resolution on Ethiopia, noting its grave alarm at the arrests of journalists and political opposition members charged with terrorism.⁸⁹ The Anti-Terrorism Proclamation was so vague and enabling that it effectively “provided the framework for arbitrary detention.”⁹⁰ The Working Group decision tied the arbitrariness of the arrest and subsequent detention with the originating law, and criticized the state government for effectively legislating to allow arbitrary detentions.

Another example is Opinion No. 472018 concerning Hisham Ahmed Awad Jaafar from Egypt, where the petitioner, a journalist, was

84. *Id.* ¶ 56.

85. Individual Complaints and Urgent Appeals, *supra* note 43.

86. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, 21-25 August 2017, ¶ 8, U.N. Doc. A/HRC/WGAD/2017/60, (Oct. 5, 2017).

87. *Id.* ¶ 11.

88. *Id.* ¶ 13.

89. *Id.* ¶ 43.

90. *Id.* ¶ 47.

detained for being on the terrorist list.⁹¹ The petition noted that Jaafar’s detention followed a pattern of arbitrary detentions of journalists and advocates under terrorism charges.⁹² The Working Group stated in its decision that Egyptian authorities seemed to only target Jaafar for his political activities, constituting a violation of the UDHR, which protects against discrimination for political and other opinions.⁹³ The acknowledgement of what is terrorist activity versus what is political opinion and freedom of speech is an integral takeaway from the Working Group’s Jaafar decision and should be expanded upon to create comprehensive guidelines in future cases.

The Working Group has also addressed terrorism-based detention as a pretense for religious persecution in the Gaybullo Jalilov case.⁹⁴ Jalilov was an Uzbek human rights activist arrested for religious extremism and terrorism.⁹⁵ The Working Group found that the Uzbek government provided insufficient evidence of a link between Jalilov and an extremist organization, and deemed his detention arbitrary for “being a practicing Muslim and for criticizing the Uzbek government’s treatment of Muslims.”⁹⁶ The Working Group therefore found a Category V violation as Uzbekistan deprived Jalilov of his liberty on discriminatory grounds based on his religion rather than on a valid terrorism charge.⁹⁷

Finally, the Working Group addressed the substantive legality of Hamza Yaman’s detention in Opinion No. 78/2018, which the government held as valid because Yaman was a member of a terrorist organization as a continuous crime. However, the Working Group rejected the government’s argument as “contrary to the presumption of innocence.”⁹⁸ This lack of *flagrante delicto* was also noted in Opinion No. 53/2019 from Turkey on Mr. and Mrs. Göksan.⁹⁹ In the Göksan opinion, the

91. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Second Session, 20-24 August 2018, ¶¶ 4, 20, U.N. Doc. A/HRC/WGAD/2018/47 (Dec. 17, 2018) [hereinafter WGAD 2018/47].

92. *Id.* ¶ 38.

93. *Id.* ¶ 81.

94. David Weissbrodt & Brittany Mitchel, *The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence*, 38 HUM. RTS. Q. 655, 698 (2016); see also HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty-Sixth Session, 29 April-3 May 2013, ¶¶ 69–76, U.N. Doc. A/HRC/WGAD/2013/4, (July 25, 2013) [hereinafter WGAD 2013/4].

95. WGAD 2013/4, *supra* note 94, ¶¶ 69–76.

96. Weissbrodt & Mitchell, *supra* note 94, at 698.

97. WGAD 2013/4, *supra* note 94, ¶ 76.

98. WGAD 2018/78, *supra* note 78, ¶ 70.

99. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Fifth Session, 12-16 August 2019, ¶ 9, U.N. Doc. A/HRC/WGAD/2019/53 (Sept. 18, 2019) [hereinafter WGAD 2019/53]. *Flagrante delicto* means a blazing offense.

Working Group commented on Turkey's designation of FETO as a terrorist organization, citing the Council of Europe Commissioner for Human Rights on the need for evidence of illegal activity to criminalize membership in an organization rather than just pure affiliation.¹⁰⁰ In the Göksan case, the Working Group denied the terrorist label given by the Turkish government and declared their detention arbitrary for discrimination on the basis of political opinion.¹⁰¹

Another relevant finding from the Yaman case is the Working Group's ruling on social media, which found that the government had not adequately argued how Yaman's alleged conduct demonstrated his membership in a terrorist organization.¹⁰² This finding heightens the standard of evidence for online terrorist involvement and can be expanded upon in future cases. The Working Group in its deliberations has noted this new phenomenon and observed, "some States are inclined to resort to deprivation of liberty, asserting that the use of the Internet in a given case serves terrorist purposes, whereas, in fact, this proves later to be just a pretext to restrict freedom of expression and repress political opponents."¹⁰³ The Working Group often makes a point to distinguish between true crimes of terror and detention based on political opinion and should reaffirm this difference in future cases.

3. Procedural Guarantees and Due Process

In addition to the substantive contours of the terrorism charges, the Working Group adjudicates on procedural guarantees of due process and the right to a fair trial, as stated in the ICCPR. Article 9 of the ICCPR provides that arrestees must be informed of the reasons for their arrest, be brought promptly before a judge, and have a court decide without delay on the lawfulness of their detention.¹⁰⁴ These are the baseline procedural guarantees against arbitrary detention that lay the foundation to prevent security-based detentions from violating international law. The Working Group's decisions will easily respond to allegations of denial of due process and unsafe detention conditions. The Group has even authored a report titled "The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty

100. *Id.* ¶¶ 76–77. FETO, or the Gülen movement, is an Islamist movement designated as a terrorist organization by Turkey. *Turkey Coup: What is Gulen Movement and What Does it Want?*, BBC NEWS (July 21, 2016), <https://www.bbc.com/news/world-europe-36855846>.

101. WGAD 2019/53, *supra* note 99, ¶ 90.

102. WGAD 2018/78, *supra* note 78.

103. Leïla Zerrougui (Chairperson-Rappporteur), Rep. of the Working Group on Arbitrary Detention, ¶ 33, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005).

104. 999 U.N.T.S. 171, *supra* note 14, art. 9.

to Bring Proceedings Before a Court” to provide guidance to states in complying with international law.¹⁰⁵

The challenge of procedural guarantees in the counter-terrorism context is to guarantee a neutral arbiter in a timely fashion. For example, in Case No. 29/2019, the Working Group found a violation of this procedural guarantee when a minor was not brought before a judge until 244 days after his arrest.¹⁰⁶ Detainees must also be promptly informed of the charges against them, ideally at the time of arrest.¹⁰⁷ Yet in preventative counter-terrorism detentions, this guarantee is often subsumed by the state’s interest in containing terrorist threats before they occur. The reasons for arrest can be speculative at best. To illustrate, in the case of Nizaar Zakka, the Working Group found a violation of the ICCPR when Mr. Zakka was not informed of the charges against him by Iranian authorities until 11 months after his arrest.¹⁰⁸

In addition, there must be strong evidence from governments to justify administrative detention. In the Göksans’ case, the Working Group found insufficient evidence on the detainees’ indictments when the Turkish government only showed evidence of their use of a mobile application with no further link to terrorist activity.¹⁰⁹ The right to a fair trial also necessitates the ability to consult a lawyer. In a case concerning a minor from Egypt, the Working Group found a Category III violation when a minor was tortured to make a confession. His lawyer was not present, and he did not have an opportunity to work with a lawyer to prepare his defense.¹¹⁰

As shown above, the Working Group regularly decides on procedural guarantees and highlights the unique challenges to due process rights during states of emergency. The Working Group has hinted at several customary standards for such cases, and these standards are expanded upon in the following section to be more normative.

105. HRC, Rep. of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/37 (Jul. 6, 2015).

106. HRC, Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Fourth Session, 24 April-3 May 2019, ¶ 39, U.N. Doc. A/HRC/WGAD/2019/29 (Oct. 9, 2019) [hereinafter WGAD 2019/29].

107. ADMINISTRATION OF JUSTICE, *supra* note 18, at 181.

108. HRC, Opinions Adopted by the Working Grp. on Arbitrary Det. at its Eighty-Fourth Session, 24 April-3 May 2019, ¶ 40(a), U.N. Doc. A/HRC/WGAD/2019/51 (Oct. 8, 2019).

109. WGAD 2018/78, *supra* note 78.

110. WGAD 2019/29, *supra* note 106, ¶¶ 59, 62–63.

III. ANALYSIS

The trends on counter-terrorism in the Working Group's jurisprudence are becoming increasingly relevant and must be strongly adopted as substantive and procedural standards to prevent arbitrary detentions. The Working Group has repeatedly expressed concern over the derogation of human rights during states of emergency. The Working Group should take a more stringent approach in its case law to confront states for vague definitions of terrorism and unlawful application of counter-terrorism laws that lead to arbitrary detentions without due process of law. By maintaining coherent and fixed standards around arbitrary detentions in the counter-terrorism context, the Working Group can strengthen its jurisprudence to positively impact state compliance with international human rights law.

Although the Working Group has highlighted principles and guideposts for addressing arbitrary detention in the counter-terrorism context, this specific area of international law could be better codified and followed. Detention conditions and procedural guarantees are easy to spot and rule on, whereas the substantive guarantees of counter-terrorism laws and non-arbitrary detention can prevent such detentions from happening on the front-end.

A. *Substantive Standards*

While state counter-terrorist efforts are necessary in containing the spread of violence and terrorism, the use of the term to justify detaining persons has been abused by authoritarian-leaning regimes and governments. State authorities should present a warrant for arrest specifying the reason for arrest, detailing intelligence on why arrest of this person is necessary, and what state interest would be furthered by depriving this person of their liberty. In addition, warrants at the time of arrest should specify the approximate duration the state anticipates holding the suspect, the detention facility where the suspect will be held, and the specific form of detention, such as solitary confinement. The provision of this basic information is required under international law, including Article 10 of the UDHR and Article 14 of the ICCPR, regardless of the arbitrariness of the terrorism charges.¹¹¹

In situations of serious emergency or conflict, derogations may occur, but the Working Group and the international community must maintain a consistent standard to truly ensure basic human rights. International humanitarian law currently limits derogations under Article 4(1) of the

111. 999 U.N.T.S. 171, *supra* note 14, art. 14; G.A. Res. 217 (III) A, *supra* note 16, art. 10.

ICCPR to the “extent strictly required by the exigencies of the situation.”¹¹² Any derogations must be necessary, proportional, and reasonable, and not inconsistent with international law obligations.¹¹³ There must be stronger, more definitive lines around the requirement of reasonableness, and “[a] state looking to engage in extended detention should be required to demonstrate more than simply a reasonable belief or suspicion that the suspect poses a threat.”¹¹⁴ The Working Group’s stated concern of vague and broad state definitions of terrorism can be acted upon to codify the standard of arbitrariness and ensure the specificity sought by the Working Group in its decisions. As the Working Group noted in its Opinion No. 10/2018 concerning Walled Abulkhair of Saudi Arabia, terrorism laws must specifically lay out what is legal and what is illegal to afford citizens the ability to discern what is punishable conduct during public emergencies.¹¹⁵ The Working Group and the UN in general must take a stronger stand against derogations from human rights during public emergency situations and remain consistent in their condemnations to encourage best state practices in times of crisis.

The Working Group has repeatedly highlighted insufficient reasons for administrative detentions in many of its decisions and the need for a stronger nexus between individuals and supposed terrorist involvement. The European Court of Human Rights has stated that police must properly interrogate detainees “about their suspected involvement in specific crimes and their suspected membership of proscribed organisations” if arresting someone on suspicion of being a terrorist.¹¹⁶ In the Yaman case, the Working Group has mirrored this sentiment by emphasizing the need to specify connections to terrorist activity, and the strength and urgency of those associations.¹¹⁷ The Working Group should set a standard for association with a designated terrorist organization as opposed to membership in a designated terrorist organization so that individuals are not arbitrarily detained based on a weak historical connection to a political party in which they no longer, or never did, participate. The Working Group should also require stronger evidence and a higher threshold of involvement in terrorist organizations to allow for preventative detention. Further, states should evidence a stronger nexus between the detainee and

112. 999 U.N.T.S. 171, *supra* note 14, art. 4(1).

113. Fact Sheet No. 32, *supra* note 19, at 29.

114. Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT’L L. 593, 645 (2009).

115. WGAD 2018/10, *supra* note 83, ¶ 56.

116. ADMINISTRATION OF JUSTICE, *supra* note 18, at 183 (*quoting* Fox, Campbell and Hartley v. the United Kingdom, 182 Eur. Ct. H.R. (ser. A) 1, 19 (1990)).

117. WGAD 2018/78, *supra* note 78, ¶ 73.

terrorist organization even before an arrest can take place. For example, tenuous connections with designated terrorist organizations should not be the basis for detention. Rather, states should present concrete evidence of the detainee recently taking action in furtherance of terrorist activity. A time limitation—such as activity within the last five or ten years—can serve as a helpful guidepost for drawing the line between membership and affiliation to criminalize legitimate terrorist involvement and detain a suspect.

The Working Group should also strongly consider the situation surrounding the initial arrest and detention in its decisions on whether a detention is arbitrary. Mass arrests often take place during or after major protests.¹¹⁸ Peaceful protests cannot on their own justify detention; in the frenzy of a protest, authorities have no time nor knowledge of attendees and cannot give a valid justification for arrest other than participating in the protest. Protests often engage an element of free speech and political opinion which is expressly protected under Article 2 of the UDHR. This Article is regularly cited by the Working Group as grounds for arbitrary detention and is an express category of the Working Group's case law.¹¹⁹

A critical part of the solution to this issue is directly addressing the domestic law in which arbitrary detentions principally occur. The Working Group has within its jurisprudence the optimal opportunity to address problematic practices and laws both on their face and in their application. Professor Monica Hakimi notes that the Human Rights Committee and European Court of Human Rights “could have—and should have—examined more carefully the domestic standards under which detentions were authorized.”¹²⁰ While the Working Group's opinions are not binding, they are certainly persuasive, and the Working Group can call upon states to review their domestic counter-terrorism legislation in opinions or even request state visits.¹²¹

In general, adjudication of arbitrariness should encompass the concept of proportionality that anything greater than is necessary in the situation is arbitrary. To demonstrate, detention should be permitted “only where the detainee himself poses a serious security threat, where

118. Take for example the protest at the Al-Aqsa Mosque in East Jerusalem following the United States' recognition of Jerusalem as Israel's capital in 2017. See *Palestinian Prisoner's Day: Israel's Use of Arbitrary Detention as a Tool of Repression and Control of Palestinians*, AL-HAQ, (Apr. 20, 2018), <http://www.alhaq.org/advocacy/6241.html>.

119. WGAD 2018/47, *supra* note 91, ¶¶ 79–81.

120. Hakimi, *supra* note 114, at 645. Hakimi also notes, “The same is true of the Human Rights Committee's review of the systems for pure security-based detention in India and Israel.” *Id.*

121. OHCHR, Country Visits - Working Group on Arbitrary Detention, <https://www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx> (last visited Oct. 26, 2020).

detention is necessary to contain that threat, and where detention is calibrated to last no longer than necessary.”¹²² Detention of suspected terrorists seems most likely to lead to short-term detention to contain an immediate threat, while any long-term detentions raise questions of arbitrariness of detention for illegitimate reasons. This standard should be continuously followed to prevent derogations from human rights in states of emergency. The Working Group and states should more diligently consider the unique complexities in states of emergency in the counter-terrorism context and remain steadfast in their conviction to prevent arbitrary detentions in compliance with international law.

B. Procedural Standards

The basic standards of prompt and sufficient legal process, access to counsel, access to courts, etc., are often disregarded or ignored as the state of emergency continues. Given the robust history of the Working Group in condemning violations of procedural due process in its cases, the Working Group should continue to strongly condemn such violations in military occupations and acknowledge the unique challenges to detainees in occupations and states of emergency to be granted fair trials and due process.

Secrecy of evidence and prolonged detentions are the most common procedural faults during states of emergency. Secret evidence is a common practice in Israeli detentions of Palestinians, including that of Ahmad Qatamesh.¹²³ These practices go hand in hand with the vague terrorism justifications offered by authorities, if any justification is given at all. Professor Hakimi writes, “terrorism suspects must have the prompt and meaningful opportunity to challenge, before a neutral arbiter, the facts giving rise to detention and to offer evidence in rebuttal.”¹²⁴ Indeed, given the vagueness and broad contours of the definition of terrorism, a detainee needs a chance to present their case for before an impartial judiciary. Through the judicial process, classified security information on the detainee can be discussed and even shared in evidence. The Working Group must further acknowledge the secrecy and classification of many documents in terrorism cases of arbitrary detention, and firmly call upon states to allow detainees at least some access to some intelligence information before their trials so they can properly work with their counsel to assert a defense, especially before military tribunals in states of emergency. The procedural guarantee of access to evidence can highlight substantive

122. Hakami, *supra* note 114, at 643.

123. Strickland, *supra* note 4.

124. Hakami, *supra* note 114, at 642.

flaws in the arresting document as well, as in the Göksan case where Turkey presented just one piece of insufficient evidence in making an attenuated connection to a designated terrorist organization.¹²⁵

Furthermore, the standard to guarantee a neutral arbiter must be closely scrutinized. In states of emergency, the state apparatus often has a strong upper-hand and its power reaches far into the judicial branch, making the supposedly neutral branch of government another biased state institution. The Working Group should not only condemn the length of detentions and the denial of detainees to be afforded prompt and meaningful legal process, but also condemn the state in tampering with neutral judges deciding detention cases. The Working Group must also highlight the unique complexities of military occupations, such as of Palestine and Kashmir, and the role the occupying power plays in consuming all prior unbiased aspects of the government, warranting stronger procedural due process guarantees when citizens are under an occupying power and subject to military tribunals.

Compounding the vague state definitions of terrorism and the arbitrary reasons for arrest are the lack of procedural guarantees once a detainee is finally afforded a chance to appear before a tribunal to plead their case. The right to be informed of the charges against the detainee, the right to counsel, and the right to a free and fair trial before a neutral arbiter are codified procedural standards that must be strongly ruled upon when violated in counter-terrorism cases during states of emergency. Such baseline procedural guarantees are critical to ensure lawful detentions before addressing the substantive allegations of a crime. Even during instances of public emergency involving military courts and tribunals, the international community and Working Group must push for consistent adherence to the rule of law and international humanitarian law.

IV. CONCLUSION

The declaration of a state of emergency cannot in itself justify nor excuse an arbitrary detention of an innocent non-combatant on a vague terrorism charge. In these grey area conflicts, the law on human rights should remain black and white. The Working Group should strengthen its jurisprudence against arbitrary detentions in states of emergency and occupations. The Working Group represents a critical body as the only charter-based organ mandated to hear individual petitions from peaceful protestors, activists, and innocent civilians seeking justice. Stronger codified safeguards against human rights abuses in the Working Group's

125. See WGAD 2019/53, *supra* note 99, ¶ 69.

jurisprudence can help lead states and the international community toward more substantial change. Its mission and work must continue to strengthen human rights and call out states' counter-terrorism and counter-dissent campaigns in their constant attempt to silence critical voices, such as Ahmad Qatamesh.¹²⁶ The military occupations of Palestine and Kashmir especially deserve stronger procedural and substantive safeguards as situations most prone to human rights abuses. While peacetime may be suspended, the people's fundamental rights should be continuously guaranteed.

As John Cerone writes, "whether and to what extent states are bound by human rights obligations with respect to . . . occupation . . . is one of the most controversial and politically charged issues in current human rights discourse."¹²⁷ The issue of state adherence to international human rights and humanitarian law has always been and will continue to be the greatest barrier in advancing human rights. Even the proposition of these stronger standards, or any at all, carries the dangerous possibility of states taking the codification of legal standards for granted to strategize ways around the law.¹²⁸ But to face head-on the worst human rights crises of our time and not propose some legal limitations on the growing authoritarian power of states is to essentially relinquish the power of international law. With such vague and flexible definitions and even murkier waters of conflict, there should persist coherent standards of human rights and due process to ensure the right to liberty and security of every person.

126. *Starved of Justice: Palestinians Detained Without Trial by Israel*, *supra* note 6, at 32.

127. John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1451 (2006).

128. For example, in *Velasquez-Rodriguez v. Honduras*, the Inter-American Court on Human Rights raised concerns of essentially giving governments a roadmap on how to violate the law but still getting away with it by working around the stated parameters. *Velasquez-Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988).