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Reconciling the Dual-Faceted Mandates of Quasi-Judicial Human Rights Bodies: The Working Group on Arbitrary Detention's *Prima Facie* Approach to Evidence

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ABSTRACT

Focusing on evidentiary approaches, this article examines the burdens and standards of proof applied at United Nations quasi-judicial international human rights bodies. These bodies have dual-faceted mandates, combining legal and human rights traditions and imperatives. However, they diverge in their approach to evidence. This article argues that the *prima facie* approach developed over the Working Group on Arbitrary Detention's 30 years of jurisprudence provides an appropriately flexible and conceptually coherent means of accommodating combined human rights and the judicial mandates. Nonetheless, this approach requires lexiconic and taxonomical tightening, and clarification of its standard of proof. Comparing the approaches taken by other quasi-judicial bodies, this article builds the impetus towards inter-institutional consistency. It reviews proposals such as wholesale reversal of the burden of proof onto Governments. It highlights the drawbacks of that unilateral type of burden and the risks that it would introduce further uncertainty for parties to proceedings, may cause onerous difficulties for claimants, and would potentially flood the human rights institutions with unsubstantiated claims.

KEYWORDS: evidence, burden of proof, standard of proof, fact-finding, Human Rights Council, Working Group on Arbitrary Detention

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1. INTRODUCTION[1]

'. . . treating like cases alike and unlike cases differently is a general axiom of rational behaviour.'[2]

Just as evidentiary procedures are the arteries of judicial bodies, the rules governing burdens and standards of proof are essential to the functioning of quasi-judicial human rights institutions.[3] These rules determine which materials will be considered, who must provide them, and on what basis they will be assessed. They also ensure consistent approaches to fact-finding. In doing so, they directly impact the outcomes of cases and, more broadly, the reputation of the human rights bodies themselves.[4]

Whereas the burdens and standards of evidence in regional human rights bodies (particularly the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR)) have been subjected to considerable scholarly analysis,[5] their approaches remain unclear and subject to debate in several respects.[6] In relation to United Nations quasi-judicial human rights bodies the situation is even more in need of clarification and systemisation. However, little scholarly attention has been paid to this topic.[7]

In the few works on this subject, the evidentiary approaches taken by United Nations quasi-judicial human rights bodies have been criticised as both opaque and lacking in consistency,

[1] The views herein are those of the authors alone, written in a personal capacity, and do not necessarily reflect those of the United Nations Working Group on Arbitrary Detention or any other entity. The views are made without prejudice to the veracity of any claim concerning a particular incident, situation, instrument or case. The authors thank Professor Carla Ferstman for her insightful comments.

[2] United Kingdom Privy Council per Lord Hoffman, *Matadeen v Pointu*, [1999] 1 AC 98, [1998] UKPC 9, [1998] 3 WLR 18, para 8 (Privy Council from Mauritius). See also Rault J. in *Police v Rose* [1976] M.R. 79, at 81 ('[e]quality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.').

[3] See infra at Section 2 for the definition of quasi-judicial human rights bodies.

[4] See, e.g. Bovino, 'La Actividad Probatoria Ante La Corte Interamericana De Derechos Humanos' (2005) 3 *Surrevista internacional de derechos humanos* 2, at 61.

[5] See, e.g. Paul, 'An Overview of the Inter-American Court's Evaluation of Evidence', in Haeck, Ruiz-Chiriboga and Herrera (eds) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future,* (2015); Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights' (2007) 50 *German Yearbook of International Law* 543; Mačkić, *Proving Discriminatory Violence at the European Court of Human Rights* (2018).

[6] See infra at Sections 2 and 6.

[7] To date, scholarship on the Working Group has largely focused on its substantive jurisprudence and its procedures other than its approach to burdens and standards of evidence; see, e.g. Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (2020) at 444 (which has only a brief discussion of its approach to evidence in Part III); Mazzinghy, 'Please, Set Me Free! The Right to Challenge an Unlawful Detention: Scrutinizing the Practice of the United Nations Working Group on Arbitrary Detention' (2020) 5 *Perth International Law Journal* at 84–85 (detailing the substantive jurisprudence and framework of the Working Group, while also briefly touching on its burden of proof); Toomey, 'Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention' (2018) 50 *Columbia Human Rights Law Review* 185 (exploring the Working Group's approach to discriminatory detention, and in doing so making passing references to its approach to the burden of proof and evidence); Weissbrodt and Mitchell, 'The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence' (2016) 38 *Human Rights Quarterly* 655 at 667–668 (providing a brief description of the Working Group's process of receiving information from the source and government, without commenting on the burden or standard of proof in any detail); Genser and Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice' (2008) 39 *Columbia Human Rights Law Review* 687 (exploring the Working Group's flexible institutional parameters without specifically focusing on its approach to the burden of proof and evidence). Almost two decades ago, Frans Viljoen examined the Working Group's fact-finding procedure in his discussion of United Nations complaint bodies. However, his assessment did not focus on the Working Group in extensive detail and whereas he made large-scale institutional proposals, such as the creating of a general human rights complaint body as a stepping stone to a United Nations Human Rights Court, as well as major adjustments like introducing oral hearings, he did not propose a model for burdens and standards of proof at the operational level (in contrast with the present article which does make specific proposals); Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies—Analysis and Suggested Reforms' (2004) 8 *Max Planck Yearbook of United Nations Law*. On the burdens in the United Nations Treaty Bodies, see Roberts, 'Reversing the Burden of Proof Before Human Rights Bodies' (2021) 25 (10) *The International Journal of Human Rights* 1682.

inter- and intra-institutionally.[8] Explicit explanation is necessary to remedy the opacity, in line with the Justice Brandeis mantra that 'sunlight is the best disinfectant'.[9] To remedy the inconsistency, identifying common approaches and standards is required. To advance in both those respects, the present article seeks to discern effective models and practices for the adjudication of evidence that quasi-judicial human rights bodies may pivot towards.

The following analysis provides a unique in-depth assessment of the approach of the United Nations Working Group on Arbitrary Detention ('Working Group' or 'WGAD'). Because of its heavy case-load and extensive jurisprudence, it is a fertile subject for examination and comparison to other quasi-judicial human rights bodies.[10] Whilst the Working Group must operate according to its mandate from the Human Rights Council,[11] it has a unique scope of manoeuvre as the only non-treaty-based mechanism whose mandate expressly provides for the consideration of individual complaints of arbitrary detention,[12] and the only Special Procedure to issue quasi-judicial conclusions in specific cases.[13] It can engage with any UN Member State irrespective of which treaties that State has or has not ratified.[14] Moreover, it does not require the exhaustion of domestic remedies on the part of the complainant.[15] Unsurprisingly, the Working Group receives a large volume of individual complaints from all regions of the World. From its inception in 1991 to the end of 2022, it has generated over 1600 decisions (called opinions) as a result of its adversarial process,[16] which adheres to the principle of *audi alteram partem*.[17] Its outputs are transparent—in 2011, the Working Group launched a database to facilitate access of victims, States and civil society to its opinions and other materials.[18] Since then, there has been a steady increase in the number of individual complaints submitted to the Working Group, which has also seen a corresponding rise in its output of opinions (now numbering around 80 to 90 per year, up from 60 to 70 per year around 2011).[19]

At the normative level, the detailed picture of how one quasi-judicial human rights body has reconciled its dual mandates[20] provides a benchmark point of reference to identify points of complementarity and dissonance with other quasi-judicial human rights bodies. Encouraging

[8] See e.g. critique of the Human Rights Committee for not always applying the shift of the burden of proof consistently and rendering a so-called 'default decision': Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (2012) at 219.

[9] Brandeis, *Other People's Money* (1914), at 92.

[10] On the relationship between United Nations Special Procedures and United Nations Treaty Bodies, see Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights—Complementarity or Competition?', in Ando (ed) *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*, (2004). Note that the Working Group has termed its decisions 'opinions', as discussed infra n 33.

[11] As noted herein, the Working Group was established by resolution 1991/42 of the Commission on Human Rights (E/CN.4/RES/1991/42) and most recently renewed in the Human Rights Council resolution 51/8 of 2022.

[12] WGAD, *Revised Fact Sheet No 26* (2019) at 4; available at: www.ohchr.org/sites/default/files/Documents/Issues/Detention/FactSheet26.pdf [last accessed 23 November 2023].

[13] Rodley supra n 10 at 14. The Working Group on Enforced and Involuntary Disappearances deals with individual complaints but does not reach findings; Viljoen supra n 7 at 61–62.

[14] WGAD supra n 12 at 4.

[15] Whereas the term 'complainant' is used inter-changeably with 'source' throughout this article, opinions of the Working Group only use the term 'source'.

[16] See Toomey supra n 7, fn. 26 (noting that the Working Group had issued 1199 opinions by December 2017) and see also the Working Group Annual Reports from 2018 to 2022 (+ 90 (2018) + 85 (2019) + 92 (2020) + 85 (2021) + 88 (2022) = 1639). To give a typical indication of the rate of opinion production, in 2022, the Working Group, under its regular procedure, adopted 88 opinions concerning the detention of 160 persons in 50 countries; A/HRC/54/51, 2022 Annual Report of the Working Group on Arbitrary Detention, 31 July 2023. Many of these cases involve multiple detainees, often numbering in the dozens.

[17] See Viljoen supra n 7 at 55 (also referring to this as *audiatur et altera pars*).

[18] WGAD, 'Report of the Working Group on Arbitrary Detention' (2011) UN Doc A/HRC/19/57, summary and para 5. That database has since been replaced by one operated by the WGAD itself, available at: https://wgad-opinions.ohchr.org/ [last accessed 23 November 2023].

[19] See A/HRC/51/29 para 14 for the number of cases in 2021 and ibid para 8 for the number of cases in 2011.

[20] See Mazzinghy supra n 7 at 84 ('[i]n dealing with evidentiary issues, the Working Group has a solid and well-established jurisprudence.').

consistency (in the Aristotelian[21] sense of like cases in fact being treated alike[22]) across similarly situated quasi-judicial bodies[23] enhances several values fundamental to the rule of law.[24] These include fairness and equality before the law, predictability, transparency, accountability, and impartiality. Consistency also undermines claims that human rights law is implemented arbitrarily. In promoting these values, consistency contributes to the legitimacy of the human rights bodies and their application of human rights law.

At the conceptual level, this article advances the literature by examining how the ontology and mandates of quasi-judicial human rights bodies cohere with a sequentially shared burden of proof. It prospectively argues that the beyond reasonable doubt standard which the ECtHR has purported to apply,[25] is incongruous for human rights bodies hearing cases against States, and that instead a 'balance of probabilities'[26] standard better reflects the context of litigating alleged incursions into fundamental rights and freedoms.[27] In this way, it seeks to enhance the fact-determining function of quasi-judicial human rights bodies, which will in turn promote reliance on and compliance with their decisions. This will also benefit States and ultimately victims through the establishment of clear, consistent, and reliable approaches to evidence of human rights violations.

Focusing on burdens of proof and approaches to evidence, the thesis of this paper is as follows: quasi-judicial international human rights bodies all have a dual-faceted mandate, mixing legal and human rights traditions and imperatives, but diverge in their approaches to evidence (Section 2); the Working Group's *prima facie* approach is an appropriately flexible and conceptually coherent means of accommodating the human rights and the judicial mandates (Section 3); despite its core validity, the Working Group's *prima facie* approach requires lexiconic and taxonomical tightening (Section 4); but the Working Group's application of this standard in practice provides considerable guidance for other quasi-judicial human rights bodies (Section 5); building the impetus towards consistency among quasi-judicial human rights bodies is imperative (Section 6); but alternative approaches, such as a selective reversal of the burden of proof in specific circumstances or a complete shift of the burden to the Government in all instances, are undesirable as they would introduce further uncertainty for parties to proceedings, may actually result in higher burdens for claimants, and would potentially flood the Working Group and other institutions with unsubstantiated claims (Section 7). The conclusions reached seek to ensure respect for both facets of the ontology of these bodies (Section 8).

[21] See Stanford Encyclopedia of Philosophy, 'Equality', (2021; available at: https://plato.stanford.edu/entries/equality/ [last accessed 23 November 2023]) citing Aristotle, Nicomachean Ethics, V. 3. 1131a10–b15; Politics, III.9.1280 a8–15, III. 12. 1282b18–23.

[22] MacCormick, *Legal Reasoning and Legal Theory* (1978), at 73. See also Brand-Ballard, *'Treating Like Cases Alike', Limits of Legality: The Ethics of Lawless Judging* (2010).

[23] There are some procedural differences between these bodies. For example, whereas the Treaty bodies typically incorporate a formalised admissibility step in their procedure, the Working Group's regulatory instruments do not explicitly set out such a step. However, they all incorporate human rights fact-finding into quasi-judicial adversarial processes and the approaches and standards set out herein can be adapted to their specific procedures as necessary. Accordingly, the proposals in this article should be considered for adoption in different bodies *mutatis mutandis*. See also Viljoen supra n 7 at 63, 77–80.

[24] See United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 (2004) ('The "rule of law" [. . .] requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.').

[25] See infra Section 6.

[26] This is equivalent to a 'preponderance of evidence', or 'convincing evidence', or 'reasonable to conclude' standard, as discussed infra at Section 6.

[27] Whereas some facets of the Working Group's operations are non-adjudicative, such as sending allegations letters to Governments, its individual complaint process has a litigation style process with the complainant providing submissions which are responded to by the Government within an established time and length limit. See also Viljoen supra n 7 at 77.

2. THE DUAL-FACETED MANDATES OF QUASI-JUDICIAL HUMAN RIGHTS BODIES

Quasi-judicial human rights bodies sit at the intersection of adjudication and human rights activism.[28] The term 'quasi-judicial' is used herein to refer to bodies that exercise court-like functions, such as receiving evidence, overseeing adversarial procedures,[29] and considering complaints by States and/or individuals. They are not courts, however, as these bodies also undertake broader human rights activities such as sending communications to States, disseminating press releases, considering State reports, issuing general comments (or deliberations) on thematic issues, and conducting regular country visits.[30] Relevant institutions include Treaty Bodies, such as the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Elimination of Racial Discrimination.[31] Although not a treaty-body, the Working Group on Arbitrary Detention exercises similar functions, as it accepts individual complaints and utilises an adversarial process.[32]

Quasi-judicial bodies issue decisions known as 'views' or 'opinions'.[33] While the bindingness of these decisions is debated,[34] they are considered authoritative interpretations of obligations under applicable treaties and customary international law, issued by specialised bodies entrusted with interpreting those instruments.[35] Some domestic legal systems have held that they require implementation.[36] The Working Group itself sees a significant number (though currently not a majority) of persons subject to its determinations released following the issuance of opinions declaring them to have been arbitrarily detained.[37]

The evidentiary approaches applied by entities typically reflect their mandates and ontology. For example, criminal courts can impose forceful measures of compulsion, including incarceration.[38] To keep such powers in check requires strict adherence to the presumption of innocence and accompanying fair trial guarantees. As conveyed by Blackstone's ratio: 'it is better that ten guilty persons escape than one innocent person suffer'.[39] For evidentiary procedures

[28] As set out in the following paragraphs, there is a contrast between the human rights world, which has traditionally not been focused on rules of evidence and burdens and standards, whereas those issues are central to adjudication and litigation. Moreover, human rights work is typically conducted in the face of an unequal dichotomy between the individual and the government, whereas litigation is conducted in the face of two equal parties (in theory).

[29] The term adversarial is used in the broad sense of parties with typically opposing viewpoints provide submission which are then adjudicated by neutral fact-finders who have no connection to the parties. It is not used to specifically refer to the common law legal system. Viljoen explains that already by 2004 the increasing judicialization of these bodies that had made the label 'quasi-judicial' bodies appropriate; Viljoen supra n 7 at 81.

[30] See generally Connors and Shah, 'Chapter 19: United Nations', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law*, 4th Edition (2022), at 393–418.

[31] See infra at Section 6; Rodley, supra n 10 at 12–13.

[32] See generally Connors and Shah supra n 30 at 393–418.

[33] The Commission on Human Rights called for the Working Group to give 'views', rather than 'decisions' in res. 1997/50, 15 April 1997, para 7, and the Working Group has termed its decisions 'opinions' since then.

[34] See Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law—The Case of Special Procedures' (2011) 29 *Netherlands Quarterly of Human Rights* 261 at 283, 286 and Genser and Winterkorn-Meikle supra n 7 at 118–119 (both arguing that the Working Group's opinions are not legally binding). Cf. Mazzinghy supra n 7 at 70–71 (noting that the prohibition of arbitrary detention is considered a jus cogens norm and therefore any treaty which conflicts with it would be voided pursuant to Article 53 of the Vienna Convention on the Law of Treaties). See also Toomey supra n 7 at 235.

[35] See HRC, General Comment 33, CCPR/C/GC/33 (2008) para 11.

[36] See, e.g. *Maria de los Ángeles Gonzalez Carreño v Ministry of Justice*, No 1263/2018 ROJ; STS 2747/2018, ROJ: STS 2747/2018, ECLI:ES.TS:2018:2747. See also Connors and Shah supra n 30 at 411–413.

[37] WGAD 2022 Annual Report of the Working Group on Arbitrary Detention (2023) A/HRC/54/51 Annex 3, para 12.

[38] See Kelsen, 'As a coercive order, the law is distinguished from other social orders. The decisive criterion is the element of force—that means that the act prescribed by the order as a consequence of socially detrimental facts ought to be executed even against the will of the individual and, if he resists, by physical force' (Kelsen, *The Pure Theory of Law*, Knight (trans.), (1967 [1934]) at 34–41.

[39] Blackstone, *Commentaries on the Laws of England*, 21st ed. (1765), bk. IV, ch. 27, at 358. Voltaire wrote of 'the great principle that it is better to run the risk of sparing the guilty than to condemn the innocent.' Arouet de Voltaire *Zadig, or Fate, in Candide and Other Stories* (1962) at 20.

and burdens, this means that the prosecution bears the burden of establishing guilt to the requisite standard, which in common law systems is typically 'beyond reasonable doubt',[40] in Francophone systems *conviction intime*,[41] and, in the Islamic tradition, has been stated as overcoming the 'slightest doubt'.[42]

Conversely, human rights institutions do not place individuals in prison; often they call on governments to do the opposite.[43] Unlike the accused in a criminal case, a respondent government in a human rights case typically has far greater access to formal sources of evidence and related materials than the complainant. Consequently, the justifications underlying criminal burdens and standards do not readily transpose across to these human rights bodies.

Even among quasi-judicial human rights bodies there exists significant variation in their approach to evidence. Flexibility is useful for these bodies, as it allows them to explore new legal issues and reflects their differing areas of legal focus. Yet, all of them must determine facts in order to have a substrate on which to superimpose the law.[44] The maintenance of rigorous and broadly consistent approaches to fact-finding in adversarial processes is important for the correct determination of each case, to avoid disparate outcomes depending on the forum chosen, and, more broadly, for the reputation, credibility, and impact of the quasi-judicial bodies' work.[45] For all these bodies it is critical to reconcile their human rights ontology with their judicial functioning. In this pursuit, the following section examines how one of these bodies—the Working Group, has balanced these two facets.

3. BALANCING JUDICIAL AND HUMAN RIGHTS MANDATES: THE WORKING GROUP'S APPROACH TO EVIDENTIARY ASSESSMENTS

As one of the Human Rights Council's Special Procedures, the Working Group is mandated to assess violations of the peremptory norm against arbitrary detention.[46] It has a broadly similar nature to treaty bodies such as the Human Right Committee,[47] albeit as part of the United

[40] See, e.g. Rome Statute of the International Criminal Court, Article 66(3); *Martić*, IT-95–11-A, Appeal Judgment, 8 October 2008, para 61) ('a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused'). Although there is variation in formulations around the world, the beyond reasonable doubt standard also features in some civil systems, such as Italy (see Article 533 of Codice di Procedura Penale, (G.U. n.250 del 24-10-1988—Suppl. Ordinario No 92)).

[41] Article 355 Code de procédure civil.

[42] See Holscher and Mahmood, *Borrowing From the Shariah: The Potential Uses of Procedural Islamic Law in the West, in From International Criminal Justice: Issues in a Global Perspective*, Delbert Rounds, 2000 at 82.

[43] See, e.g. *Case of Velásquez Rodríguez v Honduras*, Merits, IACHR Series C No 4, [1988] IACHR 1, (1989) 28 ILM 291, (1988) 9 HRLJ 212, IHRL 1385 (IACHR 1988), 29 July 1988, para 134 ('[t]he objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.').

[44] Critiques of the notion of objective facts have been made by post-modernist schools of thought, such as critical legal studies; Viljoen supra n 7 at 51–53. While these critiques are useful to be aware of, the functioning of human rights bodies depends on certain matters being established as having occurred. Moreover, victims of serious violence, such as water-boarding or having fingernails removed, would consider those occurrences objective facts. In this light, it is important to ensure that there are accepted procedures and standards for establishing facts before bodies applying international human rights law.

[45] As Frank and Fairly observe in general to human rights fact-finding: 'since the efficacy of fact-finding rests so largely on credibility, and credibility emanates primarily from manifest integrity of process, sound procedures are not merely desirable but a functional prerequisite'; Frank and Fairley, 'Procedural Due Process in Human Rights Fact Finding by International Agencies' (1980) *American Journal of International Law* 308–345, at 310.

[46] WGAD, Deliberation No 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, in Report of the Working Group on Arbitrary Detention to the Human Rights Council, A/HRC/22/44 (2012) para 75; IACtHR, *Osorio Rivera and Family Members v Peru*, Judgment (Preliminary objections, merits, reparations, and costs), 26 November 2013, Series C, No 274, para 112; Human Rights Committee, General Comment 29, art. 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 11. See also Schabas, 'Identifying the Norms of the Customary International Law of Human Rights', *The Customary International Law of Human Rights* (2021) at 66.

[47] ECtHR, *Peraldi v France* (decision), no 2096/05, 7 April 2009 (describing the Working Group as a body whose proceedings were adversarial and whose decisions were reasoned, notified to the parties and published in an appendix to its report. In addition, its recommendations made it possible to determine State liability in cases where arbitrary detention was found,

Nations Special Procedures.[48] Whereas the Working Group carries out various functions, its judicial facet is considered particularly important for its legitimacy and it 'attaches great importance to the adversarial character of its procedure.'[49]

Factual issues have always been essential to the Working Group's consideration of cases of alleged human rights violations. Its guiding Fact Sheet notes that 'whether the person is deprived of liberty is a question of fact: if the person in question is unable to leave at will, the safeguards which are in place to guard against arbitrary detention must be observed.'[50] However, recent years have seen methodological questions regarding burdens and standards of proof come under increased scrutiny before the Working Group. Its adversarial procedures,[51] sees the complainant submit its case and the Government able to respond to the alleged violations, and then the complainant able to add a further reply.[52] Pivotal to the weighing of evidence is the Working Group's *prima facie* approach,[53] which has developed and become entrenched since its establishment in 1991. This sequenced approach requires the claimant to demonstrate their case on a *prima facie* basis, before moving the onus to the Government to respond. The Government can meet this burden of proof by producing detailed and substantiated evidence in support of its claims.[54]

The Working Group's jurisprudence over its three decades of operations shows increasing precision and consistency on evidence and burdens, to the point where its current opinions have a uniform reiteration of its sequenced approach. The Working Group first authoritatively set this out in its 2011 Annual Report.[55] Prior to that, its opinions exhibited a variety of expressions, sometimes suggesting an overarching burden on the source,[56] sometimes placing it on the Government,[57] and sometimes there was no mention of the burden at all.[58] Its application of the approach to evidence also varied, sometimes making 'reasonable' assumptions due to

and even to put an end to the impugned situations. Its opinions were also subject to a monitoring procedure for the purpose of ensuring that the recommendations contained in them were implemented).

48 Although the Working Group was established by resolution of the United Nations Commission on Human Rights rather than a treaty, this has no direct bearing on the approach to evidence. Both the Working Group and the Human Rights Committees are quasi-judicial bodies with partially overlapping mandates as so should aspire to consistent approaches.

49 WGAD *Revised Fact Sheet,* supra n 12 at 7. See also Viljoen supra n 7 at 77.

50 WGAD *Revised Fact Sheet,* supra n 12 at 4.

51 See Genser and Winterkorn-Meikle supra n 7 at 107.

52 The adversarial process was adopted from the very first formulation of the Working Group's methods of work, on the basis that it would 'assist in obtaining the cooperation of the State concerned by the case considered' (Human Rights Council, Methods of work of the Working Group on Arbitrary Detention (2017) A/HRC/36/38); F/CN.4/1992/20, 4. There have been exceptional cases in which the source raised new information in its further reply that required the Working Group asking the State concerned for further comments to have a full understanding of the matters in dispute between the parties before issuing an opinion. See e.g. opinions No 32/2016, No 14/2017, and No 40/2017.

53 A *prima facie* case has been described as evidence 'which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed' Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1996) at 326–328. For the application of this standard in the context of international adjudication, see the decisions of the USA–Mexico General Claims Commission in Lillie S. Kling (*USA v United Mexican States*), 8 October 1930, 4 UNRIAA, 585 and the Parker case (*USA v Mexico*), 31 March 1926, 4 UNRIAA. See also Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (2011), 229–234.

54 See, e.g. opinion No 41/2013, which notes that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the most relevant information.

55 WGAD, supra n 18 para 68 citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, ICJ (24 May 2007) ICJ Reports 2007, p 582. The 2011 statement concerning the *prima facie* approach somewhat conflates the *prima facie* approach and evidentiary burdens and reversing of the burden of proof, necessitating the clarifications that have been made through opinions since then, as discussed in this article.

56 Decision 7/1992 (opposed) ('[w]ith regard to the use of a statement obtained under torture, there is no evidence to justify a finding by the Working Group that this allegation has been proved'.).

57 Decision 1/1992 (unopposed) ('[t]here is no material on record to lead the Working Group to draw an inference that the expression of their opinions endangered in any way national security or public order').

58 It frequently pointed to the lack of a response from the Government before reaching its factual determination, without explaining the impact on its assessment of the source's claims; see Decisions 1/1992, 2/1992, 3/1992, 4/1992.

the Government silence on an issue,[59] and sometimes requiring 'clear reasons' to find a fact.[60] Whereas the Working Group had referred to the *prima facie* notion previously,[61] its adoption of this formulation in its 2011 report marked a clear shift towards formalizing this approach.

Since 2011, the Working Group reiterated and clarified its approach many times.[62] It provided several explanations over the following decade,[63] indicating that a claim is sufficiently 'consistent' or 'detailed' in the following circumstances: the source provides corroboration;[64] the co-claimants provide accounts which match in virtually all material aspects;[65] the source supports its claims with information from external actors, such as news reports and/or findings by other international human rights bodies;[66] and where the Working Group's own prior determinations in similar situations support the source's claims.[67]

From 2019, the Working Groups has adhered to an essentially uniform description of its sequenced approach, stating:[68]

> In determining whether the detainee's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[69]

The way in which the Government[70] can refute the allegations will depend on the specific issues in question. But an advisable guideline that has emerged from the jurisprudence is that the Government should provide a 'detailed and substantiated' response.[71] The Working Group

[59] Opinion 17/2008 (opposed); 21/2008 (opposed) (taking 'reasonable' assumptions due to the Government silence on an issue).

[60] Opinion 22/2010 (opposed) (stating 'the Working Group has not been provided with clear reasons to question the allegation of the source').

[61] Opinion No 29/2010, para 25.

[62] See, e.g. Opinions No 21/2011, para 31; No 41/2013, 52/2014, 28/2016, 67/2017, 79/2017, 55/2018, 56/2019, 68/2020, and 68/2021. The WG has done so in one of three ways: (1) in a standalone paragraph or section of its discussion; (2) in a sentence embedded in a paragraph about the lack of government response to recall how the Working Group deals with evidentiary issues; (3) in a footnote referencing previous relevant opinions.

[63] For the following points, see generally American University Washington College of Law Center for Human Rights and Humanitarian Law (2021), *The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015–2018): An Introduction for Practitioners*, 14–15.

[64] See e.g. Opinions No 61/2016 paras 50 and 53. See also Opinion No 68/2020, paras 72–73.

[65] See e.g. Opinions No 7/2016 para 47 and 81/2017 para 23.

[66] See, e.g. Opinions No 15/2018 para 29, 22/2017 para 74, 20/2017 paras 33 and 40, 44/2016 paras 25–27.

[67] See, e.g. Opinions No 19/2018 para 27, 26/2017 para 50, 44/2016 para 25, 11/2016 para 27 and 10/2016 para 41.

[68] See, e.g. Opinions No 54/2019, para 146; 56/2019, para 73; 21/2021, para 60; 83/2021, para 60; 78/2022, para 77; 65/2022, para 89; 82/2022, para 32; 47/2022, para 42; 48/2021, para 48 (all referring to WGAD supra n 20, para 68).

[69] See, e.g. Opinions No 65/2022, para 89; 82/2022, para 32; 47/2022, para 42; 48/2021, para 48 (all referring to WGAD supra n 18, para 68).

[70] The Working Group can also consider individual cases based on submissions of Governments and intergovernmental and non-governmental organizations as well as by national institutions for the promotion and protection of human rights at its own initiative, under paragraphs 12 and 13 of its Methods of Work supra n 52 (see also Commission on Human Rights Resolution 1993/36, para 4); though it rarely does so. This would be unlikely to affect the *prima facie* approach set out herein, as the Working Group would likely only take up a case if it had information *prima facie* indicating arbitrariness no matter where it came from. Communications from governments in this respect would likely be the State of nationality of a citizen detained overseas rather than the government with custody of the individual. The State of nationality would thus not be in the same position as the State of custody for the purposes of establishing the expected burden and standard of evidence.

[71] See Opinions No 16/2016 (Nicaragua), para 21 (finding 'that the Government did not provide detailed information regarding the time, place and manner in which the claimant was deprived of his liberty, nor did it prove that, at the time of his arrest, the police officers showed an arrest warrant and informed him of the reasons for his arrest'); 58/2018 (Morocco), para 47 (stating '[t]he Government simply denies the ill-treatment, adding that the judge did not note any signs of ill-treatment and that the accused did not report any such acts, a claim that is contested in the additional comments from the source. The Government does not mention the confessions. The Working Group recalls that a formal objection without supporting evidence is not convincing, especially as it is up to the State to prove that no abuse took place'). See further Opinion No 68/2012 (Morocco), para 26(c) ('The Government has provided specific and detailed information in response

has oft-repeated that 'mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.'[72] Beyond that core sequence, the Working Group has clarified the contours and parameters of the *prima facie* approach through its jurisprudence, as set out forthwith.

4. THE WORKING GROUP'S CONTRIBUTION TO CLARIFYING THE LEXICON AND TAXONOMY OF BURDENS AND STANDARDS OF EVIDENCE

Although quasi-judicial human rights bodies must operate within their respective mandates, the resolutions and annexed instruments governing their operations do not typically set out specific procedural terminology and methodology.[73] However, lexicon and taxonomy are important ways to enhance operational consistency between quasi-judicial human rights bodies. In this respect, insights can be drawn from the Working Group's language and approach to evidence.

A. Burden vs Standard of Proof

First, whereas the *standard* of proof is the 'degree of conviction that must be considered verified in order to consider a fact proven at a given procedural moment',[74] the *burden* of proof is the rule determining which party has the obligation to provide evidence to prove its claims or disprove the other side's claims. In general, the overall burden of proof has been placed on claimants, both in human rights cases as well as under civil law more broadly.[75]

The Working Group's *prima facie* sequenced approach could be seen as merging the standard with the burden of proof.[76] The term *prima facie* can constitute a quantitative threshold, which is akin to a standard.[77] However, the *prima facie* approach, as used, is a means of distributing the burden, and is not identical to a standard of evidence. Indeed, if the Government responds to the source's *prima facie* case (and if the source provides a reply, known as 'further comments'),[78] then the Working Group must assess those two parties' accounts against each other and cannot simply apply a *prima facie* standard to resolve the impasse.

It is striking that the Working Group does not uniformly describe the standard it applies when assessing the ultimate outcome of a case. A more explicit and uniform articulation of its standard would enhance the accessibility and defensibility of the Working Group's reasoning

to all these allegations indicating that it fully adhered to international law on the subject. The source has not challenged that information or denied that Mr. Kaddar was represented by lawyers during both the investigation and trial stages of the proceedings. The source has not established or claimed that Mr. Kaddar's lawyers were unable to exercise their rights.'); 34/2012 (Uzbekistan), para 21 ('The Working Group observes that the Government has rebutted allegations, providing specific and detailed information on the case.'). This guideline is neutral as to the form in which the Government should refute the allegations, whether that be by a detailed narrative or documents or otherwise. See further Opinion No 78/2018, para 87 (referring to the government's failure to provide 'any concrete evidence [that the detainee] had ever been a member of any terrorist organization').

72 WGAD supra n 18 para 68. A former member of the Working Group has conveyed that, in her experience, 'late responses, blanket denials of the allegations, and assertions without supporting information or evidence that the State has acted in accordance with its domestic laws and procedures and met its international human rights obligations, often fail to respond meaningfully to the source's claims'; Toomey supra n 7 at 232.

73 See infra Section 6 concerning the frameworks of several quasi-judicial human rights bodies.

74 See Bovino supra n 4 at 65–66.

75 See Roberts supra n 7 at 1689–1690.

76 The Working Group's jurisprudence does not elaborate on the distinction between the standard and burden of proof in any consistent manner. This highlights the significance of the present study.

77 On occasion, the Working Group appears to refer to *prima facie* as the standard being applied and not just an aspect of its sequenced approach to evidence; see, e.g. Opinion No 78/2018, para 84 ('the Working Group finds that the source has established a *prima facie* violation of Mr. Yaman's right to a fair hearing').

78 A source is not obliged to provide a reply to a government's response; Methods of Work, supra n 52, para 15. However, they typically do so and the Working Group refers to all materials which have been received in a timely manner in its opinions before engaging in the analysis thereof.

and determinations.[79] Some other human rights bodies which adjudicate claims appear to apply a balance of probabilities standard, considering the totality of the circumstances.[80] Because it has partially overlapping jurisdiction with those bodies, and to avoid disparate outcomes on similar cases, and potentially forum shopping, the Working Group would benefit from procedural alignment with its sibling United Nations institutions, and the balance of probabilities standard would serve this purpose, as discussed below.[81]

B. Overall vs Evidentiary Burden

Second, there is often confusion between overall burdens and evidentiary burdens. The overall burden requires the claimant in a judicial process to establish its case (*onus probandi incumbit actori*).[82] Conversely, an evidentiary burden concerns a specific point in the litigation, such as providing materials that a victim could not reasonably be expected to access. In *Purna Maya v Nepal* the Human Rights Committee avoided putting an evidentiary burden on the victim to submit documentation, as 'requiring victims of arbitrary and illegal detention to provide records thereof would amount to a *probatio diabolica* [devil's proof].'[83]

The Working Group has explained that, if the source had established a *prima facie* case for a violation, the Government could refute the allegations 'by producing documentary evidence',[84] rationalizing that:

> the source of a communication and the Government did not always have equal access to the evidence and that it was often the Government alone that had the relevant information. In that case, the Working Group also noted that where it was alleged that a person had not been afforded certain procedural guarantees to which he or she was entitled, the burden to prove the *negative* fact asserted by the applicant was on the public authority, because the latter was generally able to demonstrate, by producing documentary evidence, that it had followed the appropriate procedures and applied the guarantees required by law.[85]

Technically, this is not a reversal of the overall burden of proving the case, but instead is an evidentiary burden relating to a specific 'negative fact' put in issue by the source's *prima facie* case.[86]

[79] See infra at Section 6 (on standard of proof, recommending a balance of probabilities or equivalent standard). See also United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (2015) at 15 (calling on human rights fact-finding bodies to make the standards they apply explicit); Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Academie du Droit Internationale Humanitaire et des Droits Humains à Genève (undated).

[80] Note that a general examination of the views of the Human Rights Committee has led commentators to conclude that its standard of proof is akin to a balance of probabilities test; see, e.g. Mc Goldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1994) 150. It also applies presumptions in some respects.

[81] See also infra Section 5 for discussion regarding whether the Working Group's flexible standard enhances the utility of its opinions. Genser and Winterkorn-Meikle, supra n 7, argue that the Working Group's opinions are non-binding and that this, in conjunction with the Working Group's flexible standards, enhances their utility (by inference the argument could be made that if the opinions were binding more exacting standards would have to be imposed on the complainants). However, the burden and standard applied is independent of whether or not a human rights body's decisions are strictly binding.

[82] See Kazazi, supra n 53 at 369. See also Forster, 'Getting to the Heart of the Burden of Proof', *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (2011) at 185, referring to the principle as 'actori incumbit probatio'.

[83] HRC, *Purna Maya v Nepal* UN Doc CCPR/C/119/D/2245/2013 (2017) para 12.7.

[84] Opinion 75/2017, para 34 citing Opinion No 41/2013.

[85] Opinion 75/2017, para 34 citing Opinion No 41/2013. See also Mazzinghy supra n 7 at 85.

[86] To clarify the terminology, a moving party has the overall burden of proof, but either party may bear an evidentiary on a specific issue irrespective of the overall burden. Separately, there is the issue of sequence, in which it falls to the moving party to first provide a *prima facie* case, upon which the onus shifts to the responding party to provide information disputing that prima facie case. Finally, there is a legal burden, which falls on a detaining power irrespective of any litigation.

Many other human rights judicial institutions apply a similar type of evidentiary burden.[87] Even if a party fails to meet an evidentiary burden, it may be successful in discharging its overall burden,[88] as the court will still look at the evidence that has been provided in order to determine whether the party bearing the overall burden has discharged it to the necessary standard of proof.[89] This is an important conceptual distinction, which the Working Group and other quasi-judicial human rights bodies should articulate more explicitly in order to guide parties and the broader public.

C. The Shifting Onus

An additional term to clarify the lexicon and taxonomy of human rights bodies is 'onus'. The onus refers to the responsibility on the respondent (the Government typically) to refute the *prima facie* case presented by the claimant. Whereas an overall burden stays with the claimant,[90] the onus falls on the Government to refute any *prima facie* case that is established. Although the Working Group does not specifically use the term 'onus',[91] adopting the term 'onus' could lead to greater consistency,[92] as it would prevent confusion arising from the term 'burden' being applied to multiple parties at the various stages of proceedings.

D. The Legal Burden

Separate from the overall burden that falls on a claimant who commences the litigation, there is the legal burden which falls on a Government to justify a person's detention. The Working Group has clarified that 'the burden of establishing the legal basis and the reasonableness, necessity and proportionality' of detention lies with the authorities responsible for the detention in every instance, including before a domestic court.[93] This is reflected in Basic Principle 13, whereby authorities must prove the 'direct and immediate connection between the exercise of the right [to detain] and the threat [posed by the accused person]'.[94] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the circumstances of the detention and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.[95]

[87] See Roberts supra n 7 at 1694–1695 referring to inter alia *Escher* et al *v Brazil* (IACtHR) para 127; *Shikhmuradov v Turkmenistan*, Communication No 2069/2011, HRC (2015), para 6.2; *D.H. and others v The Czech Republic*, Application No 57325/00, ECtHR (2007), para 179.

[88] Kazazi supra n 53 at 338 ('it is not accurate to say that establishing *prima facie* evidence shifts the burden of proof, since it would mean that the duty of the claimant to discharge the burden of proof would be fulfilled by a mere showing of a *prima facie* case, and that from that stage it would be the duty of the respondent to disprove the claimant's allegation. The burden which is in fact shifted from the proponent of the burden of proof to the opposing party is the burden of evidence, and it is an abuse of the term "burden of proof" to use it in place of the "burden of evidence." The burden of proof stays with the proponent until such time as the claim is proved.'). This also arises in criminal proceedings in relation to alibis, provocation, and other special defences in criminal proceedings; see, e.g. Shane Darcy, 'Defences to International Crimes' in Schabas and Bernaz (eds.), *Handbook of International Criminal Law* (2011) at 231–245.

[89] By way of analogy, in a criminal case, an accused may have an evidentiary burden to prove a defence such as alibi or insanity, but even if they fail to satisfy that burden, they may still be successful in the case if the prosecution fails to prove a key element of the offence.

[90] Contra, see Roberts supra n 7 at 10 (arguing that '[t]he obligation to present a prima facie case, and the burden of proof relative to the case as a whole, are two different matters.').

[91] See the current standard formulation set out in, e.g. 65/2022, para 89 and other cases, listed above.

[92] That this is the term preferred and employed in the remainder of the present analysis.

[93] WGAD 'Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings to the Court' UN Doc A/HRC/30/37 (United Nations Basic Principles), Annex, para 21.

[94] United Nations Basic Principles, Principle 13; Mazzinghy supra n 7 at 85–86.

[95] See Opinions No 1/1998, para 13; No 82/2018, para 25; No 36/2019, para 33; No 42/2019, para 43; No 51/2019, para 53; No 56/2019, para 74; No 76/2019, para 36; No 6/2020, para 36; No 13/2020, para 39; No 14/2020, para 45; and No 32/2020, para 29.

The legal burden differs conceptually from the overall burden that a plaintiff bears to prove its case. Indeed, the obligation for a government to demonstrate a justified basis for detention exists irrespective of whether any litigation is underway. In this light, the legal burden exists both within and without the litigation context.

As a corollary of this legal burden, the Government may create further obligations for itself. For example, if the Government claims that delays in a case were due to the complexity of proceedings, it must prove the existence and extent of that complexity.[96] On a related note, the legal obligation on the government to justify the detention appears to increase with the length of the detention.[97]

5. INSIGHTS FROM APPLYING THE WORKING GROUP'S *PRIMA FACIE* APPROACH IN PRACTICE

The Working Group's approach to evidence is now largely settled in its broad contours.[98] However, whereas that sequenced approach it relatively settled, the way in which each side can satisfy its obligations is more flexible and case-specific. There is no detailed regulation regarding the types of materials or information the source[99] and Government can submit.[100] The Working Group requests that complainants should fill in the model questionnaire form, which is available on its website.[101] That asks for biographical data, the details of the arrest and any procedures and remedies provided, and asks why one or more of the five categories has been violated. It notes that '[c]opies 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'. However, the Working Group has a 20-page limit on submissions, including annexes.[102] This reflects the fact that the Working Group seeks to determine as many cases as possible while still giving them sufficiently individualised treatment, as well as the fact it is not addressing criminal cases and does not have a penal mandate.[103] Aside from these more formalistic aspects of the submissions, there are no specific requirements regarding the types of materials that can be submitted, and the Working Group can take account of materials other than those submitted by the parties, such as reports of other special procedures and United Nations treaty bodies.[104]

Accordingly, sources have wide discretion regarding the materials they submit. Some parties provide detailed narratives of the relevant events and procedural steps. Others have a general overview and then specific documents attached. The documents may consist of official court records, medical reports, or witness statements, as well as photos, diagrams, and even videos. Unlike courts, there is no test for the admissibility of these materials.[105] This flexible ambit is a

[96] Opinion No 48/2005, para 22 ('[t]he burden of proof for justifying that a case was particularly complex *rests with the Government.*') (*italic added*).

[97] See e.g. Opinion No 70/2019, para 66.

[98] WGAD, supra n 18 para 68.

[99] In terms of who may submit a complaint, the Working Group receives them from the individuals concerned, their families, their representatives or non-governmental organizations for the protection of human rights, from Governments and inter-governmental organizations.

[100] The Working Group does have a standard submission form that sources are encouraged to use.

[101] Available at: www.ohchr.org/en/special-procedures/wg-arbitrary-detention/complaints-and-urgent-appeals [last accessed 23 November 2023].

[102] WGAD, Methods of Work, supra n 52, para 11.

[103] See *Velásquez Rodríguez v Honduras*, Case No 7920, IACtHR(1988), para 135; *Godínez Cruz v Honduras*, Case No 8097, IACtHR (20 January 1989), para 140; *Mathew v The Netherlands*, Case No 24919/03, ECtHR (15 February 2006), para 156; cited in Roberts supra n 7 at 1682 ('human rights claims are not criminal claims, and that a criminal approach to evidential issues is inappropriate—a respondent state is in no way a criminal defendant').

[104] Viljoen supra n 7 at 77.

necessary reflection of the Working Group's wide mandate,[106] but also emerges from its human rights etiology, in which sources are frequently not legally trained and may lack access to official records and means to take witness statements. Based on the submitted material, the Working Group takes a wholistic approach, addressing it in its entirety to reach its views. At the same time, the Working Group typically lists the evidence it relies on when examining an allegation and highlights key facts that it relies on when determining that an account is credible, which contributes to its credibility and transparency, in line with the judicial facet of its mandate.[107]

Opinion No 68/2020 (Mr. Walid El Batal against Morocco) illustrates the Working Group's assessment of evidence within its *prima facie* approach. The source submitted a video of El Batal's arrest showing he was assaulted alongside allegations of torture by police forces.[108] In the absence of any information that could confirm the veracity of the Government's denials that torture occurred, the Working Group considered that the source had made credible allegations and that the Government had not produced any evidence to the contrary, such as the findings of medical experts regarding the injuries suffered by Mr El Batal.[109] The Working Group also noted the Government's statement that prosecutions for violence had been initiated against several police officers as evidence that Mr El Batal's allegations of police violence were not unfounded.[110] Furthermore, the Working Group did not attribute substantial weight to the Government's mere denials that Mr El Batal was detained on a discriminatory basis. Rather, it referred to a widespread practice of discrimination against Saharan individuals to determine that his role as a journalist and human rights defender for the self-determination of the people of Western Sahara were the real causes of his detention, making it arbitrary.[111]

The El Batal case is an example of assessing specific pieces of evidence against the backdrop of a broader pattern of discrimination and mistreatment. The various quasi-judicial human rights bodies discussed herein are often confronted by similar paradigms.[112] The Working Group's approach, assessing case-specific evidence, while also taking into account the wider context to undermine mere assertions that the source was fabricating the account, reflects both its judicial and human rights ontologies. It provides a defensible model for other quasi-judicial human rights bodies with dual-faceted mandates when addressing similar scenarios.

An issue that arises on occasion is that of tacit acceptance. In cases when the Government does not challenge the *prima facie* credible allegations made by the author, the Working Group often insists that all conclusions are made in the absence of a government response throughout its opinions.[113] On at least one occasion, the Working Group has procedurally interpreted this silence as tacit agreement with the statement of facts provided in the application.[114] Additionally, in cases where governments provided late responses, the Working Group generally does not accept them in the same way as duly filed responses (in accordance with its Methods of Work) but still may use any substantial evidence in them to assess claimants' allegations and

[105] In this respect, the Working Group is similar to the ECtHR, which has held that 'In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence'; *El-Masri v the Former Yugoslav Republic of Macedonia*, para 151. Cf. Rome Statute of the ICC, Article 69.

[106] See Genser and Winterkorn-Meikle, supra n 7 at 107.

[107] See American University Washington College of Law Center for Human Rights and Humanitarian Law (2021), *The Legal Methods and Jurisprudence of the United Nations Working Group on Arbitrary Detention (2015–2018): An Introduction for Practitioners*, 15.

[108] Opinion No 68/2020, paras 5 and 64.

[109] Opinion No 68/2020, paras 64 and 77.

[110] Opinion No 68/2020, para 80.

[111] Opinion No 68/2020, paras 72 and 86–89.

[112] See discussion of the approaches taken by other quasi-judicial human rights bodies infra at Section 6.

[113] See e.g. Opinions No 41/2013, 67/2017, 88/2017, 27/2022.

[114] See e.g. Opinion No 2/2015, para 15.

render its opinions, if it deems it appropriate to do so.[115] This reflects the importance it places on its adversarial procedure.[116]

Another issue that often arises relates to requests to assess the sufficiency of the evidence at the detainees' trial. In this respect, the Working Group has repeatedly noted that:

> 'these are areas which fall outside the Working Group's remit. It is not for the Working Group to evaluate the facts and evidence in a particular case or to substitute itself for domestic appellate tribunals.'[117]

As an international body adjudicating human rights claims, the Working Group is not equipped to review entire dossiers of evidence submitted in domestic proceedings. At the same time, it recalls that it must assess domestic procedures to determine if they adhere to international human rights standards.[118] This is a fine nuance, which can pose difficult challenges, particularly when it comes to due process considerations that do not explicitly match those protected under international law but are closely connected, such as the power of certain branches of government to involve themselves in criminal proceedings.[119]

In terms of its assessments of evidence, the Working Group's cases that were dismissed without finding a violation can be instructive. They include cases where the Working Group found insufficient evidence from the source,[120] including 'no tangible evidence',[121] contradictions in the evidence provided by the source,[122] incompatible evidence supplied by the source vis-a-vis substantive evidence supplied by the government,[123] the source failing to contradict statements provided by the Government,[124] and evidence from both the source and the Government simply not demonstrating a failure by the government to observe international norms.[125]

In its findings, the Working Group has indicated that the specificity of the Government's response is an important factor. Where the Government has enumerated and substantiated the legal and factual bases for the detention, this has led to a rejection of the source's claims.[126] In this respect, for example, in *Khaled Kaddar v Morocco*, the Working Group noted the specific nature of the Government's responses which contrasted with the source's vague allegations. It deemed the Government's response sufficient as it covered both the particular reasons for arrest, detailed the proceedings at trial, and provided a list of the protections afforded to the detainee at every stage of detention.[127]

Whereas international criminal law has embraced the formal doctrine of *in dubio pro reo* (whereby any doubt must go to the benefit of the defendant),[128] the Working Group has not

[115] See e.g. Opinion No 27/2022, paras 43–44 (noting the additional information received by Oman and ultimately considering there to be insufficient information to find Oman to have violated the individual's rights). See also Opinions No 79/2017, 4/2021.

[116] WGAD supra n 12.

[117] WGAD supra n 12 at 6. See also 27/2019 (review), para 83. Similarly, the African Court on Human and People's Rights held in *Robert John Penessis v Tanzania*, Application 13/2015 (merits and reparation) 28 November 2019 (Penessis), at para 32 that it does not act as a review court of domestic findings but added that this does not prevent it from reviewing proceedings in national courts for 'consonance' with obligations under the African Charter and related instruments.

[118] WGAD supra n 12 at 6. See also 27/2019 (review), para 83.

[119] See, e.g. Djema'a el Seyed Suleymane *Ramadhan v Egypt* (Opinion No 18/2008); *Paul Rusesabagina v Rwanda* Opinion No 81/2021.

[120] See e.g. Opinions No 20/2004, 40/2017, and 14/2022, para 85.

[121] Opinion No 19/2021.

[122] Opinion No 28/2007, para 24.

[123] See Opinions No 39/2006, 44/2006 and 38/2021.

[124] Opinion No 28/2007, para 25.

[125] See e.g. Opinions No 12/2007, 73/2017 and 17/2018.

[126] See, e.g. Opinion No 31/1999; Genser supra n 7 (2020) at 444.

[127] Opinion No 68/2012, paras 12–26 cited in ibid at 443.

[128] See, e.g. Rome Statute, Article 22(2).

adopted that principle. For example, the Working Group addressed a complainant's argument that the date on a judgment indicated that the matter was pre-decided, as the date preceded the date of the hearing of the matter. It stated that it could not 'rule out the possibility' that the date was a mere error.[129] Conversely, in a criminal case, it would be for the prosecution (equivalent to the State) to address a significant date discrepancy (potentially showing that the judges had pre-determined an issue) and convince the court that it was a mere error rather than anything more untoward.[130]

On the other hand, where there is insufficient information, the Working Group typically states that it is 'not in a position' to determine a disputed allegation, particularly when it concerns adherence to domestic procedural law.[131] The Working Group has also on occasion emphasised that its findings are specific to the facts of each case and that it does not rule out the possibility that similar conditions may be arbitrary in different circumstances.[132]

Although the Working Group will not find a violation if there is no credible basis to do so, it is important that it does not compound the disadvantages that victims (and their representatives) often face in accessing evidence of the mistreatment and violations committed against them.[133] Arrest and charge sheets, medical records, and documentation regarding complaints about unlawful detention will sometimes not be reasonably accessible to the victim. In some cases, these materials will be intentionally denied or destroyed, or never even created, precisely because of the arbitrary nature of the detention. In this light, the Working Group must not lose sight of its human rights ontology, and must insist on the evidentiary and legal burdens, as discussed above, falling on the Government upon the showing of a *prima facie* case by the source.

The Working Group engages in independent fact-checking under its regular communications procedure. Though it has stated that its role is not to substitute for a domestic fact-finder, it does consider various reputable sources in its evaluation of factual narratives by parties.[134] Beyond referencing its jurisprudence and findings from country visits, the Working Group appears to increasingly reference third-party information. It may reference reports by other UN bodies engaging on the same or similar cases or other credible sources about relevant developments on a specific case.[135] Equally, it may reference authoritative sources evidencing historic discrimination and emerging patterns of human rights violations involving arbitrary deprivation of liberty.[136] This has the potential to contribute to the Working Group's efforts to better coordinate within the UN system. It is not inherently inconsistent with its flexible disposition in applying the *prima facie* approach, based on assessing the 'totality of the circumstances', but must be exercised with due regard to the adversarial nature of its procedures.[137]

6. BUILDING THE IMPETUS TOWARDS CONSISTENCY AMONG QUASI-JUDICIAL HUMAN RIGHTS MECHANISMS

Given their similar dual-faceted ontologies, straddling the judicial and human rights domains, the Working Group's approach should broadly align with the practice of other United Nations quasi-judicial bodies.[138] Although these bodies have different substantive concentrations, they

[129] See Opinion No 27/2019 (review), para 90.
[130] See, e.g. Rome Statute of the International Criminal Court, Article 66(3).
[131] See Opinions No 27/2019 (review), para 92, 95; No 40/2017, para 54.
[132] See e.g. Opinion No 32/2016 on the arbitrariness of preventive detention.
[133] See supra in relation to the Government's access to documents and details of procedures applied to detainees.
[134] Genser supra n 7 at Part III.
[135] See, e.g. Opinions No 67/2017, 88/2017, 68/2020.
[136] See, e.g. Opinions No 28/2016, 69/2017, 88/2017, 28/2018 and 56/2019.
[137] See, e.g. Opinion No 54/2015, para 98.
[138] On the establishment and nature of these bodies, see Rodley supra n 10 at 5. On the similarly adversarial nature of the Working Group and treaty bodies' procedures, see Viljoen supra n 7 at 81–84.

all favour adversarial procedures and must all determine facts before they can apply the law.[139] Having a reliable approach to determining facts is important irrespective of which convention or other body of law is being applied. There is no apparent reason for these bodies to apply different approaches and standards to determining facts.[140] Ensuring broadly consistent approaches to fact-finding will help to discourage forum shopping by the parties, whereby they select human rights institutions to seize of their cases based on different perceptions of the burdens and standards applied. It will also limit attempts to discredit human rights institutions by pointing to inconsistent standards being applied and potentially inconsistent outcomes reached in similar cases.[141]

Shifting towards a consistent approach to fact-finding in quasi-judicial human rights bodies would allow a complementarity and coherence of human rights reasoning across United Nations bodies. As the Working Group itself has stated: '[it] makes reference to its own jurisprudence and to that of other United Nations human rights bodies [. . .] [f]or instance, the communications, general comments and reports of the Human Rights Committee and the Committee against Torture are sources of authority on the interpretation of their respective treaties and on available remedies.'[142] This approach 'reflects a wider practice of cross-fertilization between judicial and quasi-judicial bodies at the national, regional and international level.'[143] Encouraging this shift towards greater consistency is important for the predictability and legitimacy of the application of international human rights law.

As an overarching observation, all of the bodies surveyed have adopted a flexible approach to evidence, even if not all have made clear statements as to when and in what circumstances the onus would shift to the Government. They also appear largely *ad idem* that there is typically an inequality of arms in cases involving individuals alleging human rights violations, which justifies shifting the onus to Governments once the complainants have made a *prima facie* case. However, other than the Working Group, many of these bodies do not explicitly set out their approach to evidence. Consistency and defensibility of the quasi-judicial human rights bodies practice would be augmented by replicating the Working Group's approach of routinely and explicitly stating its approach to burdens of evidence. For those bodies which have a formalised admissibility procedure, that step would *mutatis mutandis* equate with the Working Group's application of the initial *prima facie* threshold test. In several of these bodies a *prima facie* threshold is effectively incorporated into the admissibility stage of proceedings but not explicitly stated. As a result, there is considerable variation across institutions in this respect, leading to opacity and potentially disparate outcomes for similar cases.

At the regional human rights bodies, the burdens and approaches to evidence diverge markedly. Before the IACtHR, the claimant, which is the Inter-American Commission on Human Rights, bears the burden of proving its case.[144] However, the IACtHR has not determined a specific standard of proof that is required, other than referring to an absence of formalism and the fact it assess evidence 'as a whole and rationally'.[145] At the ECtHR, the

[139] See Viljoen supra n 7 at 81–84.

[140] See supra on the post-modernist critique of the notion of objective facts.

[141] See Conners and Shah, at 412.

[142] WGAD, supra n 18 para 66.

[143] WGAD, supra n 18, para 66. The ECtHR has a mix of statements regarding the burden and standard, which range from saying it is on the claimant to prove beyond reasonable doubt to it being on both parties with no clear standard. This makes it difficult to assess for comparative purposes, other than to say that the ECtHR would benefit from systemisation; see Roberts supra n 7 at 9.

[144] I/A Court HR, Godínez Cruz Case. Judgment of January 20, 1989, para 129.

[145] I/A Court HR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001, para 89–90; Bovino supra n 4 at 65–66.

distribution of the burden varies according to the context of the case.[146] Whilst it has claimed that its standard is beyond reasonable doubt, its practice varies and does not adhere to this standard in a consistent manner.[147] Indeed, the European Court has at times articulated a standard close to that of the Working Group, particularly in the context of discrimination.[148]

At the African Court on Human and People's Rights, the burden generally falls on a party asserting a fact.[149] This sequenced approach effectively matches that of the Working Group, whereby the applicant seeking to establish a fact must demonstrate a *prima facie* case and then the onus shifting to the Government to dispel this.[150] Also matching the Working Group, the African Court has acknowledged an exception whether the means of to verify the allegation are 'likely to be controlled by the State', in which case the burden is shared.[151] The African Commission has taken the position that the respondent State should prove matters such as the nationality of an applicant where it is contested.[152] On standards, the African Court appears to apply a preponderance of evidence but has also required 'convincing' evidence.[153]

Among the United Nations treaty-based quasi-judicial bodies and other similar panels,[154] the Human Rights Committee (HRC) has a broad approach in its founding documents. According to Optional Protocol 1 of the ICCPR, communications should be considered 'in the light of all written information made available to it by the individual and by the State Party concerned.'[155] The HRC has repeatedly stated that the burden of proof cannot rest on the source alone, especially considering that the source and the implicated Government(s) might not have equal access to the relevant information and that, in general, Governments that adhere to the rule of law should be able to document their actions.[156] Some commentators and respondent governments have criticised this approach and the HRC in particular for not always applying the shift of the burden of proof consistently and rendering a so-called 'default decision.'[157] For instance, the respondent State in *Bleier Lewenhoff v Uruguay* contested the rash conclusion and accused the HRC of ignorance of the legal rules regarding the presumption of innocence. The HRC replied that it had strictly adhered to the principle of *audiatur et altera pars* and had given

[146] See, e.g. *Nachova and Others v Bulgaria* [GC] (Aat Nos.43577/98 and 43,579/98), para 147; O'Boyle, 'Proof: European Court of Human Rights (ECtHR)' (2018) *The Max Planck Encyclopedia of International Procedural Law*, para 27.

[147] *Adali v Turkey*—38,187/97, 31 March 2005, para 216 ('for the Court, the required evidentiary standard of proof for the purposes of the Convention is that of 'beyond reasonable doubt'); *Ireland v the United Kingdom*, judgment of 18 January 1978, Series A No 25, at 65, para 161) (however, the Court describes this as being satisfied by a 'coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact', para 161. See also Bicknell, 'Uncertain Certainty?: Making Sense of the European Court of Human Rights' Standard of Proof' (2019) 8 *International Human Rights Law Review* 155.

[148] European Court of Human Rights, *D.H. and others v Czech Republic* (Application No 57325/00), judgment of 13 November 2007, para 189 (noting that once the applicant establishes 'a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory'.).

[149] *Robert John Penessis v Tanzania*, Application 13/2015 (merits and reparation) 28 November 2019 (Penessis), para 91; *Kennedy Owino Onyachi v United Republic of Tanzania*, (merits), para 142.

[150] *Penessis* supra n 149 at para 96.

[151] *Kennedy Owino Onyachi v United Republic of Tanzania*, (merits), para 143; *Penessis* supra n 149 at para 93.

[152] *Institute for Human Rights and Development in Africa (on behalf of the Nubian Community in Kenya) v Kenya*, Communication, 31, para 151; *Amnesty International v Zambia*, Communication 212/98, para 41.

[153] See, e.g. *Anudo Ochieng Anudo v United Republic of Tanzania*, Application No 012/2015, African Court on Human and Peoples' Rights (2018) paras 80 and 88.

[154] Note that there is also reference to a Committee on the Rights of Migrant Workers in the corresponding convention but that is not addressed in this article.

[155] Optional Protocol to the International Covenant on Civil and Political Rights, Article 5.

[156] *Shikhmuradov v Turkmenistan*, Comm. No 2069/2011, HRC (2015) para 6.2. See also *Bleier v Uruguay*, Aat No 30/1978, HRC (1982) para 13.3; *Telitsina v Russian Federation*, Comm. No 888/1999, HRC (2004) paras 7.5–7.6; *Medjnoune v Algeria*, Comm. No 1297/2004, HRC (2006) para 8.3; *El Hassy v Libyan Arab Jamahiriya*, Comm. No 1422/2005, HRC (2007) para 6.7; *Il Khwildy v Libya*, Comm. No 1804/2008, HRC (2012) para 7.2; *Al Khazmi v Libya*, Comm. No 1832/2008, HRC (2013) para 8.2; *Mufteh Younis Muftah Al-Rabassi v Libya*, Comm. No 1860/2009, HRC (2014) para 7.2.

[157] Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (School of Human Rights Research Series 51, 2012) 219.

the State ample opportunity to furnish information and refute the evidence presented by the authors.[158] In other words, when the allegations presented in a communication are uncontested or are refuted by general statements, the HRC gives 'due weight' to these allegations on the merits 'to the extent that they have been substantiated.'[159]

The Committee on Economic, Social, and Cultural Rights (CmESCR) appears to apply a 'reasonableness' standard of review, supporting a shift of the burden of proof to the State once a *prima facie* violation has been established.[160] In doing so, the CmESCR recognises that the State may adopt a range of possible policy measures for the implementation of the rights set forth in the ICESCR and requires them simply to show that they have taken 'some reasonable action.'[161] Furthermore, if a State argues it lacks the resources necessary to fulfil a Covenant right, the CmESCR has established that the State must prove such lack of resources and demonstrate that every effort has been made to use all the resources at its disposal to satisfy, as a matter of priority, minimum obligations associated with the right in question.[162] The State must also establish that it has sought international assistance and cooperation and that, having done so, has still been unable to obtain the resources required.[163] With regard to the exhaustion of domestic remedies, the CmESCR applies the equivalent of a shifting burden of proof.[164] Once a claimant presents a credible claim that domestic remedies have been exhausted or an exception to the requirement applies, if the State wishes to contest admissibility on grounds of non-exhaustion, it should demonstrate that an unexhausted remedy would be available in practice, as well as adequate and effective in the particular circumstances of the case. If the States advances such proof, the burden shifts back to the claimant to show that the remedies identified by the State were exhausted or an exception to the rule applies. This allocation of the burden of proof is similar to the HRC's approach and reflects awareness that the State enjoys significant advantages over the claimant in connection with access to evidence relevant to the exhaustion requirement. The same burden of proof seems to apply for requests for interim measures: 'the information provided by the [source] must enable the Committee to determine prima facie that there is a risk of irreparable damage and that the communication is admissible.'[165]

The Committee against Torture has clarified that 'the burden of proof is upon the author of the communication, who must present an arguable case.'[166] It also applies a reversal of the burden of proof, stating 'when complainants are in a position where they cannot elaborate on their case, the burden of proof is reversed and the State party concerned must investigate

[158] *Bleier Lewenhoff v Uruguay*, Comm. 30/1978, HRC (1982), para 13.1.

[159] HRC, Annual report 2009, para 138, available at: www.refworld.org/docid/4cb3fcaa2.html [last accessed 19 March 2023].

[160] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) Article 8(4); see also ICJ Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, at 80–84; Griffey, The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *Human Rights Law Review*, Volume 11, Issue 2, June 2011, Pages 275–327.

[161] Working Group, Report of the first session, 15 March 2004, E/CN.4/2004/44 at para 29.

[162] See e.g. Committee on Economic, Social and Cultural Rights (CmESCR), *Mohamed Ben Djazia and Naouel Bellili v Spain*, Communication No 5/2015, UN Doc. E/C.12/61/D/5/2015 (2017). For commentary on the Committee's handling of burdens of proof in that case, see Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 18 *Human Rights Law Review*, at 467–490.

[163] See e.g. CmESCR, General Comment No 12: The Right to Adequate Food (Art. 11) (1999) para 17.

[164] See ESCR-Net, Claiming ESCR at the United Nations: A Manual on Utilizing the OP-IESCR in Strategic Litigation (2014) available at: www.escr-net.org/sites/default/files/ESCR-NET-OP-Manual-FINAL.pdf [last accessed 23 November 2023].

[165] Guidelines on Interim Measures, available at: www.ohchr.org/Documents/HRBodies/CESCR/Guidelines_on_Interim_Measures.docx [last accessed 23 November 2023].

[166] *X and Y v Switzerland* (CAT/C/75/D/1081/2021), para 7.3. See also Committee Against Torture, General Comment No 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22, para 38 citing *Sivagnanaratnam v Denmark* (CAT/C/51/D/429/2010), paras 10.5 and 10.6; *Mr. A.R. v Netherlands* (CAT/C/31/D/203/2002), para 7.3; *Arthur Kasombola Kalonzo v Canada* (CAT/C/48/D/343/2008), para 9.3; *X. v Denmark* (CAT/C/53/D/458/2011), para 9.3; *W.G.D. v Canada*, para 8.4; and *T.Z. v Switzerland* (CAT/C/62/D/688/2015), para 8.4.

the allegations and verify the information on which the complaint is based.'[167] Whilst the Committee Against Torture gives 'considerable weight' to findings of fact made by organs of the State party concerned, it is not bound by such findings and needs to make its own assessment of the information available to it, in light of all of the circumstances relevant to each case.[168] Despite these clear statements, the Committee Against Torture does not uniformly include this recitation of its approach in its opinions, and sometimes adds additional explanation as to what an 'arguable' case consists of.[169] Consequently, whilst its 'arguable basis' approach broadly equates to the Working Group on Arbitrary Detention's *prima facie* approach, its jurisprudence does not have the explicit consistency of the Working Group in this respect.

The Committee on the Rights of the Child (CmRC) has noted the unequal access to evidence faced by the parties, but less frequently addressed evidentiary matters in its case law.[170] In a case which the State Party challenged the admissibility of the claim, the CmRC stated that 'the authors of all the communications have sufficiently substantiated their claims'[171] and moved into the discussion on merits. During the consideration of merits, the CmRC states 'as a general rule, it comes under the jurisdiction of national bodies to examine the facts and evidence and to interpret domestic law, unless such examination or interpretation is clearly arbitrary or amounts to a denial of justice' and does not actively examine the evidence.

The Committee on the Elimination of Discrimination against Women (CEDAW) also has a broad approach, considering communications 'in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party.'[172] It should also be noted that Article 4 CEDAW-OP contains several admissibility criteria, the fulfilment of which represents a precondition for the consideration of a communication in substance. Some of these criteria render a communication inadmissible *prima facie* while others need to be decided upon by the Committee. For example, regarding the exhaustion of domestic remedies, the CEDAW stated that, if the State claims that the source failed to exhaust domestic remedies and refers to remedies that should have been exhausted by the source, the State has to discharge its burden of proof and to provide 'explanation as to how domestic remedies would have been effective in securing the rights of the [source].'[173] Furthermore, the CEDAW has acknowledged that women may find it 'difficult, if not impossible' to obtain documentary evidence to support their claims,[174] but this does not amount to a consistently shifted burden of proof in practice. In fact, in a recent trafficking case, the Committee placed the burden of proof on the source and expected her to provide documents providing the existence of stereotypes in her case, departing from its own previous practice.[175] In the context of asylum claims, the Committee has also set a challenging threshold for proof of a 'real, personal and foreseeable risk' of violence and, so far, appears to have found all individual communications concerning asylum seekers

[167] See, e.g. *X and Y v Switzerland* (CAT/C/75/D/1081/2021), para 7.3.

[168] Committee Against Torture, supra n 166, para 20.

[169] See, e.g. *T.C. v Peru* (CAT/C/75/D/930/2019), para 7.1 (not including the reference to the author of the communication providing an arguable case); cf. *J.X.F.P v Australia* (C/75/D/770/2016), para 10.4 (explaining the arguable case as consisting of 'substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real').

[170] See, e.g. *D.D. v Spain*, CRC (2019) CRC/C/80/D/4/2016, para 13.3.

[171] WGAD, Opinions No 114/2020, No 116/2020, No 117/2020 and No 118/2020, para 9.5.

[172] 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Opened for signature 6 October 1999, entry into force 22 December 2000) 2131 UNTS 83, Article 7.

[173] CEDAW, Views adopted by the Committee under Article 7 (4) of the Optional Protocol, concerning communication No 91/2015 (2017) CEDAW/C/68/D/91/2015, para 6.5.

[174] CEDAW, Views adopted by the Committee under Article 7 (3) of the Optional Protocol, concerning communication No 77/2014 (2017) CEDAW/C/67/D/77/2014, para 7.5. The Committee referred to its General Recommendation No 33 on women's access to justice (3 August 2015), where it calls on States to revise rules of burden of proof to ensure equality between the parties in all fields where power relations deprive women of fair treatment by the judiciary (para 15(g)).

[175] CEDAW, Views adopted by the Committee under Article 7 (3) of the Optional Protocol, concerning communication No 120/2017 (2021) CEDAW/C/8/D/120/2017, para 11.8.

inadmissible, mostly due to the lack of substantiation of their claim or the non-exhaustion of domestic remedies.[176]

The Committee on the Elimination of Racial Discrimination (CERD), which was 'the first international treaty-monitoring body of its kind',[177] reaches its views on the merits of cases 'in light of all the information and evidence submitted to it by the parties, as required under article 14 (7) (a) of the Convention'.[178] However, its opinions contain no explicit paragraph or section setting out the approach it takes to burdens and/or standards of evidence. For the purposes of admissibility, it appears to apply a *prima facie* standard, though it does not expressly state this.[179] Other than this, it has noted that 'it is not the Committee's role to review the interpretation of facts and national law made by national authorities, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice',[180] but has not developed a settled approach to the distribution of burdens of proof or standards of evidence that it applies. Its recent jurisprudence indicate that it applies an 'arguable case' approach, whereby Article 6 provides protection to alleged victims if their claims are arguable under the Convention.[181]

The Committee on Enforced Disappearances (CED) makes its position about the burden of proof more explicit. After stating that 'there is acquiescence within the meaning of Article 2 when there is a known pattern of disappearances of persons and the State has failed to take the necessary measures to prevent further disappearances, investigate and bring the perpetrators to justice,'[182] the CED stated '[i]n such cases, the State has the burden of proving that there was no acquiescence on its part.'[183] The State also has to 'demonstrate what concrete measures and actions it has taken to prevent, investigate and punish the crime, as well as the effectiveness of such measures in practice.'[184] However, in practice, the CED does not further elaborate on the distribution of the 'burden of proof' in its individual communications.[185]

The Committee on the Rights of Persons with Disabilities seems to follow the path of the reversal of the burden of proof once the applicants have provided sufficient evidence to substantiate their case. It bases this conclusion on an almost purely procedural (as opposed to substantial) issue, citing similar jurisprudence by the ECtHR and other United Nations human rights bodies.[186] While it does not include a standardised expression on its evidentiary approach, the CRPD has demonstrated coherence in its approach when finding no violation of Convention rights.[187] Furthermore, the CRPD has repeatedly noted that States should dispense persons with disabilities from proving that a desired accommodation would not impose a disproportionate or undue burden.[188] The burden of proof with regards to reasonable accommodation, thus, rests with the duty bearer who claims that his or her burden would be

[176] See eg CEDAW, Communication No 39/2012 (2014) CEDAW/C/57/D/39/2012. See also similar conclusion in European Human Rights Advocacy Centre, A Guide to Using the UN CEDAW Committee and the Special Rapporteur on Violence Against Women in Cases of Gender-Based Violence (Updated December 2022), available at: https://ehrac.org.uk/wp-content/uploads/2022/12/UN-CEDAW-and-SRVAW-guide-2022-ENG.pdf [last accessed 23 November 2023].

[177] Keane and Waughray, 'Introduction', in Keane and Waughray (eds), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A living instrument* (2017), 1–31, 1.

[178] CERD/C/91/D/53/2013 *Benon Pjetri v Switzerland* (2016), para 7.1.

[179] See, e.g. Opinion adopted by the Committee under Article 14 of the Convention, regarding communication No 62/2018 (Jallow), para 6.3.

[180] CERD/C/91/D/53/2013 *Benon Pjetri v Switzerland* (5 December 2016), para 7.5.

[181] *Zapescu v Moldova;* CERD/C/106/D/61/2017, para 8.10.

[182] CED, Statement on 'non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances', CED/C/10, para 7.

[183] Ibid, para 8.

[184] Ibid, para 8.

[185] E.g., see Communication No 1/2013, 3/2019.

[186] See CRPD, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No 60/2019* (2020) CRPD/C/23/D/60/2019, paras 7.5 and 7.8; *ZH v Sweden*, No 59/2019 (2021).

[187] See CRPD, *Marie-Louise Jungelin v Sweden*, No 5/2011 (2014), para 10.6.

[188] See CRPD, General comment No 6 (2018) on equality and non-discrimination, para 26(g).

disproportionate or undue. It should also be noted that the CRPD does not place a page limit for submissions. Rather, it states that 'in addition to all the relevant information available at the time of submission, any information obtained at a later date, such as documents that demonstrate the exhaustion of domestic remedies or documents containing information relevant to the case' should be submitted.[189]

Based on the foregoing, the various United Nations and regional human rights bodies can be seen as broadly taking similarly flexible approaches to evidence. However, they employ considerable variation in their expressions of their approaches to evidence and burdens. This occurs sometimes even within those institutions' specific jurisprudence. The need for flexibility and the desire to respect for each institution's independence are important but must be weighed against the need to maintain robustness of the findings, and thereby the credibility of the human rights project globally.[190] There is no basis in the various conventions being applied by these bodies that justifies facts being determined in a materially different way from one body to another. Introducing more consistency will benefit the predictability and consistency of the handling of cases. As set out above, such consistency will benefit the cross-fertilization of these bodies' jurisprudence and will avoid disparate outcomes being reached in similar cases simply due to having been heard by different bodies. Whilst rigorous fact-finding may lead to some cases being dismissed, there are other avenues available in instances where it is difficult to determine the factual matrix, such as allegation letters and other communications with governments and sources.

Arguments have been made that the Working Group's unique character, as a non-treaty body, allows it to provide a 'politically viable alternative to treaty-based human rights enforcement mechanisms.'[191] However, bodies such as the Working Group and the Human Rights Committee often apply the same provisions of law and exercise comity in their interactions. The Working Group can cede a case to a body with an individual case function,[192] such as the Human Rights Committee, and other human rights courts have recognised that they will cede cases to the Working Group if it has already considered the matter.[193] Primacy on a matter filed in multiple jurisdictions will essentially be determined by a temporal consideration of where it was first filed, rather than a substantive assessment of the status and standards of the bodies in question, indicating that the bodies are carrying out similar functions.[194] Consequently, it is important that these bodies apply broadly consistent burdens and standards of evidence, in order to avoid complainants engaging in forum shopping in an effort to benefit from the least exacting approach.

Despite some inconsistencies, these bodies all have procedures which allow for receiving the views of all parties before entering decisions. This adversarial procedure makes clear that there is recognition, within human rights legal practice, of the need for nuanced evidentiary approaches, which does not fall on the claimant alone. Placing the onus on the Government to refute any *prima facie* case demonstrated by the source is a means of reinforcing states' obligations to ensure

[189] CRPD, Fact sheet on the procedure for submitting communications to the Committee on the Rights of Persons with Disabilities under the Optional Protocol to the Convention (2012) CRPD/C/5/2/Rev.1, para 11.

[190] See Roberts supra n 7 at 1694–1695.

[191] Genser and Winterkorn-Meikle, supra n 7 at 690, 704–706.

[192] The Working Group is directed to cede a case to a treaty body with an individual case function, such as the Human Rights Committee, if the matter has already been referred that other body; Methods of Work, supra n 52, para 33.

[193] E.g., the European Court will consider a matter inadmissible if the Working Group has already issued an opinion on it through its individual case function; ECtHR: *Peraldi c France* (decision), no 2096/05, 7 April 2009. However, the Working Group has not taken such a strict approach to considering the same matter that has been heard before another international or regional human rights body (see e.g. Opinion No 31/2021, 89/2018).

[194] See ECtHR: *Peraldi c France* (decision), no 2096/05, 7 April 2009 (concluding that the procedure before the Working Group has many similarities to that before the United Nations Human Rights Committee, which, under the European Court of Human Rights' settled case-law, represented a procedure of international investigation or settlement which can render a duplicated filing before the ECtHR inadmissible under Article 35 § 2 (b) of the Convention.).

rights protection and accountability, which respects the adversarial principle of *audi alteram partem* while also upholding the human rights origins of these mandates.[195]

6. E. Adopting a Common Standard of Proof across Human Rights Bodies

As noted above, it is proposed herein that a balance of probabilities (also expressed as the 'preponderance of evidence') be considered as an appropriate standard for human rights bodies. The balance of probabilities has been explained by Lord Justice Toulson as meaning:

> 'no less and no more than that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing.'[196]

The Working Group itself has referred to a 'convincing evidence' standard in some opinions,[197] which is effectively equivalent to the balance of probabilities (as a claim would hardly be 'convincing' if the grounds for not believing it were stronger than the grounds for believing it). Another formulation—'reasonable to conclude'—also effectively aligns with this approach, as it would not be reasonable to believe a claim resting on weaker grounds than the case against it. Conversely, the term 'sufficient evidence' is more ambiguous. Whilst it could be interpreted in line with the balance of probabilities approach, it could also be interpreted as a lower threshold simply requiring that the grounds be credible on their face and not self-contradictory. In that sense, it is akin to the *prima facie* standard which the Working Group expresses as a preliminary threshold.[198]

Given that the ultimate standard must naturally be higher than preliminary threshold, the *prima facie* threshold is inappropriate as the final standard for determining facts. Indeed, the Working Group has highlighted in its review proceedings that the *prima facie* standard is appropriate for determining the admissibility of a request but not for disposing of it.[199] However, the ultimate standard should not be as high as the criminal standard of beyond reasonable doubt. Complainants in human rights cases cannot be expected to conduct the types of investigations necessary to compile evidence meeting the criminal standard of proof.[200] Between these nadir and apex evidentiary levels sits the more moderate balance of probabilities standard. As formulated herein, it is a standard which is achievable for complainants (particularly bearing in mind the evidentiary presumptions which can be incorporated where appropriate).[201] It is also defensible against criticisms of producing unreliable and unsubstantiated outcomes. And at the systemic level, entrenching this standard explicitly will provide a layer of insulation against claims of inconsistency, selectivity, opacity, and unconscious biases in human rights adjudicative fact-finding.[202]

[195] See similar conclusion in Roberts supra n 7.

[196] *Nulty & Ors v Milton Keynes Borough Council* [2013] EWCA Civ 15, cited approvingly by King LJ in Re A at [56], Toulson LJ.

[197] See Decision nos. 9/1992, para 6(h); 14/1992, para 6(h). See also Viljoen supra n 7 at 88.

[198] If a complainant presents a *prima facie* credible case to which the Government makes no effective response, the Working Group will typically consider that, in light of the lack of a response, the case meets the requisite standard to enter ultimate findings. However, if the Government does respond to the specific allegations, the Working Group will weigh the competing arguments and will not simply rely on the fact that a *prima facie* credible case was presented by the complainant.

[199] See Opinion No 27/2019, para 76 ('[i]n the opinion of the Working Group, the decision that a request for review is admissible constitutes a prima facie conclusion based on the information provided by the party who submitted the request.').

[200] But see supra Section 6 for instances of ECtHR jurisprudence purporting to apply a beyond reasonable doubt standard.

[201] See supra Section 3.

[202] See Viljoen supra n 7 at 55–56 and 77–78 for examples of (somewhat misguided) accusations of 'inaccuracies' and 'false facts' levelled by governments against the Working Group. Note that different considerations may apply to mass claims commissions, which are not addressed here.

7. PROPOSALS TO IMPOSE COMPLETE REVERSALS OF THE BURDEN OF PROOF

There have been claims for reversal of the overall burden of proof in human rights cases. For example, it has been argued that the 'general burden' should be reversed when there is 'differential access to information'.[203] This would build on the approach of the IACtHR in the seminal case of *Velasquez Rodriguez*, where it observed that '[b]ecause the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should bear the burden of proving the facts underlying its petition'. However, it qualified this statement by observing that the 'Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances' and therefore '[w]hen the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference' as '[o]therwise, it would be impossible to prove that an individual has been disappeared.'[204]

However, this wholesale reversal based on differential information appears unnecessary for the Working Group, in light of its evidentiary burden which falls on Governments when information is not reasonably available to claimants. Moreover, as a policy consideration, it may attract a large number of completely unmeritorious claims being filed, which would use up Government resources better dedicated to assisting the observance of human rights protections than addressing unsubstantiated claims. Additionally, it is not clear how a wholesale reversal would be achieved in practice and whether the claimant would have to establish that they lack access to information or could simply presume that the burden fell on the Government.[205] Conversely, the Working Group's *prima facie* approach has the benefit of simplicity, in that the claimant need only present the case insofar as they are able, and then, as long as it is *prima facie* credible, it will fall on the Government to dispel it.[206]

Another selective shifting of the burden is represented by the claim that it should be reversed where there is a 'systemic pattern of violations'.[207] Again, this begs the question of how the claimant will demonstrate such systemic practices. For example, it has been suggested that this could be shown by three cumulative factors (the violation, the pattern, and the violation falling within the pattern), on the balance of probabilities. However, that places a heavy burden on the claimant, and may encourage them to do the kind of information gathering into other cases which could attract reprisals against them. In this light, this proposed 'reversal' appears to place an even greater burden on claimants than that currently in place. At minimum, the determination of which claimants qualify as sufficiently vulnerable would require an evidentiary process in and of itself. The Working Group's *prima facie* approach obviates this problem, by simply requiring the claimant to present the case as best they can with the information available. Moreover, the Working Group itself may look to materials indicating broader patterns, such as from other special mandate holders.[208]

Additionally, it is unclear what these selective reversals would mean for other circumstances, such as in relation to persons with disabilities, or who are economically disadvantaged, or simply

[203] Roberts supra n 7 at 24.

[204] *Case of Velásquez Rodríguez v Honduras*, Merits, IACHR Series C No 4, [1988] IACHR 1, (1989) 28 ILM 291, (1988) 9 HRLJ 212, IHRL 1385 (IACHR 1988), 29th July 1988, para 123–124.

[205] See, e.g. Roberts supra n 7 at 1706–1707.

[206] Conversely, if the Government were to raise a new issue in its response, an evidentiary burden would not naturally arise therefrom for the source, as the source would not typically have access to the same range and depth of information as the Government. Nonetheless, if it is a fact that a source would reasonably know and it remained silent without explaining why it did not respond, that may affect the weight given to the respective submissions.

[207] Roberts supra n 7 at 1712–1713.

[208] See supra Section 5.

from areas with less access to high level education. Allowing certain categories of persons to benefit from having no overall burden while denying the same special treatment to others risks creating discrimination, which itself is a violation of human rights law.

More broadly, there have been claims that the entire burden of proof in the context of human rights claims should be 'reversed' by placing the burden of proof on the Government against whom an allegation of human rights violation is made.[209] This would simply place the burden on the Government in its totality.[210] However, this rebuttable presumption approach would risk swamping human rights bodies, and Governments, with frivolous claims, as it would remove even the modest requirement of the source providing a *prima facie* case.[211] The Working Group, in particular, has to be attentive to risks of flooding, due to its open admissibility regime and lack of the requirement to exhaust domestic remedies.[212] At the ontological level, the wholesale shifting of the entire burden onto the Government would effectively see these human rights bodies presumptively finding violations to have occurred any time the Government failed to respond, even if there were no evidentiary basis indicating a violation (which is different from a finding of a violation when there is a *prima facie* case presented but no Government response). This would take quasi-judicial human rights bodies a long way from the judicial facet of their binary nature.

It has been argued that placing a burden on claimants violates the dicta from the Inter-American Court, which held that 'a national level law which placed the burden of proof on victims, relative to claims of enforced disappearance, constituted a rights violation as such.'[213] However, there is no right that prohibits requiring a claimant to demonstrate a *prima facie* case before human rights bodies. All the human rights bodies surveyed impose some form of burden or threshold on the claimant for the registration, admissibility, or consideration of a case. Eschewing any such requirement would open the floodgates to these bodies being swamped by entirely unsubstantiated claims, to the detriment of the many victims of arbitrary detention and related crimes.

8. CONCLUSIONS

The evidentiary approaches taken by quasi-judicial human rights bodies are critical to the outcome of cases that come before them. However, the preceding analysis shows they employ a multitude of procedures, taxonomies, and even lexicons. Although they differ in substantive *ratione materiae* and some have formal admissibility procedures, they all share a dual-faceted ontology. Reconciling these two facets requires respect for their underlying human rights purpose alongside their adjudicative functioning and procedures. In this respect, they have a common interest in ensuring transparent and fair evidentiary approaches.

Harmonizing quasi-judicial human rights bodies' approaches to evidence will reverberate through their substantive decisions. It will enhance the certainty of human rights law, encourage Governments to engage with these processes, and remove an incentive for forum shopping between entities. Shifting towards the adoption of similar approaches to evidence and standards of proof, as advocated for in this article, will provide a basis for even greater consistency, predictability, and overarching coherence of the international human rights architecture. It may

[209] Roberts supra n 7 referring to di Sarsina, 'The Content of the Obligation to Investigate and Prosecute International Human Rights Law Violations', in *Transitional Justice and a State's Response to Mass Atrocity* (2019).

[210] A full reversal of the burden would mean that the burden was not on the claimant, but instead on the respondent (the government) *ab initio*. That would differ significantly from the *prima facie* approach set out herein.

[211] See Roberts supra n 7 at 10 referring to 'benefit of preventing the far greater number of unmeritorious claims that would succeed if the burden were reversed' and avoiding the judicial system interfering in people's lives.

[212] See supra Section 3.

[213] See *Gomez-Palomino v Peru*, Case. No 11,062, IACtHR, Merits, reparations and costs (22 November 2005), paras 106–8.

also serve as a stepping stone towards broader institutional reforms, such as the establishment of a United Nations Court of Human Rights.[214]

In providing salutary guidance, the Working Group provides a fertile source to study because, first, it addresses large volume of cases and, second, it is not restricted to States that have signed up to treaties. Surveying the iterative development of the Working Group's jurisprudence, it can be seen that the *prima facie* approach has emerged over the three decades of its jurisprudence and has eventually become a consistent feature in its jurisprudence. This approach charts a midway between its human rights etiological roots and its quasi-judicial processing of individual claims. The Working Group's sequenced approach has considerable utility for other human rights institutions with judicial or quasi-judicial functions. It allows claimants the flexibility to establish their cases with the means available to them, while at the same time avoiding a completely open gate which would risk flooding the group with unsubstantiated allegations.

Nonetheless, the organic emergence of the *prima facie* approach has resulted in lexiconic and taxonomical variation. These divergences would benefit from standardisation, for example through a specific policy document such as its Methods of Work. Whereas alternatives to the *prima facie* approach, such as a selective reversal of the burden of proof or where there are systematic violations, have been touted,[215] these alternatives risk introducing further uncertainty for parties to proceedings. Their application remains unclear, and appear to require claimants to establish a lack of access to information, or systemic violations. In this way, they may result in higher burdens for claimants. The proposed complete shift of the burden to the Government in all instances would constitute a radical departure from the judicial facet of these bodies' origins and could see them flooded with unsubstantiated claims.

Concerning the standard of proof applied by quasi-judicial human rights bodies, there is considerable opacity and variation. Based on the analysis herein, it is a proposed that a balance of probabilities (or equivalent) standard is appropriate. Those bodies which have formal admissibility procedures could explicitly adopt a *prima facie* threshold at that stage and then progress to the balance of probabilities standard for their ultimate determinations whilst bearing in mind specific evidentiary burdens where appropriate. Explicitly referencing this standard in decisions will enhance the consistency, reliability, and transparency of the factual determinations by quasi-judicial human rights bodies. Ultimately, it may increase the implementation of their decisions, for the benefit of victims of human rights violations.

The extensive examination of the Working Group's approach to evidence alongside the comparison with other quasi-judicial human rights bodies highlights the commonality of their underlying goal to improve adherence to human rights and the importance of reliable fact-finding in this pursuit. Whereas the Working Group provides a robust procedural example via the sequenced approach, it also continues to seek the best means of balancing its human rights and quasi-adjudicative facets. Through this iterative cross-fertilisation of practices, these bodies can respect their binary etiological roots, by identifying human rights violations that occur with neither fear nor favour, while also ensuring that they do so on robust evidentiary foundations.

[214] See Viljoen supra n 7 at 96–97.
[215] See discussion of Roberts' proposals supra in Section 7.