5

The Working Group on Arbitrary Detention's Treatment of Evidence

A Three-Phase History of Increasing Sophistication

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5.1 Introduction

Redressing arbitrary detention is imperative, as this practice violates a peremptory norm of international law. It is often a gateway to further violations, including extrajudicial killings, torture and other cruel, inhuman or degrading treatment or punishment, enforced disappearances and sexual- and gender-based violence.[1] In confronting these human rights violations, several human rights monitoring mechanisms within the United Nations (UN) system are able to hear individual cases. Among these, the United Nations human rights treaty bodies (UNTBs), such as the Human Rights Committee (HRC), the Committee against Torture and the Committee on the Rights of the Child, are particularly prominent and share a quasi-judicial character with the Working Group on Arbitrary Detention (Working Group). While there are differences between the Working Group and UNTBs – including the formalised admissibility procedures at the UNTBs – one feature common to all these mechanisms is that they must deal with evidence in order to reach

* The views herein are those of the authors alone 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 or case. The authors thank the editors of the present volume for the helpful feedback; any errors remain those of the authors.

[1] Human Rights Council, *Resolution on Arbitrary Detention* (A/HRC/RES/51/8), 6 October 2022, para. 2.

https://doi.org/10.1017/9781009639231.008 Published online by Cambridge University Press

their conclusions on violations of international human rights law.[2] Reviewing the Working Group's approach to evidence provides useful points of comparison regarding the UNTBs and their evidentiary procedures.

The Working Group on Arbitrary Detention, which has operated since 1991, has heard over 1,600 individual cases based on information submitted by persons or organisations alleging arbitrary arrest or detention. The increasing sophistication of the Working Group's approach to evidence demonstrates the maturing of its work over the decades from a focus on substantive developments, which have largely been established in its jurisprudence, to cementing its procedural practices. This is also reflected in the Working Group's gradual shift to examining the secondary level legal standards that it applies, such as by formalising the burden of proof.[3] As a mechanism which has been described as enforcing human rights law through recommendations,[4] the Working Group's impact is heavily conditional on the quality of its fact-finding procedures and the accuracy of its assessments.[5] As it heightens the rigour of its approach, the Working Group provides strong incentives for rules-based bodies at the domestic and international levels to take up its conclusions and procedures.

In this way the Working Group's approach to evidence provides a model from which UNTBs may draw inspiration.[6] Just like the Working Group, UNTBs rely on material submitted to them to reach their views. This raises questions as to how evidence is submitted and assessed, what standards and burdens are applied to evidentiary questions and what

[2] See F. Viljoen, 'Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms', *Max Planck Yearbook of United Nations Law* 8 (2004): 49–100, 63 and 77–80.

[3] On 'secondary law', see H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

[4] J. Cohen and C. Sabel, 'Global Democracy?', *New York University Journal of International Law and Politics* 37 (2005): 763–797, 773.

[5] See J. Genser and M. Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice', *Columbia Human Rights Law Review* 39 (2008): 159-162.

[6] See generally J. Connors and S. Shah, 'United Nations' in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (4th edn., Oxford: Oxford University Press, 2022), pp. 393–418. See further M. Gillett, Y. Karukaya and M. Marzotto, 'Reconciling the Dual-Faceted Mandates of Quasi-Judicial Human Rights Bodies: The Working Group on Arbitrary Detention's Prima Facie Approach to Evidence', *Human Rights Law Review* 24 (2024): 1–25; Viljoen, 'Fact-Finding', pp. 77–80.

evidentiary challenges are emerging in the practice of these human rights bodies.

This chapter provides a unique point of comparison[7] for UNTBs by reviewing the phases of the Working Group's jurisprudential development and arguing that (1) the Working Group's increasingly formalised and standardised approach to evidence reflects the maturing of the Working Group and its entrenchment in the ecosystem of human rights bodies; (2) such a considered evidentiary approach on its part can serve to enhance its credibility with States (and claimants, who are called 'sources'), which in turn can prompt higher rates of compliance; and (3) its detailed approaches to evidentiary standards and challenges could inspire UNTBs with individual claims mandates to follow a similar approach. These arguments fit into the theoretical framework of effective supranational adjudication proposed by Helfer and Slaughter for transposing practices from the European Court of Human Rights (ECtHR) onto the HRC.[8] In particular, it prioritises legitimacy, in the sense of principled decision-making, coherent processes, impartiality and consistency, as the fulcrum for effectiveness for bodies with limited enforcement tools such as the Working Group.[9]

The arguments set out above stem from a detailed retrospective and prospective analysis of the evidentiary approach adopted by the Working Group in the conduct of its individual complaints mandate and associated activities. Following this introduction (Section 5.1), Section 5.2 situates the Working Group's evidentiary approach within its mandate to rely on credible and reliable information. Section 5.3 then outlines the development of this approach across three phases of the Working

[7] The detailed review of the Working Group's developmental phases and emerging challenges, along with the insights to be drawn from this trajectory for UNTBs, combine to make this a novel contribution to the scholarship on quasi-judicial human rights bodies. Other works have reviewed the Working Group's jurisprudence without examining in detail how its burdens and standards have developed over the phases of its existence and without applying those findings in relation to the emerging challenges of digital materials, external evidence and country visits as discussed below. See, e.g., J. Genser, *The United Nations Working Group on Arbitrary Detention* (Cambridge: Cambridge University Press, 2019); Viljoen, 'Fact-Finding'; D. Weissbrodt and B. Mitchell, 'The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence', *Human Rights Quarterly* 38 (2016): 655–705; Gillett et al., 'Reconciling the Dual-Faceted Mandates'.

[8] L. Helfer and A. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', *Yale Law Journal* 107 (1997): 273–391, 318–29.

[9] Helfer and Slaughter 'Toward a Theory of Effective Supranational Adjudication', p. 284.

Group's operations, namely its establishment (Section 5.3.1), expansion (Section 5.3.2) and consolidation (Section 5.3.3). Section 5.4 proceeds to address emerging evidentiary issues in the Working Group's practice, namely the heightened standard of review in certain cases (Section 5.4.1), the use of digital evidence (Section 5.4.2), the use of external evidence beyond that submitted by the parties (Section 5.4.3) and the Working Group's own gathering of relevant information while on mission (Section 5.4.4). Each of these challenges has potential ramifications for UNTBs, whose evidentiary approaches and standards may come to be scrutinised. Moreover, because the Working Group is not a consent-based body like the UNTBs, its acceptance is particularly contingent on the quality and robust evidentiary findings of its decisions. In this light, Section 5.5 examines three indicia through which the impact of the Working Group's evidentiary approach can be observed, namely compliance (Section 5.5.1), state responses (Section 5.5.2) and the responses of third parties such as regional human rights courts and UNTBs (Section 5.5.3). Section 5.6 concludes with recommendations for the Working Group's approach to evidence, which may also prove valuable for UNTBs facing similar issues.

5.2 Encouraging Credible and Reliable Information: The Working Group's Overall Evidentiary Mandate

The Working Group was established by the former Commission on Human Rights, under Resolution 1991/42.[10] Its mandate has been renewed periodically, most recently in 2025 under Human Rights Council Resolution 51/8. Regarding the Working Group's core task, the Commission on Human Rights reiterated that this is to 'investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned'.[11] To carry out its mandate, the Working Group should 'seek and gather information from Governments and inter-governmental and non-governmental organizations, as well as from the individuals concerned, their families or their legal representatives'. The Working Group must carry out its task with 'discretion, objectivity, impartiality

[10] UN Commission on Human Rights, Resolution 91/42 (Question of Arbitrary Detention) (E/CN.4/RES/1991/42), 5 March 1991.

[11] UN Commission on Human Rights, Resolution 1997/50 (E/CN.4/1997/50), 15 April 1997.

and independence, within the framework of its mandate', and the experts should 'perform their task with rigour, having regard to the very specific nature of their mandate, and to respond effectively to credible and reliable information that comes before them'.[12]

The reference to a threshold of credible and reliable information relates directly to the approach and standards that the Working Group applies to evidence. Indeed, the Working Group's evidentiary procedures are the vehicle by which it can filter out unreliable and incredible information in a fair, transparent and consistent manner. As will be mapped in the following sections, the Working Group has developed its approach to evidence over time through its jurisprudence and its other normative instruments. Examining this developmental arc reveals how the Working Group's approach has coalesced on a specific sequenced method, which shares burdens between the complainant and the respondent government. A clearer articulation of this method may help to encourage consistency across quasi-judicial human rights bodies, including UNTBs, when determining disputed cases of alleged violations.

5.3 Developing a Standardised Approach to Evidentiary Assessments

From the outset of its operations, the Working Group's core task has involved the collection of information regarding potential cases of arbitrary detention.[13] Relevant governments and individuals, as well as intergovernmental and non-governmental organisations (NGOs), are required to provide information to the Working Group to this end.[14]

Quantitatively, from 1991 to the end of 2022, the Working Group has generated at least 1,600 judgments (called opinions) as a result of its adversarial process.[15] Qualitatively, the Working Group's opinions now have a relatively settled structure, based on five categories of arbitrary detention, covering: detention for which it is impossible to invoke a legal

[12] UN Commission on Human Rights, Resolution 1997/50.
[13] UN Commission on Human Rights, Resolution 91/42.
[14] UN Commission on Human Rights, Resolution 91/42; Resolution 1997/50.
[15] See L. Toomey, 'Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention', *Columbia Human Rights Law Review* 50 (2018–2019): 185–282, fn. 26 (noting that the Working Group had issued 1199 opinions by December 2017). The Working Group's annual reports indicate the following number of adopted opinions: 90 (2018); 85 (2019); 92 (2020); 85 (2021); 88 (2022).

basis (category I); detention resulting from the exercise of certain human rights (category II); detention following serious violations of fair trial rights (category III); immigration and asylum related detention (category IV); and discriminatory detention (category V).

A survey of the Working Group's activities during its three decades of operations indicates that it has undergone three major phases: (1) an initial 'establishment' phase; (2) an 'expansion' phase; and (3) its current 'consolidation' phase.[16] As set out in Sections 5.3.1–5.3.3, in relation to evidentiary standards and burdens, the Working Group has employed increasing precision and consistency as it has progressed through these phases, to the point where its current jurisprudence has a uniform expression of its approach. However, that explicit uniformity does not comprehensively address all evidentiary issues, and in some respects raises further questions, as subsequently addressed in Section 5.4.

5.3.1 Phase 1: Establishment (1991–2011)

In the first phase of its operation after its creation in 1991, the Working Group set up its procedures and developed its major lines of jurisprudence in its opinions, including its three initial categories of arbitrary detention (i.e. detention with no legal basis, detention resulting from an exercise of rights and detention following serious violations of fair trial rights).[17] Opinions during this period were relatively short, listing the three categories, a brief summary of the parties' main arguments and the Working Group's conclusions.[18] Alongside its opinions in individual cases, the Working Group also expressed views on relevant human rights standards in its deliberations, legal opinions, country visit reports, urgent appeals and joint reports with other mandates of the special procedures on legality and arbitrariness in human rights treaties and customary international law.[19] On 1 May 2000, the Working Group issued its Fact Sheet No. 26, which explicitly set out its working methodology in a

[16] These phases are the authors' own interpretation and do not reflect any official designation on the part of the Working Group.

[17] See, e.g., *Ali Ardalan and others* v. *Islamic Republic of Iran*, WGAD opinion 1/1992, 14 October 1991.

[18] See, e.g., *Colonel Bertrand Mamour* v. *Central African Republic*, WGAD opinion 15/2007, 13 September 2007.

[19] WGAD, Report of the Working Group on Arbitrary Detention (A/HRC/19/57), 26 December 2011, para. 65.

codified manner.[20] A revised version, issued in advanced format in 2019 and formally issued in 2024, sets out the relevant procedures applied by the Working Group.[21] However, the fact sheet does not elaborate on evidentiary burdens and standards, which are instead addressed in various opinions of the Working Group that it references.

With regard to evidence and burdens, the Working Group's opinions during its establishment phase exhibited a variety of approaches. They variously suggested an overarching burden on the source or on the Government, or sometimes did not mention the burden at all. The latter was the tendency in the early years, when the Working Group 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.[22] However, various indirect references gave a mixed picture as to the evidentiary approach being taken. When the Working Group noted a lack of material on the record, this led in some cases to findings against the government – for example, that '[t]here is no material on record to lead the Working Group to draw an inference that the expression of [the claimant's] opinions endangered in any way national security or public order'.[23] In other such cases, findings were made against the source, for example, that '[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'.[24] Conversely, the absence of sufficient evidence sometimes led the Working Group to decide to take no further action, stating for example that: 'if [the Working Group] does not have enough information to take a decision, the case remains pending for further investigation and if the Working Group considers that it does not have enough information to warrant keeping the case pending, the case is filed without further action'.[25]

[20] OHCHR, Fact Sheet No. 26, The Working Group on Arbitrary Detention, 2000.

[21] OHCHR, Working Group on Arbitrary Detention – Fact Sheet No. 26 Rev. 1, 2024.

[22] See, e.g., *Ali Ardalan* (WGAD); *Latsami Khamphoui and others* v. *Lao People's Democratic Republic*, WGAD opinion 2/1992, 14 October 1991; *Al-Ajili Muhammad Abdul Rahman al-Azhari and others* v. *Libyan Arab Jamahiriya*, WGAD opinion 3/1992, 14 October 1991; *Goodluck Mhango and others* v. *Malawi*, WGAD opinion 4/1992, 14 October 1991.

[23] *Ali Ardalan* (WGAD) (unopposed).

[24] *Wilfredo Estanislao Saavedra Marreros* v. *Peru*, WGAD opinion 7/1992 (opposed), 14 October 1991.

[25] *U Nu and Aung San Suu Kyi* v. *Myanmar*, WGAD opinion 9/1992 (opposed), 14 October 1991.

On one occasion, the Working Group referred to a lack of convincing evidence as excluding the possibility of reaching a finding that detention was arbitrary or otherwise.[26] However, it also made 'reasonable' assumptions due to government silence on an issue, for example, that:

> [i]n its reply, the Government does not maintain having complied with this provision and the Working Group must consequently presume that the Government did not order any investigation. It is therefore at least reasonable to assume that Mr. Kakoun may well have been subjected to acts of torture and that his confession could well be the result of such acts, in which case, pursuant to article 15 of the Convention against Torture, the confession in question should not have served as evidence, as it did.[27]

In another case, the Working Group referred to the need for justification by the government, stating that 'the Working Group has not been provided with clear reasons to question the allegation of the source'.[28]

Despite its indirect references to evidentiary burdens, the Working Group's approach in this respect was still not presented in a settled or uniform way after two decades of its operations. However, this establishment phase came to a close in 2011, when the Working Group took several significant steps towards the expansion of its operations, including a more explicit codification of its approach to evidence and burdens.

5.3.2 Phase 2: Expansion (2011–2019)

The year 2011 saw three major developments which reflected a discernible change in the operations and outputs of the Working Group.

First, in the Working Group's annual report of 19 January 2011,[29] the Working Group expanded the range of categories of arbitrary detention it dealt with from three to five, adding category IV on immigration-related detention and category V on discriminatory detention. The expanded categories have been repeated in Working Group reports and

[26] *Juan Enrique García Cruz and Ramón Obregón Sarduy* v. *Cuba*, WGAD opinion 10/1992 (opposed), 14 October 1991.

[27] *Assem Kakoun* v. *Lebanon*, WGAD opinion 17/2008 (opposed), 9 September 2008; *Pastor Gong Shengliang* v. *China*, WGAD opinion 21/2008 (opposed), 9 September 2008.

[28] *Abdel Hakim Abdel Raouf Hassan Soliman* v. *Egypt*, WGAD opinion 22/2010 (opposed), 2 September 2010.

[29] A/HRC/16/47 and Corr.1, annex.

opinions over the ensuing years,[30] and have been extremely important facets of its work.[31]

Second, the Working Group launched a database to facilitate access of victims, states and civil society to its opinions and other materials.[32] This was followed by a steady increase in the number of individual complaints submitted to the Working Group and a corresponding rise in its output of opinions. At the time of writing, these numbered around 70–90 per year, up from 60–70 per year around 2011.[33]

Third, and most significantly for present purposes, 2011 saw the Working Group explicitly set out how it deals with burdens and evidentiary issues in its 2011 Annual Report, after years of developing jurisprudence.[34] In this report, the Working Group noted that its evidentiary approach, established through practice, was in line with the International Court of Justice (ICJ)'s position on evidentiary burdens in the case of *Ahmadou Sadio Diallo*.[35] The Working Group articulated this approach as such:

> In general the burden rests with the Government: it is for the Government to produce the necessary proof. More generally, the matter of the evidentiary burden arises where the source has established a prima facie case for breach of international requirements constituting arbitrary detention.[36]

This statement reflects two separate but related points: (1) the overall burden which typically falls on a source (also known as the claimant or initiator) of a judicial process to establish a case (*onus probandi incumbit actori*);[37] (2) the evidentiary burden of providing materials that a victim

[30] See, e.g., HRC, Methods of work of the Working Group on Arbitrary Detention (A/HRC/30/69), 4 August 2015; HRC, Methods of work of the Working Group on Arbitrary Detention (A/HRC/33/66), 12 July 2016; HRC Methods of work of the Working Group on Arbitrary Detention (A/HRC/36/38), 13 July 2017.

[31] See, e.g., Opinions 69/2021, 69/2022 (both concerning, inter alia, immigration detention under category IV).

[32] WGAD, Report 2011, summary and para. 5.

[33] See WGAD, Report of the Working Group on Arbitrary Detention (A/HRC/51/29), 21 July 2022, para 14 for the number of cases in 2021, and WGAD 'Report 2011', para 8 for the number of cases in 2011.

[34] A/HRC/19/57, para. 68.

[35] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* ICJ, Judgment, 30 November 2010, paras. 53–57.

[36] A/HRC/19/57, para. 68.

[37] See M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (The Hague: Kluwer Law International, 1996), p. 369. See also C. E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert*

could not reasonably be expected to access. Both principles are important, but the conceptual distinction between them becomes significant in terms of the sequencing of the burdens in the Working Group's usual approach to evidence, which will be discussed in Section 5.3.3. Whereas the Working Group had referred to this approach in prior opinions,[38] its adoption of this formulation in its 2011 report marked a clear shift towards formalising it. Since then, the Working Group has referred to this statement and clarified it in several of its opinions,[39] and has more or less uniformly applied this approach since 2019.[40]

With regard to evidence, this expansion phase saw the Working Group elaborate on its approach with statements that were often repeated in subsequent opinions. In relation to the source's allegations, it explained that submission is considered 'consistent' or 'detailed' when the source provides corroborating evidence;[41] when co-claimants share similar accounts that are nearly the same in all material aspects;[42] when the

Evidence, Burden of Proof and Finality (Cambridge: Cambridge University Press, 2011), p. 185, referring to the principle as *actori incumbit probatio*.

[38] *Thamki Gyatso and others* v. *China*, WGAD opinion 29/2010, 24 November 2010, para. 25.

[39] For example, see *Nasrin Sotoudeh* v. *Islamic Republic of Iran*, WGAD opinion 21/2011, 6 May 2011, para. 31; *Saif Al-Islam Gaddafi* v. *Libya*, WGAD opinion 41/2013, 7 April 2014; *Reza Raeesi* v. *Australia and Papua New Guinea*, WGAD opinion 52/2014, 13 February 2015; *Nazanin Zaghari-Ratcliffe* v. *Islamic Republic of Iran*, WGAD opinion 28/2016, 7 September 2016; *Adilur Rahman Khan* v. *Malaysia*, WGAD opinion 67/2017, 7 December 2017; *Can Thi Theu* v. *Viet Nam*, WGAD opinion 79/2017, 12 December 2017; *Yamashiro Hiroji* v. *Japan*, WGAD opinion 55/2018, 27 December 2018; *Abbas Haiji Al-Hassan* v. *Saudi Arabia*, WGAD opinion 56/2019, 10 October 2019; *Walid El Batal* v. *Morocco*, WGAD opinion 68/2020, 2 February 2021; and *Said Said* v. *Australia and Nauru*, WGAD opinion 68/2021, 22 February 2022.

[40] See, e.g., *José de la Paz Ferman Cruz and Aren Boyazhyan* v. *Mexico*, WGAD opinion 54/2019, 18 February 2020, para. 146; *Abbas Haiji Al-Hassan* v. *Saudi Arabia*, WGAD opinion, para. 73; *Gokarakonda Naga Saibaba* v. *India*, WGAD opinion 21/2021, 17 June 2021, para. 60; *Ahmed Samir Santawy* v. *Egypt*, WGAD opinion 83/2021, 28 January 2022, para. 60; *Alexey Gorinov* v. *Russian Federation*, WGAD opinion 78/2022, 20 March 2023, para. 77; *Naji Fateel* v. *Bahrain*, WGAD opinion No. 65/2022, 16 March 2023, para. 89; *Zara Mohammadi v. Islamic Republic of Iran*, WGAD opinion 82/2022, 6 March 2023, para. 32; *George Nyakpo* v. *Ghana*, WGAD opinion 47/2022, 31 January 2023, para. 42; *Sharofiddin Gadoev* v. *Russian Federation and Tajikistan*, WGAD opinion 48/2021, 15 December 2021, para. 48 (all referring to the 2011 Annual Report A/HRC/19/57, para. 68).

[41] See, e.g., *A and others* v. *Saudi Arabia*, WGAD opinion 61/2016, 6 February 2017, paras. 50 and 53. See also *Walid El Batal* (WGAD), paras. 72–73.

[42] See, e.g., *Abdullah Ahmed Mohammed Ismail Alfakharany and others* v. *Egypt*, WGAD opinion 7/2016, 14 June 2016, para. 47 and *Mi Sook Kang and Ho Seok Kim* v. *Democratic*

source's claims are supported with external documentation such as credible news reports and findings by other international human rights bodies;[43] and when the source's claims are supported by the Working Group's own prior findings that detention was arbitrary under similar conditions.[44] If a source has presented a prima facie case of arbitrary detention, the implicated government can meet its burden by producing a detailed and substantiated account of the actions that were carried out.[45] However, in an oft-repeated refrain, the Working Group has held that 'mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations'.[46] Consequently, where the government disputes credible allegations by the source but fails to address specific points or provide details that it should know, the Working Group will typically accept the source's factual submissions.[47]

Alongside the increase in the number of categories of detention to include immigration-related detention and discriminatory detention, the expansion phase saw the Working Group explicitly express its approach to burdens and evidence and increasingly apply this in opinions. Nonetheless, questions of evidence continued to arise throughout this period, and became particularly prominent during the subsequent consolidation phase.

5.3.3 *Phase 3: Consolidation (2019 Onwards)*

Having engaged in an expansion phase from 2011, the Working Group has since 2019 entered what could be seen as a phase of consolidation.

People's Republic of Korea and China, WGAD opinion 81/2017, 26 December 2017, para. 23.

[43] See, e.g., *Ramón Nsé Esono Ebalé* v. *Equatorial Guinea*, WGAD opinion 15/2018, 24 September 2018, para. 29; *Han and Young-joo Lee* v. *Republic of Korea*, WGAD opinion 22/2017, 30 May 2017, para. 74; *Musallam Mohamed Hamad alBarrak v. Kuwait*, WGAD opinion 20/2017, 18 July 2017, paras. 33 and 40; *Pongsak Sriboonpeng* v. *Thailand*, WGAD opinion 44/2016, 21 November 2016, paras. 25–27.

[44] See, e.g., *Arash Sadeghi* v. *Islamic Republic of Iran*, WGAD opinion 19/2018, 24 May 2018, para. 27; *Nguyen Van Dai* v. *Viet Nam*, WGAD opinion 26/2017, 8 June 2017, para. 50; *Pongsak Sriboonpeng* v. *Thailand*, WGAD, para. 25; *Yu Shiwen* v. *China*, WGAD opinion 11/2016, 16 June 2016, para. 27 and *Befekadu Hailu and others* v. *Ethiopia*, WGAD opinion 10/2016, 14 June 2016, para. 41.

[45] See further at Section 5.2.

[46] WGAD, Report 2011, para 68.

[47] See, e.g., *Issam Mohamed Tahar Al Barqaoui Al Uteibi* v. *Jordan*, WGAD opinion 18/2007, 22 November 2007.

This was marked by the issuance of revised Fact Sheet No. 26. It provides more details about the procedures followed by the Working Group and, significantly, adds an important new reference to discrimination as one of the major causes of arbitrary detention.[48] The Working Group's adversarial process has also progressed to the point where many states engage with this on a relatively regular basis, although not always in a timely or comprehensive manner.

During this consolidation phase, the major legal lines in the jurisprudence have been relatively settled and clear. For example, the Working Group has found detentions to be arbitrary when persons are placed incommunicado and/or without access to legal advice during significant periods of their detention;[49] or when the authorities detain a person participating in a peaceful protest and fail to demonstrate that the person was engaged in violence or any other activity falling under a permissible exception to the rights to freedom of expression and assembly.[50] These are instances which could be incorporated into UNTBs' approaches where relevant.

While a reasonably consistent substantive jurisprudence has developed, the Working Group's approach to evidence has received increasing focus in this phase. The Working Group has now largely settled its approach to evidence, particularly in terms of the burden, but has not definitively settled the standard it applies to weighing evidence. These and other issues that continue to arise during this current phase are analysed in detail in the following section.

5.4 Emerging Evidentiary Issues

With the Working Group having firmly established its approach to evidence over these three phases of its existence, several questions arise regarding associated tests, such as the heightened standard of review in certain cases, the use of digital and external materials as evidence and the evidentiary standards applied by the Working Group in its other functions beyond considering individual cases. Responses to these issues could be instructive for other human rights bodies, particularly UNTBs with adjudicative functions.

[48] On 14 February 2024, the Revised Factsheet was officially published: OHCHR, Fact Sheet No. 26, Rev. 1: Working Group on Arbitrary Detention, 14 February 2024.

[49] See, e.g., *Pham Doan Trang* v. *Viet Nam*, WGAD opinion 40/2021, 4 November 2021; *Mehmet Ali Öztürk* v. *United Arab Emirates*, WGAD opinion 51/2021, 8 February 2022.

[50] See, e.g., *Ros Sokhet* v. *Cambodia,* WGAD opinion 75/2021, 27 January 2022; *Sharofiddin Gadoev* v. *Russian Federation and Tajikistan* (WGAD).

5.4.1 *The Heightened Standard of Review*

When claims involve certain rights or victims, the Working Group has often reiterated that it applies a 'heightened standard of review'.[51] This includes cases when the deprivation of liberty results from the exercise of fundamental rights and freedoms (category II)[52] or involves a discriminatory aspect or targeting of certain individuals, such as human rights defenders (category V).[53] Concerning the cases of human rights defenders, in particular, the Working Group has held that restrictions on their expression would be subject to 'particularly intense review'[54] and 'strict scrutiny',[55] adding that to detain a human rights defender because of their work would violate their rights to equality under the law.[56] The Working Group has also stated that this heightened review by international bodies is especially appropriate where there is a 'pattern of harassment' by national authorities targeting such individuals.[57]

In its 2017 Annual Report, the Working Group laid out how it determines whether a source has demonstrated a case of arbitrary

[51] The justification for this heightened standard of review is apparently derived from article 9, paragraph 3, of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the General Assembly. It clarifies that it requires State parties to provide information that *directly* rebuts claims that human rights guarantees have been violated. For example, see *Nasrin Sotoudeh* (WGAD), para. 31, noting that '[a] mere listing up of the judgements and other decisions is not sufficient in this respect'. See also J. Genser, *Working Group on Arbitrary Detention,* pp. 153 and 177.

[52] See, e.g., *Aleksandr Viktorovich Bialatski* v. *Belarus*, WGAD opinion 39/2012, 23 November 2012, para. 45; *Thirumurugan Gandhi* v. *India*, WGAD opinion 88/2017, 23 January 2018, para. 25; *Chayapha Chokepornbudsri* v. *Thailand*, WGAD opinion 3/2018, 9 July 2018, para. 40; *Yamashiro Hiroji* (WGAD), para. 62.

[53] See, e.g., *Aleksandr Viktorovich Bialatski* (WGAD), para. 45; *Yamashiro Hiroji* (WGAD), para. 62; *Eskinder Nega* v. *Ethiopia*, WGAD opinion 62/2012, 9 August 2013, para. 39; *Nasrin Sotoudeh* (WGAD) para. 29; and *Đinh Thị Thu Thuỷ* v. *Viet Nam*, WGAD opinion 82/2021, 9 September 2022, para. 69. See also Genser, *Working Group on Arbitrary Detention*, p. 177.

[54] See, e.g., *Tran Duc Thach* v. *Viet Nam*, WGAD opinion 40/2022, 4 November 2022, para. 76; *Nguyen Ngoc Anh* v. *Viet Nam*, WGAD opinion 43/2022, 10 November 2022, para. 97; *Le Huu Minh Tuan* v. *Viet Nam*, WGAD opinion 11/2021, 7 June 2021, para. 79; *Pham Doan Trang* (WGAD), paras. 78–79.

[55] See *Haytham Fawzy Mohamden* v. *Egypt*, WGAD opinion 53/2022, 5 October 2022, para. 78; *Jagtar Singh Johal* v. *India*, WGAD opinion 80/2021, 4 May 2022, para. 105.

[56] See, e.g., *Muhammad Ismail* v. *Pakistan*, WGAD opinion 37/2021, 1 October 2021, para. 82.

[57] *Aleksandr Viktorovich Bialatski* (WGAD), para. 43; and *Nasrin Sotoudeh* (WGAD), para. 29.

deprivation of liberty on discriminatory grounds to the requisite prima facie standard.[58] In such cases, governments have the obligation to demonstrate that the detention is proportional and absolutely necessary and no other alternative measure is feasible on the basis of a legitimate state interest. Governments are also under the obligation to prove that the length and the overall conditions of custody are in full respect of international guarantees. In a similar vein, the Working Group has held that when individuals are detained under preventative detention, the government's burden of proof increases the longer the person is detained, which aligns with the HRC's position on the issue.[59] Given the synchrony between the Working Group and the HRC on this issue, it could be taken up by other UNTBs as a guide for their application of the law to the facts concerning potentially discriminatory detention (or any similar type of human rights violation).

However, based on its category V jurisprudence, it is not yet clear how the Working Group might take into account multiple, intersecting forms of discrimination, and whether this requires the government to rebut each alleged ground with evidence[60] or to demonstrate that the cumulative effect of multiple forms of discrimination did not result in arbitrary detention.[61] The Working Group could be more explicit in its analysis of what constitutes intersectional discrimination under international law and add significant value to its jurisprudence, as well as to the broader understanding of detention on discriminatory grounds.[62]

5.4.2 *Digital Evidence and Digital Submissions*

Another emerging issue is that of the Working Group's receipt and assessment of digital evidence. The Working Group requires information to be submitted digitally under its communications procedure but has not explicitly stated how it deals with the use and management of digital

[58] WGAD, Report of the Working Group on Arbitrary Detention (A/HRC/36/37), 19 July 2017, para. 48.

[59] See, e.g., *Salem Badi Dardasawi* v. *Israel*, WGAD opinion 86/2017, 18 December 2017, para. 31.

[60] The Working Group took a similar approach in *Ammar al Baluchi* v. *United States of America*, WGAD opinion No. 89/2017, 24 January 2018, para. 62.

[61] See Toomey, 'Detention on Discriminatory Grounds', p. 185.

[62] A. Traldi, 'The Recent Free Expression Jurisprudence of the Working Group on Arbitrary Detention', *Chicago Journal of International Law* 24.1 (2023): pp. 160–161.

evidence.[63] The Working Group's Model Questionnaire refers to the submission of documents but does not explicitly address the types of evidence formats that the Working Group may accept or how it uses and manages digital evidence.[64] In its practice, the Working Group has dealt with evidence and information in digital formats, including both scanned documents and originally electronic documents. However, questions that may arise concern how the Working Group evaluates and stores such evidence, in line with principles of data integrity, authenticity, confidentiality and quality, as well as the source's privacy where applicable.

In this respect, the Council of Europe's guidelines on electronic evidence in civil and administrative proceedings provide examples of good practices, including those aimed at assuring authenticity and avoiding falsification.[65] The Office of the High Commissioner for Human Rights (OHCHR's) submission form for other UN human rights special procedures also accepts digital evidence, and does not limit this to printable materials.[66] Furthermore, the Working Group on Enforced or Involuntary Disappearances (WGEID) is currently studying the use of new digital technologies, including digital evidence, in prosecutions.[67] It is expected that WGEID's study will contribute to developing the position of other UN human rights mechanisms in relation to the use of digital evidence in proceedings.

On the other hand, the UNTB online submission portal for individual communications only accepts certain file formats and is limited to printable materials.[68] Although this is a technical matter, it can result in restricting the ability of sources (claimants) to provide cogent evidence regarding human rights violations, such as contemporary videos and photos.

Substantively, digital evidence – such as video footage and social media posts – features frequently and with increasing significance in

[63] Digital evidence is understood here to mean 'any evidence derived from data contained in or produced by any device, the functioning of which depends on a software program or data stored on or transmitted over a computer system or network'. Council of Europe, 'Electronic Evidence in Civil and Administrative Procedures', 30 January 2019, https://rm.coe.int/guidelines-on-electronic-evidence-and-explanatory-memorandum/1680968ab5, 6.

[64] WGAD, Model Questionnaire, www.ohchr.org/en/special-procedures/wg-arbitrary-detention/complaints-and-urgent-appeals.

[65] Council of Europe, Electronic Evidence in Civil and Administrative Procedures.

[66] OHCHR, Submission of Information to Special Procedures.

[67] UNWGEID, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/51/31), 2022, para 37.

[68] OHCHR, Submission of an individual communication to a UN Treaty Body.

international criminal trials and international human rights investigations.[69] The Working Group is increasingly confronted with such materials, particularly in the context of protests, where footage can help provide insights which written materials may not capture or effectively convey. However, the Working Group has not adopted a specific approach regarding digital materials to date. Other UNTBs have also not yet adapted their formal procedures in this respect. As digital evidence becomes more ubiquitous, the UNTBs and the Working Group will have to become more accustomed in practice and procedure to accommodating their use.

5.4.3 *Use of External Materials in Determining Cases*

The Working Group engages in independent fact-checking under its regular communications procedure. Though it has repeated that its role is not to substitute itself for a domestic fact-finder, it does consider various reputable sources in its evaluation of factual narratives by parties.[70] Beyond referencing its jurisprudence and findings from country visits, the Working Group appears to increasingly reference third-party information for both procedural and substantive purposes.

Technically, there are no explicit limitations in this respect. The Working Group 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.[71] This may include referencing any joint communications from UN special procedure mandate holders and related press coverage to highlight the urgency of the situation, as in the case concerning the Government of Malaysia's treatment of Mr. Khan.[72] For substantive reasons, the Working Group may reference authoritative sources evidencing historic discrimination and emerging patterns of human rights violations involving arbitrary deprivation of

[69] M. Gillett and W. Fan, 'Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom', *Journal of International Criminal Justice* 21. 4 (2023): 661–693. Even the International Court of Justice has seen posts from social media used as key items of evidence, in its recent provisional measures order in *South Africa* v. *Israel*, ICJ, pending.

[70] Genser, *Working Group on Arbitrary Detention*, Part III.

[71] See, e.g., *Adilur Rahman Khan* (WGAD); *Thirumurugan Gandhi* (WGAD); *Walid El Batal* (WGAD); *Hamid Soudad* (WGAD), Avis 4/2023, 10 May 2023.

[72] *Adilur Rahman Khan* (WGAD), para. 29.

liberty.[73] As a case in point, the Working Group has identified an emerging pattern involving the arbitrary deprivation of liberty of dual nationals in Iran, referencing the findings and reasoning of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran.[74] More recently, the Working Group cited the latest findings from the Human Rights Council's Universal Periodic Review and other reports related to Algeria to support its reasoning on the discriminatory detention of Mr Soudad.[75]

This use of external materials in determining cases is consistent with the Working Group's flexible approach to evidence, based on assessing the 'totality of the circumstances'.[76] It also demonstrates that despite its specific mandate, the Working Group sees its work as essentially complementary to other international justice-seeking efforts, both within the UN system and beyond.

UNTBs could adhere to the same approach. Beyond enhancing fact-finding, this has the potential to contribute to the Working Group and UNTBs' efforts to better coordinate within the UN system. Furthermore, it can foster cohesion and consistency across the law, institutions, and practice of the contemporary human rights regime. Finally, this can lead to significant advances in specific cases and help serve the broader goal of harmonious jurisprudential development in the field of human rights.

5.4.4 *Standards Applied During the Working Group's Own Fact-Finding*

As with its opinions, the Working Group has not yet fully addressed what standard of proof it applies during country visits for fact-finding. The Working Group's Methods of Work and Terms of Reference for Country Visits are both silent in this sense. However, the Code of Conduct for Special Procedures Mandate holders of the Human Rights Council states that mandate holders shall 'always seek to establish the facts, based on

[73] See, e.g., *Nazanin Zaghari-Ratcliffe* (WGAD); *Tashi Wangchuk* v. *China*, WGAD opinion 69/2017, 7 December 2017; *Thirumurugan Gandhi* (WGAD); *Bakri Mohammed Abdul Latif and others* v. *Egypt*, WGAD opinion 28/2018, 30 May 2018 and *Abbas Haiji Al-Hassan* (WGAD). See also C. Roberts, 'Reversing the Burden of Proof Before Human Rights Bodies', *The International Journal of Human Rights* 25 (2021): 1682–1703, 1682.

[74] *Nazanin Zaghari-Ratcliffe* (WGAD), para. 48.

[75] *Hamid Soudad* (WGAD), para. 98.

[76] See, e.g., *Julian Assange* v. *Sweden and the United Kingdom of Great Britain and Northern Ireland*, WGAD opinion 54/2015, 6 April 2016, para. 91.

objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible'.[77] It further states that mandate holders shall 'rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up'.[78] A similar provision is included in the Manual of Operations of the Special Procedures of the Human Rights Council.[79] The Manual further requires mandate holders to assess the reliability of the information and of the person(s) providing the information collected during interviews with victims and witnesses of human rights violations.[80] Overall, this may suggest that the Working Group should apply a standard of proof that is deemed appropriate on a case-by-case basis.

A review of recent country visit reports indicates that the Working Group issues its conclusions on the basis of having more evidence supporting findings than contradicting them.[81] For example, when concluding that there are discrepancies between domestic legal provisions in principle and practice, the Working Group relies on its own observations and the testimonies collected during a visit, sometimes corroborated by third-party reports, as reason enough to disprove information shared by official authorities in the country under consideration.[82] Yet, in some cases, the Working Group appears to apply a higher standard of proof by looking for clear and convincing evidence – that is, significantly more evidence supporting a finding and limited information suggesting the contrary. For example, the Working Group has concluded that some facilities visited were not places of deprivation of liberty on the basis of its interviews with both the officials in charge and the residents in such

[77] Human Rights Council, Code of Conduct for Special Procedures Mandate holders of the Human Rights Council (A/HRC/RES/5/2), Article 6(a).

[78] Human Rights Council, Code of Conduct for Special Procedures Mandate holders of the Human Rights Council, Article 6(a) and Article 8(c).

[79] OHCHR, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008, para. 24.

[80] OHCHR, Manual of Operations of the Special Procedures of the Human Rights Council, para. 73.

[81] The review included reports from country visits to the following countries (in chronological order): Azerbaijan, the United States of America, Argentina, Sri Lanka, Hungary, Bhutan, Qatar, Greece and Maldives.

[82] See, e.g., reports of visits to the USA (A/HRC/36/37/Add.2), Sri Lanka (A/HRC/39/45/Add.2) and Greece (A/HRC/45/16/Add.1).

facilities.[83] In other cases, the Working Group has concluded that it was 'not clear' whether the information gathered amounted to arbitrary deprivation of liberty and invited stakeholders to submit further information.[84] This may impact the uptake of the Working Group's findings.[85] Therefore, the Working Group should consider the application of a set standard of proof and clarify its evidentiary considerations for country visits. It should also address its standard of proof at the outset of its country visit reports, following its general remarks about the visits' programmes.

In this regard, it should be noted that a balance of probabilities standard (often expressed as 'reasonable to conclude' and equivalent to a 'preponderance of evidence', or 'convincing evidence' standard) charts a careful course for human rights monitoring and litigation. This standard is likely to be the most coherent standard of proof to apply in most circumstances, because of the inherent limitations of fact-finding mechanisms coupled with the interests at stake.[86]

The balance of probabilities standard fits well, as it must naturally be higher than the preliminary prima facie threshold but lower than a criminal standard of beyond reasonable doubt. Regarding the latter, victims and complainants should not be held to the same level of proof as police and prosecution services, as they do not have the same access to investigative materials and techniques.[87] The balance of probabilities standard matches that applicable in many types of civil claims. It is achievable for complainants, particularly if evidentiary presumptions are adopted, such as not requiring the complainant to produce a document or piece of information to which they would not reasonably have access. It is nevertheless also a robust standard capable of providing some insulation against reaching incorrect and ill-founded conclusions,

[83] See, e.g., reports of visits to Qatar (A/HRC/45/16/Add.2) and Bhutan (A/HRC/42/39/Add.1).

[84] See, e.g., report of visit to Qatar (A/HRC/45/16/Add.2), Argentina (A/HRC/39/45/Add.1) and Sri Lanka (A/HRC/39/45/Add.2).

[85] S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2014).

[86] Wilkinson, *Standards of Proof*, 4.

[87] For similar observations, M.-B. Dembour, 'Beyond Reasonable Doubt at Its Worst but Also at its Potential Best: Dissecting *Ireland v the United Kingdom*'s No-Torture Finding', *European Convention on Human Rights Law Review* 4 (2024): 375–425, 381.

which would open human rights bodies up to claims of inconsistency, selectivity, opacity and unconscious biases.[88]

Hence, explicitly adopting the balance of probabilities standard would place the Working Group on a defensible footing, while ensuring that its approach is transparent. Similarly, other human rights bodies, such as UNTBs, could benefit from the combination of reliability and flexibility provided by this evidentiary standard.

5.5 Impact of the Working Group's Changing Approach to Evidence

There are a number of indicia to gauge the impact of the Working Group's approach to evidence, namely compliance with decisions, state responses and the responses of other third parties such as UNTBs and regional human rights courts. These indicia will be examined in the subsections below.

5.5.1 Compliance

In the context of the Working Group, compliance is primarily an issue of releases of arbitrarily detained persons, though the Working Group also typically calls for compensation to be afforded to them. Fundamentally, it is the release of persons found to have been arbitrarily detained which signals States' commitment to redressing arbitrary detention. Historically, compliance has been hard to measure. However, a rough evaluation can be made from the fact that in the 2022 Annual Report, the Working Group noted that it had learned of approximately 22 individuals subject to its opinions being released in the reporting period, during which it had issued 88 opinions.[89] In 2023, there were 38 releases and 77 opinions issued, a significant increase on the year before.[90] In preceding years, that rate appears relatively stable. This only gives an approximate assessment of compliance, as there are also forms of implementation which

[88] See Viljoen, 'Fact-Finding', pp. 55–56 and 77–78 (referring to examples where the Working Group was (incorrectly) accused of including 'inaccuracies' and 'false facts' in its reports).

[89] See WGAD, Report of the Working Group on Arbitrary Detention (A/HRC/54/51), 2023, para.12. Note that many of the releasees were subjects of opinions issued prior to 2022, and so only an approximate estimate of compliance can be ascertained.

[90] See WGAD, Report of the Working Group on Arbitrary Detention (A/HRC/57/44), 2024, para. 11.

are less easily quantifiable, such as adhering to Working Group recommendations to bring domestic laws into line with international human rights law.[91] Nonetheless, broadly speaking, the rate of implementation of the Working Group's findings could be roughly seen as hovering somewhere around 20–40 per cent. In that light, the Working Group's compliance rate falls broadly within the range of UNTBs with individual complaint mandates, which Ullman and von Staden have measured as between nineteen and thirty-nine percent.[92]

By comparison, for regional bodies, there appears to be great variation in the rate of compliance: around 50–60 per cent for the (ECtHR) but only 6–14 per cent for judgments of the Inter-American Court of Human Rights.[93] More broadly, at the ICJ, which is increasingly being confronted with human rights-related claims, the compliance rate has been 49 per cent for provisional measures orders, but seems to have fallen in recent years as it takes on more contentious cases.[94]

[91] See, e.g.,, Letter on Opinion 40/2018 from the Republic of Korea, 22 February 2019 (indicating in response to the Working Group's recommendations of Opinion 40/2018, that the Korean courts had since changed their interpretation of the governing legislation regarding detention of conscientious objectors).

[92] A. J. Ullmann and A. von Staden, 'A Room Full of "Views": Introducing a New Dataset to Explore Compliance with the Decisions of the UN Human Rights Treaty Bodies' Individual Complaints Procedures', *Journal of Conflict Resolution* 68 (2023): 534–561.

[93] See C. Giorgetti, 'What Happens After a Judgment Is Given? Judgment Compliance and the Performance of International Courts and Tribunals' in T. Squatrito, O. Young, A. Follesdal and G. Ulfstein (eds.), *The Performance of International Courts and Tribunals* (Cambridge: Cambridge University Press, 2024), pp. 324–350, 343; D. Hawkins and W. Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights', *Journal of International Law and International Relations* 6 (2010): 51-59. See also A. von Staden and A. J. Ullmann, 'Seeking Overlap and Redundancy in Human Rights Protection: Reputation, Consistency and the Acceptance of the UN Human Rights Treaties' Individual Communications Procedures', *The International Journal of Human Rights* 26 (2022): 1476–1502, 1478 ('it is at least partly driven by states' intention to maintain and consolidate a reputation as a sincere committer; abstaining from such commitment when it is expected may, by contrast, subject states to charges of inconsistency'). It is finally worth noting that in her comparative analysis of the degree of compliance which the judgments of the European and Inter-American Courts of Human Rights attracted, Dembour notes that the Inter-American Court is typically more demanding than the European Court in what it requires from states, in turn reducing Inter-American compliance rates: *When Humans Become Migrants: Study of the European Court with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015), 340–344.

[94] See M. Alexianu, 'Provisional, but Not (Always) Pointless: Compliance with ICJ Provisional Measures', *EJIL: Talk* (blogpost dated 3 November 2023). Regarding its final judgments, compliance appears to be much higher than 50 percent, with instances of non-compliance generally being the infrequent exception: H. L. Jones, 'Why Comply?

States have indicated that the quality, coherence, and correctness of human rights bodies' decisions are key factors in encouraging compliance.[95] Achieving rigorous standards in these respects is heavily reliant on access to reliable evidence. If the materials on which the Working Group must base its assessments are unreliable and lacking in probity, then it will be difficult to reach any firm factual conclusions on which to superimpose the legal standards governing arbitrary detention. For this reason, the Working Group has increasingly sought to tighten its approach to evidence, to ensure cogency and consistency in its findings. A similar rigour on the part of the UNTBs will assist in enhancing the legitimacy, acceptance and impact of their determinations.

5.5.2 *State Responses*

Another indicator from which to gauge the uptake of the Working Group's opinions, including reactions to its approach to evidence, is via state responses. On a number of occasions, the Working Group has been confronted with States questioning its determinations.

For example, in the context of the Working Group's 2002 country visit to Australia, disputed issues ranged from legal questions concerning the incorporation of international human rights law into Australian domestic law, to motivational questions concerning the purpose behind Australia's immigration policy,[96] to specific factual issues, such as whether detainees were generally handcuffed when leaving immigration facilities.[97] The Australian Government accused the Working Group of including 'inaccuracies' and 'incorrect' statements in its country visit report, making assumptions and inferences, and reporting unsubstantiated allegations.[98] The Working Group responded by noting that its information is received from a variety of sources and that it establishes

An Analysis of Trends in Compliance with Judgments of the International Court of Justice Since Nicaragua', *Chicago-Kent International and Comparative Law* 12 (2010): 58–98, Appendix C.

[95] See N. Pillay, Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights (OHCHR, June 2012), p. 8.

[96] Australia took issue with the Working Group's observation that talks with Government officials indicated that one of the goals of the system of mandatory detention was to discourage would-be immigrants from entering without a visa.

[97] UN Doc. E/CN.4/2003/G/22, 10 January 2003, Annex III ('Australian Objections'), pp. 7–8, 10–11.

[98] Australian Objections; Viljoen, 'Fact-Finding', p. 55.

facts in 'as objective and impartial' a manner as possible in the limited time available.[99]

This exchange highlights the subtle but important difference between the Working Group's information-gathering function and its quasi-judicial individual complaint function. Information-gathering, such as through country visits, is an open and evolutive process which culminates in recommendations.[100] Conversely, the consideration of individual complaints has a more judicial character. The submissions of the parties are compared, before the Working Group ultimately sets out in its disposition whether violations of the relevant legal instruments have occurred. These approaches adhere to the Special Procedures Code of Conduct, which, as noted above, provides that in their fact-finding activities, Special Mandate holders should seek objective, reliable information from relevant credible sources and cross-check them as far as possible.[101] The Code of Conduct also specifies that Special Mandate holders' information-gathering functions have a distinct character from the quasi-judicial consideration of individual complaints, such as those conducted by the Working Group.[102]

In the context of the Working Group's individual complaints procedures, its approach to determining facts has also been challenged on occasion. For example, the United States of America accused the Working Group of reaching conclusions which were 'unsubstantiated', based on 'false facts' and a 'fundamental misunderstanding of our law',[103] in a 2002 case concerning the detention of two Indian nationals.[104] However, the United States Government had only provided general arguments which 'merely described the current procedure under

[99] UN Doc. E/CN.4/2003/G/22, 10 January 2003, Annex II ('Working Group Response'); Viljoen, 'Fact-Finding', p. 55.

[100] For example, the Working Group can re-visit a country and in doing so will seek to update the views and recommendations it presented in its earlier visit(s). This occurred in relation to Mexico, which the Working Group visited in 2002 and then in 2023; WGAD, Preliminary Findings from its visit to Mexico, 29 September 2003, p. 1.

[101] See fn. 77 above referring to Human Rights Council, *Code of Conduct for Special Procedures Mandate holders of the Human Rights Council*, 18 June 2007, Article 6(a).

[102] Human Rights Council, *Code of Conduct for Special Procedures Mandate holders of the Human Rights Council*, Article 8(c).

[103] Permanent Mission of the United States of America, Letter to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights (E/CN.4/2003/G/72), 7 April 2003; Viljoen 'Fact-Finding', pp. 78–79.

[104] *Ayub Ali Khan and Azmath Jaweed* v. *United States of America*, WGAD opinion 21/2002, 3 December 2002, para. 1.

United States law without providing any information on the individuals in question'.[105] Ultimately, according to the Working Group, 'the misunderstanding seem[ed] to be rather on the American side',[106] as the State only presented specific and detailed information regarding the case after the deadline for its response had elapsed and after the Working Group had rendered its opinion. Through this adherence to a structured procedure, the Working Group insulates itself against inaccuracies and unfounded critiques. Both parties are given an opportunity to present their views in line with the principle of *audi alteram partem* (each side must be heard), but with time limits designed to facilitate the efficiency and finalisation of proceedings.

In an example illustrating the role of time limits, the Government of Cameroon expressed its dissatisfaction that the source's submissions were summarised in thirty-two paragraphs in a 2016 opinion, whereas the Government's submissions were limited to just one paragraph.[107] However, the Government overlooked that it had submitted its response one month late, thus violating the Working Group's adversarial procedure.[108] Nonetheless, the reference to the Government having 'duly' submitted its response may have caused confusion, and is not a term the Working Group would typically use in present times to describe a late-filed submission. Consequently, whereas the Working Group's adherence to its procedures helped to insulate it in this specific case, it highlights the need to ensure clear messaging in subsequent opinions, which has been the case.

Following the issuance of a Working Group opinion in 2019, finding that Rwanda had arbitrarily detained two women, the Government complained that the Working Group had reached erroneous conclusions and was 'fundamentally flawed'.[109] In this case as well, the Government failed to provide a timely response, meaning the Working Group could

[105] *Ayub Ali Khan and Azmath Jaweed,* (WGAD), para. 12; Viljoen, 'Fact-finding' (2004), pp. 78–79.

[106] Viljoen, 'Fact-Finding', pp. 78–79.

[107] OHCHR website, Cameroon, 'Government Response in Relation to Opinion 22/2016', 27 January 2017.

[108] See *Marafa Hamidou Yaya* v. *Cameroon*, WGAD opinion 22/2016, 1 July 2016, paras. 37–38. The government had asked for a 60-day extension but the Working Group was only able to grant it the maximum 30-day extension in line with its Methods of Work.

[109] Government response in relation to WGAD Opinion 24/2019 (Rwanda), 17 June 2019 (https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Rwanda_reply__2019_06_19_14_29_44.pdf).

not place as much weight on the response as if it were timely filed,[110] in line with the established jurisprudence.[111] Nonetheless, the Working Group assessed the specific allegations and found some had been established and others not. In particular, the Working Group dismissed the claims of discrimination based on a pattern of harassment due to a lack of information indicating a connection with the State.[112] Again, this exchange highlights the importance of the Working Group's rigorous adherence to its adversarial procedures, particularly in relation to the receipt and weighing of evidence. The Working Group's adversarial procedure, in which both parties have the opportunity to submit their views, does not make it infallible but does insulate it against allegations of inaccuracy and lacking objectivity.

5.5.3 *Responses of UNTBs and Regional Human Rights Bodies*

A further means of assessing the Working Group's approach to evidence is via the response of external entities such as UNTBs and the regional human rights courts. Based on the Working Group's well-developed approaches to evidence, its views are cited by regional human rights courts. For example, the ECtHR has mentioned the Working Group's opinions or the reports of the country visit in many cases,[113] and considers the analysis of the Working Group when the same case is under the consideration of the Working Group.[114]A highly pertinent example is the ECtHR judgment in *Ibrahimov and Mammadov* v. *Azerbaijan*.[115] In this case, the Working Group had met the applicant in the Baku pre-trial detention facility on its country visit to Azerbaijan.

[110] See *Diane Shima Rwigara and Adeline Rwigara* v. *Rwanda*, WGAD opinion 24/2019, 2 May 2019, paras. 31, 36 ('the Government chose to submit its response late, knowing the consequences of such a late submission. In addition, the Government, in its late response, chose not to provide any supporting evidence.').

[111] See, e.g., *Do Nam Trung* v. *Viet Nam*, WGAD opinion 86/2022, 18 November 2022, para. 26.

[112] See, e.g., *Diane Shima Rwigara and Adeline Rwigara* (WGAD), para. 46.

[113] See, e.g., *Mohammadi* v. *Austria*, ECtHR, 71932/12, Judgment, 3 July 2014; *Rashad Hasanov and others* v. *Azerbaijan*, ECtHR, 2059/16, Judgment, 7 June 2018; *Abdolkhani and Karimina* v. *Turkey*, ECtHR, 30471/08, Judgment, 22 September 2009; *Aliyev* v. *Azerbaijan*, ECtHR, 68762/14 and 71200/14, Judgment, 20 September 2018.

[114] See, e.g., *Hilal Mammadov* v. *Azerbaijan*, ECtHR, 81553/12, Judgment, 4 February 2016; *Kavala* v. *Turkey*, ECtHR, 28749/18, Judgment, 10 December 2019.

[115] *Ibrahimov and Mammadov* v. *Azerbaijan*, ECtHR, 63571/16, 74143/16, 2883/17 et al., Judgment, 13 February 2020. See also *Ilnseher* v. *Germany*, ECtHR, 10211/12 and 27505/14, Judgment, 4 December 2018, para. 79.

The ECtHR quoted the statement of the Working Group that it 'observed what seemed to be physical sequels of such treatment'.[116] The ECtHR used this statement in consideration of the credibility of the applicant's claim. Noting that the claim was supported by the Working Group's report,[117] the ECtHR found that 'there is prima facie evidence in favour of the applicants' version of events and that the burden of proof shifts to the Government to provide a satisfactory and convincing explanation'.[118]

The above shines an important light on how the Working Group's approach to evidence affects its impact. This can provide insights for the UNTBs as well. Whereas compliance rates provide a form of quantitative indicia, States' responses provide a more qualitative explanation as to why certain determinations are well received, and whether the issues relate to procedure or substance or a mix of the two. The analysis demonstrates that the quality and consistency of fact-finding conducted by quasi-judicial human rights bodies such as the Working Group and the UNTBs is a major factor impacting on competent authorities' uptake of their determinations. Additionally, the use of UNTB and Working Group findings by regional human rights bodies is important for the cross-fertilisation of approaches to evidence, as the Working Group itself has not.[119]

5.6 Conclusions

Over the three phases of its operations, the Working Group has elaborated a clear but flexible approach to evidence and burdens. Since it explicitly spelled out its approach to burdens and evidence in its 2011 Annual Report, the Working Group's formulation has been increasingly repeated and refined to the point where it has become essentially a uniform component in its opinions. This contributes to the legal consistency and predictability of its opinions. Nonetheless, issues regarding the Working Group's approach in cases involving heightened review, digital evidence, materials from external sources and its own fact-finding are increasingly emerging as factors to address during this consolidation phase of its operations. Ensuring consistency is not just important for the coherence of the Working Group's jurisprudence, but also for the

[116] *Ibrahimov and Mammadov* v. *Azerbaijan*, ECtHR, para. 35.
[117] *Ibrahimov*, ECtHR, para. 92.
[118] *Ibrahimov*, ECtHR, para. 93.
[119] On cross-fertilization, see WGAD, Report 2011, para. 66.

uptake and implementation of its decisions and recommendations by governments which hold persons in detention. In line with Helfer and Slaughter's observations regarding the quality of legal reasoning as a controllable means of inducing adherence to human rights rulings, mechanisms established to provide quasi-judicial human rights determinations must accentuate the consistency and cogency of their outputs, including 'the legal language itself: the language of reasoned interpretation, logical deduction, systemic and temporal coherence'.[120]

In relation to adherence to its determinations and recommendations for redress, the Working Group faces considerable challenges. This is highlighted by comparison with other international bodies. For example, unlike the ICJ, the Working Group's jurisdiction is not based on the consent of the relevant government(s) to its proceedings, which generally can be expected to increase compliance rates.[121] Accordingly, compliance is far more dependent on the quality and persuasiveness of the Working Group's assessment and opinions and the perceived fairness of its procedures. Prior consent to the bodies' jurisdiction (as exists for the UNTBs) is a factor which should naturally lead to higher compliance rates. However, the quality of the body's issuances and the reasoning therein will be important factors for those advocating for greater uptake of the quasi-judicial human rights bodies' decisions. As Giorgetti has noted: 'If the losing party finds that the substantive part of the judgment is understandable and that the court listened to its arguments, it will make it easier to comply.'[122] The development of a consistent, coherent and predictable procedure during the three phases of the Working Group's existence enhances the persuasiveness of the position it arrives at in specific cases while at the same time raising the reputational costs inherent in ignoring its determinations.

This is particularly important for the Working Group's cases, where there is typically a vast power and resource gap between the government and the detained person. Adhering to the Working Group's calls to release the person and provide reparation will largely come down to the relevant government's acceptance of the validity of the reasoning

[120] Helfer and Slaughter 'Toward a Theory of Effective Supranational Adjudication', p. 318, referring to J. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies* 26 (1994): 510–534, 521.

[121] See C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004), pp. 403–410. C.f. Giorgetti, 'What Happens After a Judgment Is Given?', p. 343.

[122] Giorgetti, 'What Happens?', pp. 347–348.

behind the determination, along with individual factors regarding the detained person and the nature of the crimes for which they may have been arrested.

Moreover, like the UNTBs, the Working Group does not have a direct procedure enabling it to send cases to the United Nations Security Council (UNSC) for enforcement. Efforts to enforce ICJ judgments via the UNSC can be vetoed by any of the permanent five members, as occurred with the Court's judgments in the *Nicaragua* case, for example.[123] However, for the vast majority of States in the world, the mere possibility of being brought before the UNSC for not complying with an ICJ decision is a strong compliance pull factor. In theory, the Working Group could report a lack of compliance to the Human Rights Council, which in turn could report this to the United Nations General Assembly. In practice, though, this would rarely be done, particularly in light of debates over the bindingness of the Working Group's opinions.[124] This observation highlights the relevance of formal enforcement structures attached to human rights adjudicative bodies, as well as the impact of a rigorous approach to evidence and the law on improving implementation prospects.

Bearing in mind these external comparisons, the Working Group's operations can serve as a canary in the coal mine for emerging evidentiary issues which are increasingly becoming important for human rights litigation. As the Working Group continues to engage with the problem of arbitrary detention and build its credibility in the international human rights community, it may consider implementing the following recommendations:

1) First, the Working Group should consider a more explicit elucidation of the heightened review test and state whether this impacts factual determinations, particularly in category V (discrimination) cases, and particularly when intersectional issues arise.

[123] Giorgetti, 'What Happens?'

[124] See E. D. Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law—The Case of Special Procedures', *Netherlands Quarterly of Human Rights* 29 (2011): 261–288, 283 and 286; J. M. Genser and M. K. Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and in Practice' *Columbia Human Rights Law Review* 39 (2008): 687–756; A. Mazzinghy, 'Please, Set Me Free! The Right to Challenge an Unlawful Detention: Scrutinizing the Practice of the United Nations Working Group on Arbitrary Detention', *Perth International Law Journal* 5 (2020): 63–115, 84–85. See also Toomey, 'Detention on Discriminatory Grounds'.

2) Second, the Working Group should consider including a plain-language explanation of its approach to evidence and the standards and burdens it applies and should make this information available on its website and any other relevant official communications, as well as its model questionnaire. This will help individuals, NGOs, governments and other actors make the best use of the complaints and urgent appeals procedure. It may also clarify whether the Working Group applies the same test for fact-finding during country visits as it does during the assessment of individual complaints.
3) Third, the Working Group should explicitly set out the balance of probabilities standard as the approach it applies to individual cases and to its broader fact-finding functions, including during country visits.
4) Fourth, the Working Group should consider its specific approach to digital evidence, including what type of digital evidence the Working Group accepts, and how it evaluates and stores it. This should align with principles of data integrity, authenticity, confidentiality and quality, as well as the sources' privacy, where applicable.

Implementing these recommendations would allow the Working Group to gain an even greater acceptance as an authoritative international arbiter and make an even greater contribution to the global effort of protecting individuals from arbitrary detention.

Over four decades ago, renowned human rights expert Louis Henkin claimed that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[125] While that was debatable at the time, it is clear that since then, compliance with international law has not become universal, and if anything, has deteriorated in many respects. Unfortunately, the field of human rights has not been spared this fate. Nonetheless, compliance can be achieved in many instances, making it all the more important that human rights bodies address the factors within their control. One of these is the rigour and consistency applied to assessing factual claims. In this respect, the Working Group's approach to evidence highlights a robust and dependable methodology, which is sufficiently flexible to account for the wide variety of cases it receives, while also being clear in its core parameters in most respects. However, a close examination of the Working Group's approach to evidence highlights areas in need of

[125] L. Henkin, *How Nations Behave* (New York: Columbia University Press, 1979), p. 47.

further clarification, as well as specific challenges on the horizon, regarding which adjustments have been suggested in this chapter. Through an ongoing assessment and refinement of its approach to evidence, the Working Group can provide a model for other human rights bodies, including UNTBs, to examine and potentially utilise in their own important efforts to universalise human rights compliance.

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