Part I. Background

Introduction

There is arbitrary detention in every country in the world today. It knows no boundaries and countless people are subjected to arbitrary detention every year. But what is detention and what makes it arbitrary? The *Universal Declaration of Human Rights* (UDHR) declares that "[n]o one shall be subjected to arbitrary arrest, detention or exile."[1] The *International Covenant on Civil and Political Rights* (ICCPR), a multilateral treaty, goes further: "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are establishment by law."[2]

I What Is Detention?

As originally established by UN Commission on Human Rights (UNCHR) Resolution 1991/42, the five-member UN Working Group on Arbitrary Detention (WGAD) focuses on adjudicating and issuing individual legal opinions as to whether the deprivation of liberty of detainees is or is not in violation of international law. But it did not at the outset define the term "detention," which led to differing interpretations of the term. Ultimately, this was corrected in UNCHR Resolution 1997/50, where it noted the WGAD was "entrusted with the task of investigating cases of *deprivation of liberty* imposed arbitrarily . . . "[3]

The deprivation of liberty of a person charged with or convicted of a serious crime may be legitimate. In certain cases, a person may be deprived of liberty by administrative authorities, such as a person with serious mental illness. Personal liberty may also be limited during states of emergency. There are certain categories of deprivation of liberty that are illegal, such as imprisoning a person for failing to pay their debt. The reality is that international instruments used differing terminology and it can be challenging to discern differences between them. Varying terms can include "arrest," "apprehension," "detention," "incarceration," "imprisonment," and "custody," among others.[4]

[1] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at Art. 9 (1948).
[2] *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at Art. 9(1).
[3] Resolution 1997/50 (Arbitrary Detention), Commission on Human Rights, E.CN.4/1997/50, Adopted Apr. 15, 1997, at ¶ 15 (emphasis added).
[4] *Revised Fact Sheet No. 26, The Working Group on Arbitrary Detention*, Office of the High Commissioner for Human Rights, Feb. 8, 2019.

With regards to the WGAD, the terms "arbitrary detention" and "deprivation of liberty" were chosen, however, because it is instructed to act for the protection of all individuals deprived of their liberties in all their forms. Its mandate extends to the deprivation of liberty before, during, or after a trial, or in the absence of a trial at all. It also extends to other types of deprivation of liberty such as house arrest, rehabilitation through labor, and involuntary psychiatric hospitalization when accompanied by serious restrictions on freedom of movement.[5]

II What Makes a Deprivation of Liberty Arbitrary?

What makes the deprivation of liberty in a particular case arbitrary is the focus of this book. But prior to examining the concept of arbitrary detention, it is useful to look at arbitrariness generally and in the context of international law. In this regard, the WGAD in its jurisprudence[6] has referred to Judge Cançado Trindade's discussions of arbitrariness in customary international law in his judgment in the International Court of Justice in *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of Congo*). In speaking of the notion of arbitrariness, Judge Trindade explained:

> 108. The adjective "arbitrary," derived from the Latin "*arbitrarius*," originally meant that which depended on the authority or will of the arbitrator, of a legally recognized authority. With the passing of time, however, it gradually acquired a different connotation; already in the mid-seventeenth century, it had been taken to mean that which appeared uncontrolled (arbitrary) in the exercise of will, amounting to capriciousness or despotism. The qualification "arbitrary" came thus to be used in order to characterize decisions grounded on simple preference or prejudice, defying any test of "foresee-ability," ensuing from the entirely *free will* of the authority concerned, rather than based on *reason*, on the conception of the rule of law in a democratic society, on the criterion of reasonableness and the imperatives of justice, on the fundamental principle of equality and non-discrimination.
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> 109. As human rights treaties and instruments conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim, it is not at all surprising that the prohibition of *arbitrariness* (in its modern and contemporary sense) covers arrests and detentions, as well as other acts of the public power, such as expulsions. Bearing in mind the hermeneutics of human rights treaties, as outlined above, a merely exegetical or literal interpretation of treaty provisions would be wholly unwarranted.[7]

Judge Trindade then proceeded to explain the position of the UN Human Rights Committee (HR Committee) as it has interpreted the term "arbitrary." In *Mukong* v. *Cameroon*, the HR Committee interpreted "arbitrary" in the broadest sense, as

[5] *Id.*
[6] Liu Xiaobo v. China, WGAD Opinion No. 15/2011, Adopted May 5, 2011, ¶ 20. The author began representing Liu Xiaobo as pro bono counsel through Freedom Now in mid-2010, a few months before he was announced as the recipient of the 2010 Nobel Peace Prize.
[7] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), Judgment, Nov. 30, 2010, Separate Opinion of Judge Cançado Trindade, at p. 128, ¶¶ 108–109.

meaning inappropriate, unjust, unpredictable, and inconsistent with legality.[8] As such, arbitrariness was not simply "against the law," but had to be interpreted "more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."[9] And in *Jalloh* v. *The Netherlands*, it said "arbitrary," should be understood as covering "unreasonable action," such that the way a state acted should be appropriate and proportional in the circumstances of the case at issue.[10]

For its part, the WGAD has been unequivocal in its views, which were explained in detail in its Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty under Customary International Law. It stated: "The prohibition of the arbitrary deprivation of liberty is part of treaty law, customary international law, and constitutions a *jus cogens*[11] norm. Its specific content, as laid out in this deliberation, remains fully applicable in all situations."[12]

The WGAD has further explained that it considers a deprivation of liberty as arbitrary if a person is detained in a way that is incompatible with a state's international legal obligations. By definition, if a person is convicted in violation of domestic law and due process rights, their detention is also arbitrary. The WGAD's focus, however, is on violations of international law, though it will consider violations of domestic law to inform whether international law was violated as well.

According to its Methods of Work, when discharging its mandate to assess if specific deprivations of liberty are arbitrary, the WGAD refers to five legal categories of cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her (category I);
(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13–14 and 18–21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18–19, 21–22, and 25–27 of the International Covenant on Civil and Political Rights (category II);
(c) When the total or partial nonobservance 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 III);
(d) When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual

[8] Mukong v. Cameroon, Communication No. 458/1991, Human Rights Committee, CCPR/C/51/D/458/1991, July 21, 1994, at ¶ 9.8.
[9] *Id.*
[10] Jalloh v. The Netherlands, Communication No. 794/1998, Human Rights Committee, CCPR/C/74/D/794/1998, Mar. 26, 2002, at ¶ 8.2.
[11] *Jus cogens*, from Latin for "compelling law," is a peremptory norm, which is a fundamental, overriding principle of international law, from which no derogation is ever permitted.
[12] *Report of the Working Group on Arbitrary Detention*, Human Rights Council, A/HRC/22/44, Dec. 24, 2012, at ¶¶ 50–51.

> orientation, disability, or any other status, that aims toward or can result in ignoring the equality of human beings (category V).[13]

In its annual report published in 2017, the WGAD provided further explanation of what it described as "irregular forms of deprivation of liberty":

> 50. The right to liberty of person is not an absolute right and limitations to that right may be justified. However, any deprivation of liberty, irrespective of the context in which it occurs, must not be arbitrary and must be carried out with respect to the rule of law.
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> 51. The Working Group wishes to recall that the deprivation of personal liberty occurs when a person is being held without his or her free consent. Individuals who, for example, go voluntarily to a police station to participate in an investigation and who know that they are free to leave at any time are not in fact deprived of their liberty. It is, however, paramount that the element of voluntariness is not abused and that any claim that an individual is at a certain place at his or her own free will is indeed the case.
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> 52. The Working Group is conscious of the increasing number of new regimes of deprivation of liberty that arise in different situations and contexts around the world. While prisons and police stations remain the most common places where an individual may be deprived of his or her liberty, there are a number of different places which an individual is not free to leave at will and which raise a question of de facto deprivation of liberty. It is paramount that, irrespective of what such places are called, the circumstances in which an individual is detained are examined so as to determine whether he or she is in fact at liberty to leave such a place at will. If not, it is paramount that all the safeguards applicable to situations of deprivation of liberty are in place so as to guard against any arbitrariness.
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> 53. The Working Group has come across such examples in the context of immigration detention. There is an increasing number of countries that hold irregular migrants in various temporary or permanent settings, such as holding rooms, reception centers, and shelters. While not officially called "detention centers," those places are in fact closed institutions and individuals kept in them are not at liberty to leave, which makes such places de facto detention places. Therefore, all the safeguards that are in place, or should be in place, to guard against arbitrary deprivation of liberty must be respected in relation to every person held in such a setting.
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> 54. Equally, the Working Group is mindful that some countries have introduced and continue to introduce stringent counter-terrorism measures, of which so-called anti-radicalization measures form an important part. Such measures may include establishing dedicated units within prisons or even separate establishments, such as anti-radicalization centers, to hold not only those suspected or convicted of terrorist offences but also those considered to be "radicalized" or "at risk of radicalization." It is sometimes presumed that people would commit themselves voluntarily to such centers, which would seemingly exclude such places from the scope of the places of deprivation of liberty. However, in most cases, there may be adverse consequences for individuals who do not commit themselves voluntarily and therefore questions surrounding what constitutes "voluntary commitment," the consequences for those who do not volunteer to be committed, or the options to leave become paramount.

[13] *Methods of Work of the Working Group*, Human Rights Council, A/HRC/36/38, July 13, 2017, at ¶ 8.

55. The Working Group is aware that there are a variety of health-care and social care settings that are increasingly used for different health-related conditions. They include but are not limited to social care homes for older persons, care facilities for those with dementia, and private institutions for people with psychosocial disabilities. It is increasingly aware of persons with disabilities being detained in psychiatric hospitals, nursing homes, and other institutional settings, or forced treatment in prayer camps to "cure" disability, and of persons subject to physical and chemical restraint in the community. The Working Group reiterates that it is contrary to the provisions of the Convention on the Rights of Persons with Disabilities to deprive a person of his or her liberty on the basis of disability (art. 14). It also reiterates that every State retains a positive duty of care in relation to those on its territory and under its jurisdiction and that a State cannot absolve itself of this responsibility in relation to those in privately run institutions.

56. The Working Group wishes to emphasize that the deprivation of liberty is not only a question of legal definition but also of fact. If the person concerned is not at liberty to leave, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected and the right to challenge the lawfulness of detention before a court afforded to the individual.[14]

III The Case of *Ayub Masih* v. *Pakistan*

To understand the importance of the WGAD as an institution, even before understanding how it functions and operates, it is instructive to examine how an actual case brought before it developed and how the opinion adopted in the case was used strategically to help secure the release of a detainee.

Ayub Masih was a twenty-six-year-old Pakistani Christian who was sentenced to death by hanging under Pakistan's draconian blasphemy law. Under Pakistan Penal Code § 295C, the sentence of death is imposed on persons who "directly or indirectly defile[] the sacred name of the Holy Prophet." Masih's Muslim neighbor complained that Masih had purportedly stated that Christianity was "right" and suggested he read Salman Rushdie's *Satanic Verses*. Masih was initially arrested on October 14, 1996, and was held in solitary confinement in Multan, Pakistan, about 200 miles southwest of Lahore, where the daytime temperature in his small cell often exceeded 120 degrees Fahrenheit (49 degrees Celsius). He denied the charges against him.[15]

Masih's trial began more than a year after his arrest. During the trial, the same neighbor who accused him of blasphemy shot and injured Masih in the courthouse but was never charged with any crime. On the day the verdict was to be issued, extremists in the courtroom threatened the lives of Masih and his lawyers if the court ruled in Masih's favor. On April 20, 1998, Masih was sentenced to death. Masih immediately appealed the sentence to the Lahore High Court but the appeal was not heard until more than three years later. Again, extremists crowded the court, threatening Masih, his lawyers, and the court with reprisal if Masih's appeal succeeded. On July 24, 2001, the High Court affirmed the lower court's judgment.[16]

[14] *Report of the Working Group on Arbitrary Detention*, Human Rights Council, A/HRC/36/37, at ¶¶ 50–56.
[15] Petition to UN Working Group on Arbitrary Detention, Freedom Now, Oct. 8, 2001.
[16] *Id.*

In September 2001, just before the 9/11 attacks on the United States, Masih's family retained the author to serve as his international counsel.[17] On October 8, 2001, the author submitted a Petition to the WGAD under its "urgent action" procedure. This meant that the WGAD would immediately write to the Government of Pakistan noting the source (under its procedures, whoever sends a communication to the WGAD is kept anonymous and referred to as the "source") had expressed concern about Masih's health and welfare. Without prejudging the merits of the case, the WGAD would request in the first instance that the Government ensure he remain protected. The Petition asserted two sets of violations of international law. First, it argued and presented evidence that Masih was arrested because he was a religious minority in violation of Article 18 of the UDHR, which protects freedom of thought, conscience, and religion. And second, it presented a range of evidence that Masih's due process rights were not upheld in violation of Articles 9 and 10 of the UDHR.[18]

On November 30, 2001, the WGAD issued its Opinion finding "[t]he deprivation of liberty of Ayub Masih is arbitrary" and in violation of Articles 9 and 10 of the UDHR. While noting the cooperation of the Government, it held that "the procedure conducted against Ayub Masih did not respect the fundamental rights of a person charged." It noted the Government had failed to provide Masih with evidence against him and the verdict "was based on the testimony of a … biased witness," and the trial environment was hostile. The requirements under the blasphemy law of having a Muslim judge also contributed to a lack of procedural safeguards to ensure fairness. The WGAD then called for the Government to remedy the situation by either retrying Masih or pardoning him and recommended it consider ratifying the ICCPR.[19]

After the WGAD issued its Opinion, the author requested a meeting with the Ambassador of Pakistan to the United States. She declined, stating her country's Supreme Court was considering the case. Subsequently, working with another nongovernmental organization, Jubilee Campaign, the author secured private letters to then-President Pervez Musharraf from twelve US Senators urging Ayub Masih be pardoned. Intentionally on the part of Masih's advocates, many of these Senators served in influential positions on the appropriations subcommittee that provided foreign assistance to Pakistan.[20] In response to the pressure, the Government accelerated the review of the case. On August 16, 2002, a three-judge panel on the Supreme Court heard the appeal, acquitted Masih of the charges, and ordered his immediate release.[21] The judges' oral judgment echoed the WGAD Opinion, stating that the arrest, conviction, and sentencing violated Masih's fundamental guarantees of due process. Shortly, therefore, Masih was freed from prison and the author and the Jubilee Campaign arranged for his safe exit from Pakistan. He arrived in the United States on September 4, 2002, where he

[17] In May 2001, the author had founded a then all-volunteer organization called Freedom Now, whose mission was to free prisoners of conscience through focused legal, political, and public relations advocacy efforts.

[18] *Id.*

[19] Ayub Masih v. Pakistan, WGAD Opinion No. 25/2001, Adopted Nov. 30, 2001.

[20] Letter from 11 US Senators to President Pervez Musharraf, July 2, 2002 (Nov. 2018), www.freedom-now.org/wp-content/uploads/2010/09/Masih-Senate-Letter-7.2.02.pdf (an additional letter was sent under separate cover).

[21] *Past Campaigns: Ayub Masih*, Freedom Now (Nov. 2018), www.freedom-now.org/campaign/ayub-masih/.

was met at the airport by his advocates. He spoke little English but thanked them saying "God bless you." He was later granted political asylum in the United States.[22]

IV Lessons from Ayub Masih's Case

Ayub Masih's case is instructive as a case study because a closer examination of the role of the WGAD in securing his release from prison demonstrates many of the key features of the institution. This book is focused on explaining how the WGAD functions and operates so as to maximize its value as a tool for practitioners seeking to secure the release of people arbitrarily deprived of their liberty. Examples of these key features, which will be explored in great depth in subsequent chapters include:

- **Speed.** This case was submitted to the WGAD on October 8, 2001, and a written opinion was issued on November 30, 2001. Cases do not ordinarily move that fast – in this instance it was helped along by a swift response from the Government and a fortuitously timed session of the WGAD. But compared to other UN mechanisms and regional human rights courts, the WGAD is much faster. By paying careful attention to the WGAD's schedule, a typical case can generally be decided within six months to one year.
- **Adversarial.** Under the WGAD's procedures, the Government was given an opportunity to respond to the original petition. In addition, the source was then able to reply to the response. This adversarial process enables more objective results to be obtained by the WGAD. If a government fails to respond, by its ordinary practice, the WGAD assumes as fact allegations presented by the source.
- **Soft Law Applied.** The WGAD found the Government had violated Articles 9 and 10 of the UDHR. Pakistan was not a party to the ICCPR, but despite the fact that the UDHR is not generally viewed as binding, it was applied to Masih's case.
- **Narrow Reasoning.** Given its willingness to apply soft law, the WGAD may find the right result but sometimes do so on narrower grounds than requested by sources. In this case, there were egregious abuses of fair trial rights, which made finding Masih's detention in violation of international law very easy. While the focus of the blasphemy laws in Pakistan only targets blasphemy of Islam and judges on such cases are required to be Muslim, the WGAD declined to find a violation of Article 18 of the UDHR relating to freedom of thought, conscience, or religion. Instead, it interpreted the requirement of a Muslim judge to be part of the due process violations in this case. As a matter of international law, Pakistan's blasphemy laws contravene any established right to freedom of religion. But finding Masih's detention to be in violation of international law did not require a practical invalidation of Pakistan's blasphemy laws, which is what finding a violation of Article 18 could have been interpreted to mean. Thus, the WGAD demurred on that question.
- **Recommendations Issued.** As per its standard practices, the WGAD made recommendations to resolve the case. It specifically urged Masih's pardon or retrial. And, as it does with non-state parties, it urged Pakistan to sign and ratify the ICCPR.

[22] *Id.*

- **Legal Opinion.** There is immense power in having an independent and impartial group of five experts of a United Nations quasi-judicial body render an opinion that a person's detention is an arbitrary deprivation of liberty in violation of international law. Securing enforcement of an opinion to leverage a detainee's release often requires using it as a tool to mobilize political and public relations pressure on a detaining government. In this instance, the Opinion was sufficient for an influential group of US Senators to write privately to then-President Musharraf, who found a way to resolve the case through the courts.

V Background on UN Human Rights System

The UN Human Rights Council (HRC) is an inter-governmental body within the United Nations systems that is responsible for protecting and promoting human rights around the world. It comprises forty-seven United Nations Member States, which are elected annually by the UN General Assembly (UNGA). The HRC was created by the UNGA on March 15, 2006, through the adoption of Resolution 60/251. The HRC replaced the UN Commission on Human Rights (UNCHR), which itself had been established on December 10, 1946, as one of two functional commissions of the United Nations as a subsidiary body of the UN Economic and Social Council. The HRC is responsible for "promoting universal respect for the protection of human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner." To that end, the HRC should be "guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhance the promotion and protection of all human rights . . . "[23]

The "special procedures" of the HRC are independent volunteer human rights experts appointed by the HRC, who report and advise on a thematic or country-specific perspective. As of 2018, the HRC has forty-four thematic and twelve country mandates. Among the thematic mandate holders, that includes thirty-two "special rapporteurs," six "independent experts," and six "working groups." The roles and functions of the UN Special Procedures are defined in resolutions adopted by the HRC. With the support of the Office of the High Commissioner for Human Rights (OHCHR), they engage in a range of activities to fulfill their mandates. These include country visits; acting on individual cases or broader concerns through communications with relevant Member States; conducting thematic studies; and advocating and raising awareness about issues relating to their mandate. They all report annually to the HRC and many also report to the UNGA as well.[24]

[23] Resolution 60/251, General Assembly, A/RES/60/250, Adopted Mar. 15, 2006.
[24] Special Procedures of the Human Rights Council (July 2018), www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.

UNITED NATIONS SPECIAL PROCEDURES

Working Groups	Thematic Rapporteurs/ Independent Experts	Cont'd	Country Rapporteurs/ Independent Experts
• Arbitrary Detention • Discrimination against Women in Law and in Practice • Enforced or Involuntary Disappearances • Human Rights and Transnational Corporations and Other Business Enterprises • People of African Descent • Use of Mercenaries	• Adequate Housing • Effects of Foreign Debt • Enjoyment of Human Rights by Persons with Albinism (IE) • Enjoyment of Safe, Clean, Healthy, and Sustainable Environment • Extrajudicial, Summary, or Arbitrary Execution • Extreme Poverty • Field of Cultural Rights • Freedom of Opinion and Expression • Freedom of Peaceful Assembly and Association • Hazardous Substances • Human Rights Defenders • Independence of Judges and Lawyers • International Solidarity • Indigenous Peoples • Internally Displaced Persons • Migrants • Minority Issues • Older Persons • Privacy • Promotion of a Democratic and Equitable International Order (IE)	• Promotion of Human Rights While Countering Terrorism • Racism • Religion or Belief • Right to Development • Right to Education • Right to Food • Right to Health • Safe Drinking Water and Sanitation • Sale and Sexual Exploitation of Children • Sexual Orientation and Gender Identity (IE) • Slavery, Its Causes and Consequences • Torture, Cruel, Inhuman, or Degrading Treatment or Punishment • Trafficking in Persons • Truth, Justice,, Reparations, and Non-Recurrence • Unilateral Coercive Measures • Violence against Women, Its Causes and Consequences	• Belarus • Cambodia • Central African Republic • Democratic People's Republic of Korea • Islamic Republic of Iran • Mali • Myanmar • Somalia (IE) • Sudan (IE) • Syrian Arab Republic • Palestinian Territories Occupied since 1967

Source: UN Human Rights Council, Summer 2018

Figure 1: List of UN special procedures