

Engaging with the Working Group on Arbitrary Detention

This briefing note has been developed for the purpose of supporting UNHCR operations and other partners in their interactions with the [United Nations Working Group on Arbitrary Detention](#)¹ (WGAD). It is prepared as part of the tools and guidance notes developed under the framework of the [Global Strategy Beyond Detention](#)² and drafted based on information available on OHCHR website as well as on the [Methods of work of the Working Group on Arbitrary Detention](#)³, and UNHCR's own practical experience in engaging with the WGAD. This paper presents the working procedures of the WGAD and explores the options available to UNHCR operations and partners to engage with this mandate.

1. Introduction

The United Nations Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. It is now one of the Special Procedures of the Human Rights Council. Special Procedures Mandate Holders are independent human rights experts with mandates to report and advice on human rights from a thematic perspectives (for which there are currently 44 mandates) or on a country-specific basis (currently 12 mandates) perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights, including civil, cultural, economic, political, and social rights. The special procedures are distinct from the so-called treaty-based bodies, the legal basis for which is a human rights treaty (convention or covenant), and the members of which are independent experts of recognized competence in human rights, which are nominated and elected for fixed renewable terms of four years by State parties.

2. Mandate of the Working Group on Arbitrary Detention

The Human Rights Council has entrusted the WGAD with the following mandate:

- (a) To investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law;
- (b) To seek and receive information from Government and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives;
- (c) To present a comprehensive report to the Council at its annual session.

¹ Official page: <https://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>

² UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, 2014, available at: <http://www.refworld.org/docid/536b564d4.html>.

³ UN Human Rights Council, *Methods of work of the Working Group on Arbitrary Detention*, 4 August 2015, A/HRC/30/69, available at: <http://www.refworld.org/docid/55f7f8f4d.html>.

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The WGAD can discharge its mandate in relation to individual complaints or allegations regarding any UN Member State, even those States who are not Parties to certain human rights treaties, such as the ICCPR. From a substantive point of view, the mandate of the WGAD is related to assessing whether deprivation of liberty is arbitrary. Moreover, the understanding of the WGAD is that the prohibition of arbitrary detention and the right to challenge detention is non-derogable and part of customary international law.⁴

The WGAD is entitled to seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives. For this reason it constitutes an important actor with whom UNHCR can engage when seeking to prevent or redress situations of unnecessary or arbitrary detention of persons of concern. It is however crucial to recall that the mandate of the WGAD does not extend to the examination of the substance of asylum applications and is strictly limited to the examination of whether a particular detention decision or situation is found to be arbitrary.

Composition: The WGAD is composed of five independent experts. The Group is assisted by the Secretariat throughout the year and holds three sessions per year, each lasting between five and ten working days. The WGAD has three working languages: English, French and Spanish.

3. When is detention ‘arbitrary’?

The question of how is “deprivation of liberty” defined and when it might become “arbitrary” have been clearly addressed by UNHCR and the WGAD on several policy documents.

UNHCR recalls that “arbitrariness” is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose. Indefinite detention is arbitrary and maximum limits on detention should be established in law. Further, failure to consider less coercive or intrusive alternative means of achieving the purpose could also render detention arbitrary.⁵

In line with this position, when examining whether a particular situation qualifies as arbitrary deprivation of liberty, the WGAD considers specific criteria that may fall within of the following categories:⁶

⁴ Since the WGAD is one of the Human Rights Council’s Special Procedures, it can engage with any UN Member State. This is a significant advantage if compared to the UN treaty-body system since that system is limited to only those States which have ratified the respective treaties. Thus the WGAD can examine any cases of arbitrary detention arising in any UN Member State with the reference to all relevant international standards set forth in the Universal Declaration of Human Rights and other relevant international legal instruments, in particular the International Covenant on Civil and Political Rights, the Convention relating to the Status of Refugees of 1951 and the Protocol relating to the Status of Refugees of 1967, the International Convention on the Elimination of All Forms of Racial Discrimination and, when appropriate, any other relevant standards, such as the Convention on the Rights of the Child or other UN convention or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is also worth noticing that Special Procedures, including the WGAD, have global mandates, meaning that cases may be brought to their attention regardless of the State in which they occur and of whether the State has ratified any of the human rights treaties.

⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paragraph 18, available at: <http://www.refworld.org/docid/503489533b8.html>.

⁶ For further reference please refer to Fact Sheet No. 26, The Working Group on Arbitrary Detention, available at: <https://www.ohchr.org/Documents/Publications/FactSheet26en.pdf> and to the Revised Deliberation No. 5 on deprivation

Category I: when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to the detainee);

Category II: 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 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;

Category III: when the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character ;

Category IV: when asylum seekers, refugees or migrants are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy;

Category V: when the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.

4. What action can the WGAD take?

The WGAD can initiate an action either on the basis of information submitted to it regarding an alleged arbitrary detention situation or it can initiate an action *proprio motu*. Broadly, there are three types of actions that the WGAD can initiate. These are: investigation of individual complaints, urgent appeals and country visits.

If the WGAD, while examining allegations of violations of human rights, considers that the allegations could be more appropriately dealt with by another working group or special rapporteur, it will refer the allegations to the relevant working group or special rapporteur within whose competence they fall, for appropriate action. Where the WGAD receives allegations of violations of human rights that fall within its competence as well as within the competence of another thematic mechanism, it may consider taking appropriate action jointly with the working group or special rapporteur concerned.

4.1 Individual complaints (or regular procedure)

The so called “regular procedure” is usually triggered by communications sent to the WGAD by the individuals directly concerned, their families, their representatives or non-governmental organizations, although it may also receive communications from Governments and inter-governmental organizations and it may take up cases on its own initiative. In order to facilitate the task of those submitting communications, the WGAD has prepared a model questionnaire,⁷ which while not compulsory to use, offers valuable guidance on the information that the Working Group requires in order to initiate the action.

of liberty of migrants (Advanced Edited Version), WGAD, 7 February 2018, available at: https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

⁷ The Model Questionnaire can be found here: <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

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The regular procedure of a communication to the WGAD will trigger the adoption of an Opinion of the WGAD as to the arbitrariness of the detention. In some cases the WGAD may decide as well to issue an urgent appeal and/or proceed to further investigate the case.

The Opinions adopted by the WGAD are public documents and are available at: <http://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx>

Example of an Opinion:

In its Opinion 72/2017, the WGAD denounces the unrealistic character of the alternative to detention available to an asylum-seeker detained for 6 years in the US (with a very high amount set for the bail). The WGAD also points out the obligation for the State to ensure periodic and automatic review of the detention in the course of immigration proceedings. Such reviews should be organised at the State's initiative. The failure to provide the person with assistance of counsel and access to the services of a translator or interpreter is considered to have adversely affected the person's ability to challenge the legality of his continued detention.

The WGAD issues approximately 70-90 Opinions per year and all of these are adopted during its sessions (3 per year). The Opinions are adopted in one of the three working languages of the Working Group: English, French or Spanish.

What does an Opinion of the WGAD entail?

In each Opinion, which is a public document (once adopted), the WGAD examines whether the situation presented is one of arbitrary detention and if so, the WGAD qualifies the situation under one or more of the five categories presented in section 3 above. It then recommends that the State take appropriate actions (usually the release of the individual) and may also ask for reparations (e.g. compensation) as well as guarantees of non-repetition.

Each Opinion entails a follow-up section where the government is asked to respond within 6 months on the steps taken regarding the implementation of its recommendations. The WGAD may also invite other parties, such as civil society organisations, to provide further information on the implementation of the suggested measures.

➤ How to engage with the regular procedure of the WGAD?

It is worth noting that, first and foremost, submitting a complaint to the WGAD does not require prior exhaustion of domestic remedies. Furthermore, since the mandate of the WGAD covers all UN member states and different types of detention, it is clear that the Group receives far more communications than it is able to address through its regular communications procedure. Therefore, it is paramount that when bringing an individual case to the attention of the WGAD, the opportunity to engage with the WGAD is maximised by grouping similar cases together to the extent possible. The WGAD could then adopt an opinion which would concern large number of individuals thus maximising the impact of the individual opinion.

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When considering bringing an individual complaint to the attention of the WGAD please take into account the following stages the procedure may follow:

STAGE 1: Bring the situation to the attention of the WGAD

- Obtain explicit consent of all the individuals concerned.⁸ It may be that the consent cannot be obtained from the alleged victim but could be obtained from a close family member. It is always best to send the consent with the communication.
- Present the case in writing⁹, including details of each individual or, in for a multiple case submission, combine information into one format for all individuals. Be concise in your description, but make sure you include such important factual details as the date on which the person was detained, by whom, on what grounds and where the person is held. You may wish to highlight the relevant potential breaches of international law, quoting relevant instruments and provisions.
- It may be possible to include an annex, listing the names of other persons in a similar situation (with their consent).
- Submissions can be made in one of the three working languages of the WGAD: English, French or Spanish.
- Submissions should not exceed 20 pages, excluding Annexes.
- The written complaint or questionnaire can be sent by mail to: Working Group on Arbitrary Detention, c/o Office of the High Commissioner for Human Rights, United Nations Office at Geneva – 1211 Geneva 10, Switzerland; or by email to: urgent-action@ohchr.org (specifying in the subject box the mandate that is being addressed) and, in copy, wgad@ohchr.org.

STAGE 2: WGAD offers the Government an opportunity to respond

- The submitted communications are examined during the inter-sessional period of the WGAD and if the WGAD decides to take up the matter, it, through its Secretariat, will write to the Government concerned, inviting it to comment on the allegations made. This is a confidential communication between the State and the Group.¹⁰

⁸ Anyone submitting a complaint on behalf of an individual must ensure he/she obtains the consent of that individual and the individual is aware of the implications of making the complaint. This is because when information is submitted to the WGAD (but this equally applies to other special procedures), the mandate-holder sends a communication to the State regarding the case, which will ultimately be included in a public report (that is presented to the Human Rights Council during one of its sessions in March, June or September). It is therefore fundamental for the alleged victim to be familiar with how the individual complaint procedure works.

⁹ It is important to note that while a complaint to the Special Procedures need not to be presented in any particular format, it is highly advisable to use the online form/questionnaire available at <https://spsubmission.ohchr.org/> or, alternatively, the model questionnaire relating to the specific mandate, see Annex 1.

¹⁰ Communication between the State and the WGAD remains confidential even from the complainant. The communications and replies, along with any action taken, only become public once they are published in the Communication report submitted to one of the regular sessions of the Human Rights Council. Although the exchanges are confidential, the names of alleged victims are usually included in the communication sent to the State to enable the competent authorities to investigate the alleged violation or take appropriate preventive action. These names are also published in the Communications reports, unless privacy and protection concerns require keeping the identity of the concerned victim(s) confidential. However, the identity of the source of information is always kept confidential and neither included in the communication sent to the Government, nor in the public communications report.

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- The Government is given 60 days to respond (with a possibility of an additional 30 day extension).

STAGE 3: Adoption of the Opinion

- The WGAD considers each communication and the responses received from the Government during its closed sessions, adopting an Opinion on each case.
- If the Government has failed to reply by the deadline set, the WGAD will proceed to consider the communication in the absence of the reply.
- The unedited version of the Opinion is sent first to the Government, along with the recommendation to take appropriate action to put an end to the situation of arbitrariness or ensure conformity with international human rights standards.
- Forty-eight hours after its transmittal, the Opinion is also communicated to the complainant. Both parties are free to use it as a public document.¹¹
- Once edited, the Opinions are published on the WGAD's web site.¹²
- If requested, the name of the source can be removed from the public document. The names of minors are always removed before publication.

STAGE 4: Follow-up to the implementation of the Opinions

- Each Opinion contains a dedicated section of follow-up in which the Working Group requests both the complainant and the Government to inform the WGAD about the steps taken to implement the Opinion.

4.2 Urgent Action

The WGAD has also developed an "Urgent Action" procedure for cases in which there are sufficiently reliable allegations that a person is being arbitrarily deprived of his or her liberty and that the alleged violations may be time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims in the event of the continuation of the detention.

An Urgent Action does not trigger automatically an opinion by the WGAD on the arbitrariness of the detention, but reminds the Government of its obligations and requests a response from the Government on the case(s) raised. After having transmitted an urgent appeal to the Government, the Working Group may also investigate the case in order to render an opinion on whether the deprivation of liberty is arbitrary or not. Such appeals, which are of a purely humanitarian nature, in no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the Urgent Action procedure and the regular procedure. An Urgent Action

¹¹ However, please note that all Opinions need to undergo a specific editing process before being public and published as described in the following bullet. For this reason, the WGAD discourages both the government and the source to make the opinion public before it is edited, in order to avoid circulation and/or citation of inaccurate versions of opinions. The WGAD therefore suggests that in principle the findings can be made public, but the actual text of the opinion should not go into circulation until the edited version is officially uploaded onto the web site.

¹² <http://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx>

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procedure can also be sent jointly with demarches towards other Special Procedures Mandate Holders, if and as relevant.

What differentiates the Urgent Action procedure from the standard procedure of a communication on an individual case (or multiple cases), is the urgency to the situation and the confidentiality of the procedure since urgent appeals remain confidential until they are published in the next Special Procedures' Communications Report.

➤ How to engage with the urgent action procedure?¹³

- When there is a situation which requires urgent action, UNHCR may consider writing to the WGAD, asking it to issue an urgent appeal.
- The information submitted to the WGAD for urgent action needs to be concise but also cover all relevant details pertinent to the alleged situation of arbitrary arrest.
- Submissions can be made in one of the three working languages of the WGAD: English, French or Spanish.

4.3 Country Visits

The WGAD also conducts field missions, usually two per year, upon the invitation of Governments, in order to understand better the situations prevailing in countries, as well as the underlying reasons for instances of arbitrary deprivation of liberty. During these country visits, the WGAD carries out site visits to wide variety of places of deprivation of liberty, including immigration detention facilities where it can conduct interviews with detainees. The Group also carries out extensive consultations and meetings with various government officials and other stakeholders, including other UN agencies, national and international civil society organisations and national human rights institutions. At the conclusion of its visit, it issues public Preliminary Observations, highlighting main findings of the visit. A full report is presented in the next scheduled session of the Human Rights Council.

More than 100 countries have extended standing invitations to the WGAD to conduct country visits.¹⁴

¹³ Regarding access to and working with these and other complaint procedures, including in cases where urgent appeals are being sought, UNHCR internal guidance establishes the following procedures: a) an UNHCR operation willing to submit a complaint on behalf of an individual or group (or to advise individuals or groups on how to submit a complaint) should carefully review the various procedures available and consider the one(s) that would be more appropriate in the specific case. Guidance may be sought from DIP/Human Rights Liaison Unit as needed and relevant; b) each complaint procedure has its own requirements, which need to be carefully followed to ensure that the complaint is admissible. Additional information on communications under special procedures is available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>; and c) after identifying the most appropriate mechanism(s) and reviewing the necessary requirements, UNHCR operations may proceed with submitting a complaint (or advising individuals or groups on submitting a complaint) directly to the chosen body(ies), making sure that all required formalities are strictly followed. UNHCR operations should inform the HRLU if any complaints are submitted by UNHCR on behalf of individuals or groups so that the HRLU can assist where necessary and appropriate with follow up.

¹⁴ Information about the terms of reference for country visits and the visit requests made by WGAD can be found here: <http://www.ohchr.org/EN/Issues/Detention/Pages/Visits.aspx> and the list of countries with standing invitations to all thematic Special Procedures mandate holders can be found here: <http://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/StandingInvitations.aspx>

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➤ How to engage with the WGAD during the country missions?

- UNHCR country operations should consider requesting the WGAD to consider carrying out a country mission to a country of concern by sending information concerning immigration detention, even if the WGAD has not announced a visit to the country yet.¹⁵
- If the WGAD has announced a visit, UNHCR will proceed, through the Human Rights Liaison Unit in the Division of International Protection, to contact the relevant country operation to gather up-to-date information about the immigration detention legislation, policies and their implementation in the country and send it to the Working Group so as to inform it of any issues of concern in advance of the visit and assist the WGAD in setting its priorities for the visit.
- The WGAD will always hold stakeholders' meetings which are an opportunity to engage with the members of the WGAD directly and bring any issues of concern to their attention.
- When Preliminary Observations are presented, UNHCR may wish to consider their wide dissemination and follow-up to the recommendations made. The same should be considered once the full report has been issued.

4.4 Deliberations

The Working Group may also formulate “deliberations” on matters of a general nature involving a position of principle in order to develop a consistent set of precedents and assist States, for purposes of prevention, to guard against the practice of arbitrary deprivation of liberty.

- [Deliberation No. 5 on deprivation of liberty of migrants](#)

4.5 Oral briefings during the WGAD sessions

Operations can consider whether making oral briefings on arbitrary detention on specific countries or on particular issues of concern for UNHCR. For instance, in 2016, UNHCR provided inputs to the WGAD on the practice of arbitrary detention in the United States; in 2018, UNHCR conducted an oral briefing on the issue of statelessness.

Contact details of the Working Group on Arbitrary Detention

Working Group on Arbitrary Detention (c/o Office of the High Commissioner for Human Rights)
United Nations Office at Geneva
8-14, avenue de la Paix
1211 Geneva 10, Switzerland
facsimile: +41 22 9179006
e-mail: wgad@ohchr.org
Website: <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>

¹⁵UNHCR, [Using UN Human Rights Mechanisms in Protection. A Good Practice Guide](#), 2014, “Instigating country visits”, p. 24 with a concrete example of UNHCR engagement with the WGAD.

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Annex 1.

MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION¹⁶

I. IDENTITY

1. Family name:
2. First name:
3. Sex: (Male) (Female)
4. Birth date or age (at the time of detention):
5. Nationality/Nationalities:
6. (a) Identity document (if any):
- (b) Issued by:
- (c) On (date):
- (d) No.:
7. Profession and/or activity (if believed to be relevant to the arrest/detention):
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8. Address of usual residence:
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II. Arrest¹⁷

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

¹⁶ This questionnaire should be addressed to the Working Group on Arbitrary Detention. Office of the High Commissioner for Human Rights, United Nations Office at Geneva, 8-14 avenue de la Paix, 1211 Geneva 10, Switzerland, fax No.(41) (0) 22 917.90.06, E-mail: wqad@ohchr.org; and, urgent-action@ohchr.org.

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

¹⁷ For the purpose of this questionnaire, "arrest" refers to the initial act of apprehending a person. "Detention" means and includes any deprivation of liberty before, during and after trial. In some cases, only section II or III may be applicable. Nonetheless, whenever possible, both sections should be completed.

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

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

(Yes)..... (No).....

5. Authority who issued the warrant or decision:

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6. Reasons for the arrest imputed by the authorities:

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7. Legal basis for the arrest including relevant legislation applied (if known):

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III. Detention

1. Date of detention:

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

3. Forces holding the detainee under custody:

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

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5. Authorities that ordered the detention:

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6. Reasons for the detention imputed by the authorities:

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7. Legal basis for the detention including relevant legislation applied (if known):

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IV. Describe the circumstances of the arrest.

V. Indicate reasons why you consider the arrest and/or detention to be arbitrary¹⁸. Specifically provide details on whether:

- (i) The basis for the deprivation of liberty is authorized by the Constitution or the domestic law?
- (ii) The reason the individual has been deprived of liberty is a result of the exercise of his or her rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights 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?
- (iii) The international norms relating the right to a fair trial have been totally or partially observed, specifically, articles 9 and 10 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 9 and 14 of the International Covenant on Civil and Political Rights?
- (iv) In the case of an asylum seeker, migrant or refugee who has been subjected to prolonged administrative custody, if he or she has been guaranteed the possibility of administrative or judicial review or remedy?
- (v) The individual has been deprived of his or her liberty for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status which aims towards or can result in ignoring the equality of human rights?

¹⁸ Copies of documents that prove the arbitrary nature of the arrest or detention, or help to understand the specific circumstances of the case, as well as any other relevant information, may also be attached to this questionnaire.

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VI. Indicate internal steps, including domestic remedies, taken especially with the legal and administrative authorities, particularly for the purpose of establishing the detention and, as appropriate, their results or the reasons why such steps or remedies were ineffective or why they were not taken.¹⁹

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VII. Full name, postal and electronic addresses of the person(s) submitting the information (telephone and fax number, if possible).²⁰

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Date: Signature:

¹⁹ Note that the Methods of Work of the Working Group do not require exhaustion of all available domestic remedies for the communication to be admissible for consideration by the Working Group.
²⁰ If a case is submitted to the Working Group by anyone other than the victim or his family, such a person or organization should indicate authorization by the victim or his family to act on their behalf. If, however the authorization is not readily available, the Working Group reserves the right to proceed without the authorization. All details concerning the person(s) submitting the information to the Working Group, and any authorization provided by the victim or his family, will be kept confidential.