THE INTERSECTION OF POLITICS AND INTERNATIONAL LAW: THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION IN THEORY AND IN PRACTICE

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ABSTRACT

The United Nations Working Group on Arbitrary Detention (WGAD) is a body within the U.N. Human Rights Council that receives communications and issues opinions regarding the detention of individuals throughout the world. The WGAD's methods are quasi-judicial, its opinions are non-binding, and it has no direct enforcement power of its own. Yet these and other flexible features of the WGAD are critical to its effectiveness, allowing it to provide a politically viable alternative to treaty-based human rights enforcement mechanisms. Indeed, in some cases the opinions have catalyzed others to take action and have helped initiate a chain of events leading to the prisoner's release. This Article explains in detail the WGAD's history, procedures, and practical functions. It also describes four cases in which the WGAD's opinion was intentionally sought and leveraged as part of a broader effort to release an individual detainee and draw attention to a country's violation of international legal norms

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relating to arbitrary detention. Finally, this Article offers some suggestions to increase the WGAD's effectiveness in fulfilling its mandate and becoming a more useful tool for those advocating for the rights of the arbitrarily detained.

I. INTRODUCTION

Securing adherence to international law is a complex and dynamic process. In the international arena, where there is no supranational body to enforce the law, international actors substantially rely on "soft law mechanisms," which lack formal enforcement authority and depend on civil society, at least in part, to carry out their recommendations.[1] Joshua Cohen and Charles Sabel explain that international law enforcement consists mainly of recommendations—as opposed to binding rules—or regulatory networks with informal decision-making procedures and agreements.[2] The actors in this "global administration" are "global institutions . . . [which] make, elaborate, and apply rules with some de facto decisionmaking independence from their creators."[3] These non-binding, soft law rules are "increasingly consequential . . . because they provide standards for coordinated action and . . . because national rulemaking itself proceeds subject to rules, standards, and principles established beyond the national level."[4] Finally, these institutions "guide conduct by providing incentives and permitting the imposition of sanctions, even when they lack independent coercive powers."[5] Thus, they establish standards of conduct, which others then can enforce through political and public relations advocacy to increase government accountability.

The United Nations Working Group on Arbitrary Detention (WGAD) is one such global institution. The WGAD generates information on the problem of arbitrary detention, applies international standards to individual cases, and (though it lacks "independent coercive powers") relies on communication among

1. Minsu Longiaru, *The Secondary Consequences of International Institutions: A Case Study of Mexican Civil Society Networks and Claims-Making*, 37 Cal. W. Int'l L.J. 63, 71–72 (2006).
2. Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. Int'l L. & Pol. 763, 773 (2005).
3. *Id.* at 764.
4. *Id.*
5. *Id.*

states, policy-makers, and advocates to encourage governments to implement its recommendations. Created by the former U.N. Commission on Human Rights (UNCHR)[6] in 1991, the WGAD performs four core activities.[7] First, it investigates individual cases of detention and evaluates whether they are consistent with the relevant international legal norms regarding detention, including those articulated in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles).[8] Second, it formulates "deliberations"[9] on general

6. The U.N. Commission on Human Rights (UNCHR), a subsidiary body of the Economic and Social Council (ECOSOC), was composed of 53 Member States elected by the ECOSOC and distributed to reflect the principle of regional balance. Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 27: Seventeen Frequently Asked Questions about United Nations Special Rapporteurs 2, http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx (follow No. 27, "Seventeen Frequently Asked Questions about United Nations Special Rapporteurs") (last visited Feb. 22, 2008) [hereinafter Fact Sheet No. 27]. The UNCHR was authorized to create special procedures, including rapporteurs and working groups, to address substantive human rights issues ("thematic procedures") or human rights problems in a particular country ("country-specific procedures"). *Id.* at 4–6. ECOSOC resolution 1236 (XLII) in 1967 authorized the UNCHR to examine cases revealing a consistent pattern of human rights violations. Zdzislaw Kedzia, *United Nations Mechanisms to Promote and Protect Human Rights*, *in* Human Rights: International Protection, Monitoring, Enforcement 3, 49 (Janusz Symonides ed., 2003). The UNCHR was abolished on June 16, 2006 and in its place the U.N. General Assembly created the U.N. Human Rights Council (UNHRC). The UNHRC is composed of 47 Member States, yet as this is a subsidiary body of the entire General Assembly, the UNHRC's Member States are chosen from a broader group of states than those in the former UNCHR. Press Release, General Assembly, General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, with 3 Abstentions, U.N. Doc. GA/10449 (Mar. 15, 2006), *available at* http://www.un.org/News/Press/docs/2006/ga10449.doc.htm. This also means that the independent experts who together form the WGAD are selected from this broader group of countries.

7. Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 26: The Working Group on Arbitrary Detention, pt. V(A)–V(D), http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx (follow No. 26, "The Working Group on Arbitrary Detention") (last visited Feb. 22, 2008) [hereinafter Fact Sheet No. 26].

8. *Id.* pt. IV(B), V(A).

9. "Deliberations" are decisions adopted in connection with individual cases that the WGAD applies to all subsequent cases. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Arbitrary

matters to develop a consistent set of principles on arbitrary detention.[10] Third, it takes "urgent action" in cases where detention may pose a serious danger to a person's health or life.[11] Fourth, it conducts field missions.[12] This Article will focus on the first of these activities—case investigations—and, taking into account the WGAD's history and mandate as well as a review of four WGAD case studies, suggest areas for reform that will help the WGAD more effectively promote compliance with international law norms related to arbitrary detention.

The WGAD's methods are quasi-judicial, its opinions are non-binding, and it has no direct enforcement power of its own. Yet these features are actually critical to the mechanism's effectiveness, allowing it to provide a politically viable alternative to treaty-based human rights enforcement mechanisms. Moreover, while the WGAD's opinions are not technically binding, they can serve as a catalyst for information sharing among non-governmental organizations (NGOs) and governments, raise awareness about particular types of problems such as abuse of emergency situations and special courts, increase government accountability, and ultimately lead to the release of detainees. The UNCHR renewed the WGAD's mandate every three years.[13] On September 28, 2007, the new Human Rights Council (UNHRC), which was charged with examining, rationalizing, and improving all of the UNCHR's mandates, again extended the mandate of the WGAD.[14] Therefore, this is an opportune time to examine the

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Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, ¶¶ 4, 19, at 3, 8–9, U.N. Doc. E/CN.4/1993/24 (Jan. 12, 1993) [hereinafter U.N. Doc. E/CN.4/1993/24].

10. Fact Sheet No. 26, *supra* note 7, pt. V(B).

11. *Id.* pt. V(C).

12. *Id.* pt. V(D).

13. *Id.* pt. III; OHCHR Res. 2003/31, para. 10, U.N. Doc. E/CN.4/RES/2003/31 (Apr. 23, 2003); ECOSOC, Office of the High Comm'r for Human Rights, *Question of Arbitrary Detention*, U.N. Doc. E/DEC/2000/263 (Apr. 20, 2000); ECOSOC, Office of the High Comm'r for Human Rights, *Question of Arbitrary Detention*, U.N. Doc. E/DEC/1997/260 (July 27, 1997); ECOSOC, Office of the High Comm'r of Human Rights, *Question of Arbitrary Detention*, U.N. Doc. E/CN.4/RES/1997/50 (Apr. 15, 1997); ECOSOC, Office of the High Comm'r for Human Rights, *Question of Arbitrary Detention*, para. 2, U.N. Doc. E/DEC/1994/279 (July 25, 1994).

14. UNHRC, *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development: Arbitrary Detention*, ¶ 1, U.N. Doc A/HRC/6/L.30 (Sept. 28, 2007).

WGAD and suggest reforms to increase its effectiveness.

Part II of this Article describes the WGAD's mandate and structure. Section A discusses the WGAD's mandate to investigate cases of detention, render opinions, and convey them to governments alleged to be detaining persons arbitrarily. The mandate is both broad and flexible, creating an informal procedure that is accessible by anyone. Section B describes how the WGAD's flexible structure helps secure the detainees' releases and encourages governments to embrace universal standards regarding detainees' human rights. Part III discusses the practical application of WGAD opinions. Section A describes four cases in which the WGAD played a role in the release of detainees. Section B analyzes the lessons learned from involving the WGAD to help secure the freedom of individual prisoners, thereby informing an approach for advocates to maximize the WGAD's effectiveness. Finally, Part IV explores three areas for improving the WGAD—legal reasoning, follow-up, and outreach—and their feasibility in light of the group's financial and political limitations.

II. THE MANDATE AND STRUCTURE OF THE WORKING GROUP ON ARBITRARY DETENTION

A. Mandate and Key Features of the Working Group

The UNCHR created the WGAD in 1991 after a long investigation by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities[15] into the practice of administrative detention.[16] In his final report to the Sub-Commission, Louis Joinet emphasized the need for "suitable machinery . . . to prevent and report violations" of international

15. In 1999, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities was renamed the Sub-Commission on the - Promotion and Protection of Human Rights. Office of the High Comm'r for Human Rights, Sub-Comm'n on the Prevention of Human Rights, *Sub-Committee on the Prevention of Human Rights, Supplement No. 2*, http://www.unhchr.ch/html/menu2/2/sc.htm (last visited Feb. 4, 2008).

16. In 1985, the UNCHR requested the Sub-Commission "to analyse available information about the practice of administrative detention without charge or trial, and to make appropriate recommendations regarding its use." C.H.R. Res. 1985/16, at 49, U.N. Doc. E/CN.4/1985/66 or E/1985/22 (Mar. 11, 1985). *See generally* Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 Am. J. Int'l L. 709 (1991) (describing the creation of the WGAD and its initial goals).

law regarding detention and recommended that the UNCHR create either a special thematic rapporteur or a five-person working group.[17] He thought the latter option "might be more effective, by being better able to deal with the variety of categories of detention."[18]

In response, the UNCHR created "for a three-year period, a working group composed of five independent experts, with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the UDHR or in the relevant international legal instruments accepted by the States concerned."[19] It mandated the group to "seek and receive information"[20] about cases and to

17. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Report on the Practice of Administrative Detention, Addition*, ¶¶ 85, 86, 89, U.N. Doc. E/CN.4/Sub.2/1990/29/Add.1 (Aug. 27, 1990) (*submitted by* Louis Joinet) [hereinafter U.N. Doc. E/CN.4/Sub.2/1990/29/Add.1].

18. *Id.*; *see also* ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Explanatory Paper on the Practice of Administrative Detention Without Charge or Trial*, 10, U.N. Doc. E/CN.4/Sub.2/1987/16 (July 4, 1987) (*submitted by* Louis Joinet) (recommending that the Sub-Commission call upon a special rapporteur to respond adequately to the Commission's requests); ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Report on the Practice of Administrative Detention*, 20, U.N. Doc. E/CN.4/Sub.2/1989/27 (July 6, 1989) (*submitted by* Louis Joinet) (recommending the annual submission of a special report to the Commission in the absence of any other monitoring procedure); ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Report on the Practice of Administrative Detention*, para. 83, U.N. Doc. E/CN.4/Sub.2/1990/29 (July 24, 1990) (*submitted by* Louis Joinet) (concluding that the appointment of a special rapporteur would provide a monitoring mechanism covering virtually all sectors at risk).

19. C.H.R. Res. 1991/42, para. 2, U.N. Doc. E/CN.4/1991/91 or E/1991/22 (Mar. 5, 1991) [hereinafter U.N. Doc E/CN.4/1991/91]. The WGAD also takes "urgent action" on cases where necessary and engages in country missions. Appendix A, *infra*, shows the process for taking a case to the WGAD.

20. *Id.* para. 3.

"present a comprehensive report to the Commission [on Human Rights]" at its annual meeting.[21] This mandate was both broad and vague, leaving the WGAD to draft its own working methods and determine its objectives.[22] Since its establishment in 1991, the WGAD has issued 558 opinions regarding the detention of 2,493 detainees in 102 countries around the world.[23] In cases where the WGAD has rendered an opinion on the facts, it found the detention arbitrary eighty-nine percent of the time.[24]

Six key features can be discerned from the WGAD's first report to the UNCHR:[25] (1) independent experts make up the adjudicatory panel, giving it a high level of *prima facie* credibility; (2) flexible standing and rules of evidence ensure the widest range of complaints can be considered; (3) an adversarial process that can be conducted by correspondence provides the opportunity for the complainant, other U.N. mechanisms, and the government involved to be heard; (4) all available principles—from treaties to aspirational soft law—are applied to cases, positioning the WGAD as a place to welcome all complaints about arbitrary detention; (5) non-binding opinions, with some limited appreciation for diplomatic concerns, reduce direct confrontation with governments; and (6) a flexible mandate, with considerable discretion as to its internal methods and procedures, enables the group to evolve to meet new situations and to build a cumulative

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21. *Id.* para. 5.

22. Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community*, 21 Sch. Hum. Rts. Res. Series 100 (2006), *available at* http://igitur-archive.library.uu.nl/dissertations/2006-0626-200413/index.htm.

23. The WGAD issues annual reports about its activities, but has never issued a report aggregating its statistics over time. Therefore, these statistics were compiled by the authors based on a detailed assessment of all annual reports of the WGAD covering the periods of 1992–2006. A chart showing the response rate of governments over the last ten years is in Appendix B, *infra*.

24. Since its inception, the WGAD has issued 247 opinions where it made a determination as to whether the petitioner's detention had been arbitrary. In the balance of the opinions, other procedural determinations have been made. *See infra* note 50 and accompanying text. A chart showing the rate at which the WGAD determined detentions to be arbitrary is in Appendix C, *infra*.

25. ECOSOC, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, ¶ 13, U.N. Doc. E/CN.4/1992/20 (Jan. 21, 1992) [hereinafter U.N. Doc. E/CN.4/1992/20].

expertise. Each of these features is examined briefly in the following discussion.

1. Consists of Independent Experts

The five independent experts who make up the WGAD—currently from Chile, Iran, the Russian Federation, Senegal, and Spain—are selected by the Chairman of the Human Rights Council[26] for their professional expertise and experience, personal integrity, and independence.[27] The experts are selected from all regions to reflect the geographical distribution requirement that applies to the United Nations.[28]

The experts meet three times per year, for five to eight days at a time, to discuss and decide cases, write opinions, and finalize reports.[29] The UNCHR instructed the experts to "carry out [their] task with discretion, objectivity, and independence."[30] Initially, experts could serve indefinitely, but in 1999, the UNCHR imposed a six-year maximum term on experts to enhance the group's independence.[31] Moreover, the experts are not remunerated for their work for the WGAD[32] and they may not participate in decisions involving their own countries.[33]

2. Standing and Admissibility Procedures Allow

26. Fact Sheet No. 26, *supra* note 7, pt. III.

27. Manual of the United Nations Human Rights Special Procedures, at 4 (Draft, June 2006), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf [hereinafter Human Rights Special Procedures Manual]; Fact Sheet No. 27, *supra* note 6, at 6.

28. Fact Sheet No. 26, *supra* note 7, pt. III. One expert is from each of the five U.N. regional groupings: Africa, Asia, Latin America and the Caribbean, Eastern Europe, and the Western Group. Fact Sheet No. 27, *supra* note 6, at 5. Although it could conceivably be of concern that experts are nominated and selected from countries with poor human rights records, this does not appear to have been a problem with regards to the independence and impartiality of the Working Group on Arbitrary Detention. Peggy Hicks, Op-Ed., *Don't Write It Off Yet*, Int'l Herald Tribune, June 21, 2007.

29. Fact Sheet No. 26, *supra* note 7, pt. III.

30. C.H.R. Res. 1991/42, *supra* note 19, para. 4.

31. Fact Sheet No. 27, *supra* note 6, at 7.

32. *Id.* at 8.

33. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 13 ("When the case under consideration concerns a country of which one of the members of the Working Group is a national, the latter shall not, in principle, participate in the discussion because of the possibility of a conflict of interest.").

Greater Accessibility to Working Group Review

The WGAD's mandate grants wide standing to "governments and intergovernmental and non-governmental organizations, and . . . the individuals concerned, their families or their representatives" to bring a case before the WGAD.[34] While the WGAD requires communications to contain certain essential facts, it developed its procedures with the expectation that not all of its sources would have legal experience.[35] It also noted that "[f]ailure to comply with all the formalities . . . shall not directly or indirectly result in the inadmissibility of the communication."[36] Furthermore, the WGAD expressed a flexible attitude about who can submit a case for a detained person:

> If a case is submitted to the WGAD by anyone other than the victim or his family, such person or organization should indicate authorization . . . to act on their behalf. If, however, the authorization is not readily available, the Working Group reserves the right to proceed without the authorization.[37]

This flexibility allows the WGAD to address the broadest class of arbitrary detentions.

The WGAD's flexible admissibility requirements, however, create certain disadvantages. Petitions submitted by inexperienced or unsophisticated applicants may be carelessly drafted or contain inaccuracies. Such communications may be easier for the WGAD to overlook or governments to disregard, even though they may contain important information about serious human rights violations. Moreover, since the WGAD relies on the evidence provided in written communications to make its findings, carelessly drafted communications can also lead to erroneous opinions. Preventing such mistakes in informal communications demands more care and attention by the WGAD

34. C.H.R. Res. 1991/42, *supra* note 19, para. 3.

35. The WGAD requires communications to be submitted in writing and contain the name of the person detained, the date and place of arrest or detention, the forces presumed to have carried out the arrest or detention, the reasons given for the detention, the relevant legislation applied to the case, and any steps taken to secure the person's release. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 13. Moreover, to facilitate communications and to encourage sources to provide specific, accurate information, the WGAD prepared a model questionnaire for sources to use when submitting their complaints. *Id.* ¶ 13.

36. *Id.* ¶ 13.

37. *Id.* app. II n.4, at 17.

experts and staff, whose time and resources are scarce.

While this original mandate permitted the WGAD to review a broad spectrum of cases, the WGAD lamented early on its inability to initiate its own investigations and its need to rely entirely on its sources.[38] Thus, despite the fact that the WGAD might have been aware of situations of arbitrary detention, it had to depend on governments, intergovernmental and non-governmental organizations, and the individuals involved, their families, and their representatives to generate investigations. In response to this concern, the UNCHR subsequently expanded the WGAD's jurisdiction, resolving that "the Working Group, within the framework of its mandate, and aiming still at objectivity, could take up cases on its own initiative."[39] Nevertheless, it rarely does.[40]

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38. U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶¶ 28–29.

39. C.H.R. Res. 1993/36, para. 4, U.N. Doc. E/CN.4/1993/36 (Mar. 5, 1993) [hereinafter C.H.R. Res. 1993/36]; *see also* ECOSOC, Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, ¶¶ 20, 47–48, U.N. Doc. E/CN.4/1994/27 (Dec. 17, 1993) (once empowered to do so, the WGAD revised its guidelines to allow it to initiate investigations) [hereinafter U.N. Doc. E/CN.4/1994/27].

40. The authors are aware of only a handful of cases and one broader situation in which the Working Group has initiated a request for information from a government regarding arbitrary detentions. In 2002, after receiving several communications from sources regarding the United States detention center at Guantánamo Bay, the Working Group sought an invitation to visit the detention center and also requested that the U.S. Government provide responses to a series of questions concerning the situation of detainees there. ECOSOC, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, ¶¶ 61–64, U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002) (*prepared by* Louis Joinet) [hereinafter U.N. Doc. E/CN.4/2003/8]. In 2004, the Working Group on Arbitrary Detention, in conjunction with four other U.N. mandate holders, again requested to visit the detention center. In 2005, the U.S. Government extended an invitation for a one-day visit to three of the five mandate holders but stipulated that the visit would not include private visits with detainees. Since these terms of reference would violate the mandate holders' terms of reference for field missions, they canceled the visit. Instead, in 2006 they issued a report based on the replies from the U.S. Government to a questionnaire concerning the detention center. In this report, the mandate holders found that "the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of ICCPR." ECOSOC, Comm'n on Human Rights, *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the Independence of Judges and Lawyers, Leandro*

Most importantly, the WGAD does not require exhaustion of domestic remedies to file a case,[41] offering the broadest possible jurisdiction to hear individual cases. This flexible approach signals the WGAD's intention to make its procedures available to the maximum number of arbitrarily detained persons and those advocating on their behalf. Moreover, it allows the WGAD to circumvent national courts that are merely stalling in order to continue detaining an individual. By not requiring exhaustion of domestic remedies, however, the WGAD risks getting involved in cases prematurely. This may draw hostility from governments that view the WGAD as meddling in their sovereign affairs,[42] and a premature WGAD opinion may have less impact since it could be made moot by any subsequent government action.

3. Engages in an Adversarial Process

The WGAD has adopted an adversarial procedure for

Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt: Situation of Detainees at Guantánamo Bay, ¶¶ 1–4, 84, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006). *See also* Press Release, United Nations Human Rights Experts Express Continued Concern about Situation of Guantánamo Bay Detainees, U.N. Doc. HR/4812 (Feb. 4, 2005), *available at* http://www.un.org/news/Press/docs/2005/hr4812.doc.htm (reporting on a statement by human rights experts outlining the history of the detention center in Guantánamo Bay and expressing their specific concerns about the situation).

41. U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 20, at 12.

42. For example, in 2005 the permanent representative of the United States expressed his disappointment that the WGAD had issued an opinion on a case relating to Cuban nationals detained and ultimately tried on charges of spying for the Cuban government. ECOSOC, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, ¶ 10, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005) (*prepared by* Leïla Zerrougui) [hereinafter U.N. Doc. E/CN.4/2006/7] (discussing Opinion No. 19/2005 (United States of America), issued May 26, 2005). The United States argued that the WGAD's practice of not requiring exhaustion of domestic remedies was contrary to customary international law and that "international tribunals and mechanisms were not intended to replace national adjudication." *Id.*

investigating cases.[43] After reviewing a communication from a petitioner, referred to as "the source," the WGAD transmits the communication to the relevant government requesting comments on the allegations to be submitted within ninety days.[44] If the government does not respond, the WGAD may consider the case and make its recommendations.[45] However, if the government does respond, the WGAD sends the reply to the source of the allegations requesting more information.[46] This adversarial procedure is meant to help the WGAD remain neutral in the information-gathering process.[47] The exchange of information not only initiates a dialogue among the source, the government, and the WGAD, but also facilitates international coordination and cooperation by "shar[ing] the information at its disposal with any United Nations organ wishing to have such information."[48]

Despite the fact that governments have no legal obligation to respond to a WGAD request for information, in the last ten years, governments have been responding with increasing frequency—more than eighty percent of the time in the last five years.[49] This is likely the case because governments like to be viewed as cooperating with the United Nations and the failure to respond, in practice, results in the WGAD issuing an opinion presuming the accuracy of the allegations contained in the petitioner's communication.

When the WGAD considers a case ripe for decision, it has

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43. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 13.

44. *Id.*

45. The Working Group also employs an "urgent action" procedure in cases where the allegation stipulates that the health or life of the person being detained may be in imminent danger. *Id.* Also, Mr. Kooijmans, the former Special Rapporteur on Torture, noted that since the WGAD's urgent action procedure "might well lead to an overlap with the urgent appeals sent under his own mandate, he welcomed the Working Group's willingness to coordinate its work with other international mechanisms." ECOSOC, Comm'n on Human Rights, 48th Sess., *Summary Record of the 21st Meeting*, ¶ 34, U.N. Doc. E/CN.4/1992/SR.21 (Feb. 21, 1992) [hereinafter U.N. Doc. E/CN.4/1992/SR.21].

46. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 13.

47. *See* U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 3, at 15 (noting that the Working Group considered that the adversarial approach was the only option that would enable it to comply with the objectivity requirement imposed by the UNCHR).

48. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 20.

49. Based on the authors' analysis of WGAD annual reports. *See supra* note 23.

five options:[50] (1) if a person has been released, it can render an opinion at its discretion as to whether that person was detained arbitrarily; (2) if the person is not arbitrarily detained, it shall render such an opinion; (3) if further information is required, it can hold the case for further review pending the receipt of that information; (4) if the group cannot obtain sufficient information, it can file the case (i.e., dismiss it) provisionally or definitively; or (5) if a person is being detained arbitrarily, the group shall issue an opinion and make recommendations to the government involved.

4. Uses All Available Law and Principles

As the only thematic procedure of the UNCHR to adopt an adjudicatory function with respect to individual cases, the WGAD had to formulate a clear framework to evaluate claims.[51] In its first report to the UNCHR, the WGAD determined that a deprivation of freedom will be considered arbitrary if it falls into one of three categories:[52] Category I includes cases where the detention has no legal basis; Category II includes cases where the detention results from the exercise of rights and freedoms protected by the UDHR[53] or the ICCPR;[54] and Category III includes cases where the detention was enforced in violation of the right to a fair trial.

The UNHCR requested that the WGAD apply the "relevant international standards set forth in the Universal Declaration of

50. *See* Fact Sheet No. 26, *supra* note 7, pt. V(A).

51. The UNCHR consisted of country-specific and thematic mechanisms. A thematic mechanism is a non-country-specific mechanism designed to examine a particular category of human rights abuses across the world. World Conference on Human Rights, Apr. 19–30, 1993, *Status of Preparation of Publications, Studies and Documents for the World Conference, "Towards a More Effective and Integrated System of Human Rights Protection by the United Nations"*, ¶ 42, U.N. Doc. A/CONF.157/PC/60/Add.6 (Apr. 1, 1993) (*prepared by* Nigel Rodley) [hereinafter U.N. Doc. A/CONF.157/PC/60/Add.6].

52. U.N. Doc. E/CN.4/1992/20, *supra* note 25, app. I, at 10; *see also* Fact Sheet No. 26, *supra* note 7, pt. IV(B).

53. Universal Declaration of Human Rights, G.A. Res. 217A, at arts. 7, 13, 14, 18, 19, 20, 21, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

54. International Covenant on Civil and Political Rights, arts. 12, 18, 19, 21, 22, 25, 26, 27, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

Human Rights or in the relevant international legal instruments accepted by the states concerned."[55] In its first report to the UNCHR,[56] the WGAD stated that its legal framework would include the UDHR[57] (Articles 7, 13, 14, 18, 19, 20, and 21), the ICCPR[58] (Articles 12, 18, 19, 21, 22, 25, 26, and 27), and the Body of Principles.[59]

Therefore, the WGAD decided it would rely heavily on "soft" international legal principles to adjudicate individual cases. The UDHR is not considered, *in toto*, binding international law and the legal status of its various provisions is itself debated. On the one hand, some scholars argue that the UDHR (or at least certain core provisions of it) reflects widely accepted norms which, over time, may have become universally recognized as customary international law.[60] To the extent that the UDHR has become customary international law, they argue, it is binding on all nations.[61] On the other hand, the UDHR does not constitute a binding legal obligation as it is a resolution of the U.N. General Assembly.[62] Similarly, the Body of Principles is not legally binding law.[63] The General Assembly adopted the Body of Principles by consensus in 1988 and "urged that every effort be made so that the Body of Principles becomes generally known and respected."[64]

The ICCPR, a treaty signed and ratified by states parties, however, is legally binding.[65] Initially, the WGAD chose to invoke

55. U.N. Doc. E/CN.4/1991/91, *supra* note 19, para. 11.
56. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 7, at 11.
57. UDHR, *supra* note 53.
58. ICCPR, *supra* note 54.
59. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988) [hereinafter Body of Principles].
60. Mark W. Janis, An Introduction to International Law 259–60 (4th ed., 2003).
61. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) ("[S]everal commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.").
62. Janis, *supra* note 60, at 259.
63. As a U.N. General Assembly resolution, the Body of Principles is not binding under international law. Ian Brownlie, *Principles of Public International Law* 14 (5th ed., 2001) (stating that in general U.N. General Assembly resolutions are not binding on member states).
64. Body of Principles, *supra* note 59, para. 4.
65. While states that have signed the ICCPR have no obligations to implement all of its provisions until it is ratified, states that have signed the Convention still may not proactively violate its provisions. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1979, art. 18, 1155

the ICCPR in all cases, even where the state in question had not ratified the ICCPR.[66] However, in 1996, in response to strong government objections,[67] the UNCHR expressly requested the WGAD to apply the ICCPR only to those states that were parties to the ICCPR.[68] This limitation has been criticized as unduly restricting the WGAD's "essentially flexible and pragmatic character: these are not jurisdictional organs, but hybrid mechanisms, partly political, partly legal."[69] Some argue that "[i]t would seriously compromise their usefulness if they were forbidden to function as a catalyst vis-à-vis States by clarifying the common principles of an emerging international

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U.N.T.S. 331, (entered into force Jan. 27, 1980).

66. The WGAD adopted Deliberation 02 in response to a letter from the Cuban government requesting it to explain the legal basis for its reliance on purely "declaratory" documents, such as the Body of Principles or the ICCPR to a state that has not ratified them. The WGAD concluded that it could invoke these instruments with respect to any state because they set forth customary law and were "accepted" by consensus of the Member States of the General Assembly. In particular, even where a State had not ratified the ICCPR, it was "justified" in referring to that Covenant when reviewing cases of detention in that State "in view of the tenacity of the declaratory effect of the quasi-totality of [the Covenant's] provisions." U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 23, at 12.

67. The Cuban government, in particular, continued to criticize the WGAD for applying these non-binding documents. *See* ECOSOC, Comm'n on Human Rights, 49th Sess., *Summary Record of the 33rd Meeting*, ¶ 25, U.N. Doc. E/CN.4/1993/SR.33 (Feb. 7, 1993); ECOSOC, Comm'n on Human Rights, 59th Sess., *Summary Record of the 34th Meeting*, ¶ 15, U.N. Doc. E/CN.4/1994/SR.34 (Feb. 28, 1994); ECOSOC, Comm'n on Human Rights, 51st Sess., *Summary Record of the 32nd Meeting*, ¶¶ 23–25, U.N. Doc. E/CN.4/1995/SR.32 (Feb. 24, 1995) [hereinafter U.N. Doc. E/CN.4/1995/SR.32]; ECOSOC, Comm'n on Human Rights, 52d Sess., *Summary Record of the 29th Meeting*, ¶ 3, U.N. Doc. E/CN.4/1996/SR.29 (May 17, 1996).

68. C.H.R. Res. 1996/28, para. 5, U.N. Doc. E/CN.4/1996/28 (Apr. 19, 1996) [hereinafter C.H.R. Res. 1996/28]. *See also* ECOSOC, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subject to Any Form of Detention or Imprisonment*, para. 49, U.N. Doc. E/CN.4/1997/4 (Dec. 17. 1996) [hereinafter U.N. Doc. E/CN.4/1997/4] (noting the Working Group's decision not to apply the ICCPR to those states not a party to it); C.H.R. Res. 1997/50, para. 5, U.N. Doc. E/CN.4/1997/50 (Apr. 19, 1997) [hereinafter C.H.R. Res. 1997/50] (discussing the Working Group's decision to cease applying the ICCPR to those states which are not parties to it).

69. Olivier de Frouville, Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme 59–60 (1996) (in French), *translated and cited in* Gutter, *supra* note 22, at 180 n.468.

community."[70] Nevertheless, although the WGAD's opinions now indicate whether the state in question is a party to the ICCPR, WGAD practice since 1996 reveals that it still invokes this instrument in cases involving non-party states.[71] It would be a mistake, however, for the WGAD to invoke the ICCPR as embodying binding legal obligations with respect to states that have not ceded their national sovereignty by agreeing to be bound by the treaty. Governments will object to such attempts, which may lead to a backlash against the WGAD on the ground that its invocation of the ICCPR is extra-legal. Framing its opinions as hortatory recommendations instead could avoid this tension.

The WGAD's analysis is further complicated because not all cases of alleged detention are prohibited by domestic law. Unlike other special procedures, such as the Special Rapporteur on Torture, whose mandate is to investigate violations of non-derogable rights, the WGAD must often engage in line-drawing. Since detention is a permissible punishment in some cases, the WGAD must weigh the evidence to determine first "whether internal law has been respected and, [if] in the affirmative, whether this internal law conforms to international standards."[72] In some cases, the WGAD reviews both an individual case of detention and, more generally, a country's domestic laws to determine whether they violate international law.[73] Moreover, while some violations of the right to a fair trial may make a detention arbitrary, other violations may not.[74] The WGAD

70. *Id.*

71. For example, in an opinion concerning the detention of Yang Jianli in China, the WGAD found a violation of Article 9 of the UDHR and Article 9 of the ICCPR, even though the People's Republic of China has signed but not ratified the ICCPR. Jianli v. People's Republic of China, Opinion, U.N. Working Group on Arbitrary Detention, No. 2/2003, para. 11 (May 7, 2003), U.N. Doc. E/CN.4/2004/3/Add.1, at 26 (Nov. 26, 2003), *available at* http://www.freedom-now.org/jianli.php [hereinafter Opinion No. 2/2003]. As a signatory to the ICCPR, China is obligated not to proactively violate its provisions, but it does not have an obligation to conform its domestic law to the ICCPR's requirements.

72. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 10. *See also* U.N. Doc. E/CN.4/1992/SR.21, *supra* note 45, ¶ 22 (noting that the Working Group is to determine whether internal law is respected as well as the extent to which it complies with international guidelines).

73. This approach was set forth in the Working Group's revised methods of work. *See* U.N. Doc. E/CN.4/1992/20, *supra* note 25, app. I, at 10 (setting out the principles applicable to the Working Group's consideration of individual cases).

74. *Id.* para. 23(f) (explaining that "[i]n some cases, the violation of a

reserved for itself the authority to draw this distinction. By evaluating all cases of detention irrespective of domestic law, the WGAD can help to create a uniform body of human rights law relating to detention. By repeatedly questioning the same domestic laws in multiple decisions, the WGAD can also draw attention to particular laws that need to be changed.[75]

However, by applying non-binding international norms to criticize and urge invalidation of entrenched domestic laws, the WGAD may be overstepping its bounds. Rather than promoting respect for international law, this practice may actually lead countries to see international law as interfering with national sovereignty, especially where the power to detain criminals is at issue.[76]

The WGAD's ability to use all available law and principles is not unlimited. Indeed, there are some aspects of detention that the WGAD will not consider. For example, its mandate does not permit the group to review the evidence presented in a trial, evaluate the merits of a case, or otherwise "substitute itself for domestic appellate tribunals."[77] The WGAD will not "examine complaints about instances of detention and subsequent disappearance of individuals, about alleged torture, or about inhumane conditions of detention."[78] These matters will be referred to another body, such as the Working Group on Enforced

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few, or even one of those principles [of international law concerning detention], particularly where they are not fundamental, may be sufficient for a determination as to whether there has been a violation of the right to a fair trial, without necessarily justifying the conclusion that the detention is of an arbitrary nature").

75. For example, in its opinion concerning the detention of James Mawdsley in Burma, the WGAD implied that the Burmese printing and publishing law was inconsistent with its obligations under international law. Mawdsley v. Myanmar, Opinion, U.N. Working Group on Arbitrary Detention, No. 25/2000, para. 12 (Sep. 14, 2000), U.N. Doc. E/CN.4/2001/14/Add. 1, at 124 (Nov. 9, 2000) [hereinafter Opinion No. 25/2000] ("Mr. Mawdsley was doing no more than expressing his opinions . . . . Freedom of thought and expression are both protected by articles 18 and 19 of the Universal Declaration of Human Rights. Those have been clearly violated by the State in arresting Mawdsley, as alleged.").

76. *See, e.g.*, U.N. Doc. E/CN.4/1995/SR.32, *supra* note 67, ¶¶ 22–28 (Cuba's representative criticized the WGAD as violating state sovereignty and utilizing a "double-standard" in its work that could "threaten its very existence").

77. Fact Sheet No. 26, *supra* note 7, pt. IV.

78. *Id.*

Disappearances or the Special Rapporteur on Torture.[79] The WGAD has also stated that it "will not deal with situations of international armed conflict . . . [if] they are covered by the Geneva Conventions of August 12, 1949, and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence."[80]

5. Issues Non-Binding Opinions

Though the WGAD issues opinions expressing its view on individual cases and recommending steps to remedy violations of international law, these opinions are non-binding as a matter of law. While the WGAD was created by the fifty-three states of the UNCHR, it considers cases from all over the world. Since governments do not have to accept the WGAD's competence to have their practices reviewed, they are not legally compelled to respond to its communications or recommendations. To avoid confusion about this issue, in 1997 the WGAD decided to call its judgments and recommendations "opinions" rather than decisions.[81] While the WGAD's opinions are not legally binding, the WGAD on occasion cites its prior opinions as persuasive authority.[82]

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79. *Id.*

80. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 13. The WGAD has further clarified that it will review cases of detention arising out of international armed conflict where the detainees are denied protection under the Third or the Fourth Geneva Conventions or where the ICRC's involvement is not otherwise triggered. U.N. Doc. E/CN.4/2006/7, *supra* note 42, ¶ 75. Under this standard, the WGAD has considered communications relating to detainees at the U.S. detention center at Guantánamo Bay as well as the detention of Saddam Hussein in Iraq. *See* U.N. Doc. E/CN.4/2003/8, *supra* note 40, ¶¶ 61–64, 74.

81. C.H.R. Res. 1997/50, *supra* note 68; *see also* ECOSOC, Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Written Statement by the American Association of Jurists*, ¶ 15, U.N. Doc. E/CN.4/1994/NGO/18 (Feb. 8, 1994) [hereinafter U.N. Doc. E/CN.4/1994/NGO/18] ("All the resolutions adopted by the Group are described as 'decisions.' The American Association of Jurists believes that this formula is not the most suitable. The Group's opinions have no binding legal force; it can only 'request [States] to take the necessary steps to remedy the situation.' It is up to the good will of the Government concerned to respect such a request or not . . . . In order to avoid creating unfortunate confusion, the Group should use terms of a more neutral nature, such as 'opinions' or 'views', and confine itself to 'considering' or 'believing' that a detention is or is not arbitrary.").

82. *See, e.g.*, Aung San Suu Kyi v. Myanmar, Opinion, No. 2/2007, at

Once the WGAD renders its view on a case, it sends its opinion to the government in question.[83] Three weeks later, the opinion is also transmitted to the source, which can do what it chooses with this information.[84] If the source does not publicize the opinion, it is merely reported at the end of the year in the WGAD's annual report along with any response of the government in question. Formally, this is where the WGAD's work concludes.

As mentioned previously, since its establishment in 1991, the WGAD has issued 558 opinions regarding the detention of 2,493 detainees in 102 countries around the world.[85] A detailed analysis of these opinions demonstrates that almost fifty percent of opinions issued cover only ten countries: Peru (59); China (48); Cuba (39); Syria (26); Israel (21); Vietnam (17); Burma (15); United States (15); Tunisia (13); and Turkey (13).[86] It is important to recall, however, that while the WGAD has the discretion to take up cases *sua sponte*, it does so infrequently.[87] As a result, one may conclude these top subjects of WGAD opinions are not on this list because of any political bias, but rather are more often targeted by non-governmental organizations and other private sources.

While the WGAD cannot compel governments to respond to communications, many governments do respond.[88] Moreover, although the WGAD itself cannot issue binding judgments, its opinions may serve to catalyze other states and international bodies to take action. Some sources have, in fact, taken steps to "enforce" the WGAD's opinions by publicizing them and lobbying governments to put diplomatic pressure on the detaining government.[89] Typically, these steps are taken by human rights

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para. 6, U.N. Doc. E/CN.4/2003/8/Add.1 (citing earlier WGAD opinions in which the working group ruled that house arrest was an arbitrary deprivation of liberty equivalent to detention).

83. Fact Sheet No. 26, *supra* note 7, pt. V(A).

84. *See id.*

85. *See supra* note 23.

86. *See id.* A detailed chart showing this analysis can be found in Appendix D, *infra*.

87. *See supra* notes 39–40 and accompanying text.

88. *See* UNHRC, 2d Sess., 7th mtg, at ¶ 32, U.N. Doc. A/HRC/2/SR.7 (Oct. 10, 2006) [hereinafter U.N. Doc. A/HRC/2/SR.7] ("Few Governments refused to respond to approaches made concerning individual communications."); *see also supra* note 49 and accompanying text (providing statistics on the response rate of governments over the last ten years).

89. *See infra* Part III.

lawyers and other organizations with connections to governments and other influential actors in the global system.[90] If a government fails to heed the WGAD's recommendations, the United Nations and the world may criticize that government. In this way, a WGAD opinion can be a powerful tool to assist someone who is arbitrarily detained. However, this is rarely done; it is much more common for the WGAD's opinions to be published quietly in its annual report. While many detainees have been released at some point after WGAD opinions were provided to the detaining government, there has been no systematic study determining the reasons for the release, the number released, or who still remains in custody.

6. Updates Its Working Methods and Procedures

Although the UNCHR instructed the WGAD to carry out its task "with discretion,"[91] the mandate's wording is broad, allowing the WGAD flexibility to adopt its own procedures.[92] In its first report to the UNCHR, the WGAD established its own working methods,[93] the principles it would apply to individual cases,[94] and a model questionnaire to help claimants submit their cases for review.[95] It also reserved the authority to "update these documents if this is deemed necessary, in the light of experience acquired while discharging its mandate."[96] In response to the UNCHR's invitation to "make any suggestions and recommendations which would enable it to discharge its task in the best way possible,"[97] the WGAD has reviewed and updated its methods in subsequent reports to the UNCHR.[98] For example, in

90. *See, e.g.*, Freedom Now, http://www.freedom-now.org (last visited Oct. 31, 2007) [hereinafter Freedom Now website] (seeking to free prisoners of conscience through focused legal, political, and public relations advocacy efforts).

91. C.H.R. Res. 1991/42, *supra* note 19, para. 4.

92. In the WGAD's first report to the UNCHR, the WGAD described its views on its mandate, its methods of work, the principles applicable to the cases it considered, and its first initiatives. *See* U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 5; *see also* M.T. Kamminga, *The Thematic Procedures of the UN Commission on Human Rights*, 34 Netherlands Int'l L. Rev. 299, 314–17 (1987) (discussing the sources of information on thematic procedures).

93. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶¶ 12–13.

94. *Id.* app. I

95. *Id.* app. II.

96. *Id.* ¶ 12.

97. C.H.R. Res. 1996/28, *supra* note 68, para. 20.

98. *See* U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶¶ 12–13, at 11; U.N.

its 1993 report, the WGAD introduced "deliberations," a category of decisions adopted in connection with individual cases but applied generally to all subsequent cases.[99] In its 1996 and 1997 reports, the WGAD stated that it could review cases involving pre-trial detention as well as cases involving mid- or post-trial detention where the right to a fair trial had not been satisfied.[100] By continually broadening its procedures, the WGAD reaffirms its commitment to investigating all cases of arbitrary detention.

Taken together, the main features of the WGAD's mandate have yielded a flexible mechanism with broad authority to review cases of detention. Many aspects of the WGAD are informal: its standing requirements are minimal; its attitude toward exhausting local remedies is flexible; its opinions are non-binding and rely on soft law; its enforcement mechanisms are based on actions by external NGOs and political actors; and its mandate itself is malleable, permitting the experts to interpret their role and to suggest changes they believe would increase the body's effectiveness. However, the WGAD's authority is limited by other factors: its subject matter jurisdiction is limited to cases of detention that violate certain international legal norms falling under the ICCPR, UDHR, and Body of Principles; it is not part of a state system and it lacks formal powers to compel governments to implement its recommendations; and it is a small body composed of five experts with limited staff, time, and resources.

B. Implementation of the Mandate

When it created the WGAD, the UNCHR did not expressly state its objectives or define how the mechanism's success would be measured.[101] Yet upon closer examination, the WGAD's mandate can be interpreted as oriented toward both a specific goal—obtaining the release of arbitrarily detained individuals—and more general objectives—such as facilitating communication among individuals, organizations, and governments to promote worldwide adherence to universal standards that discourage arbitrary detention. These goals are often associated with

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Doc. E/CN.4/1993/24, *supra* note 9, at 9–16; U.N. Doc. E/CN.4/1997/4, *supra* note 68, paras. 49, 96.

99. U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶¶ 4, 19; *see also supra* note 9 (defining "deliberations").

100. U.N. Doc. E/CN.4/1997/4, *supra* note 68, para. 96.1.

101. Gutter, *supra* note 22, at 243.

adjudicatory bodies and may be achieved with differing levels of success based on the formal aspects of the particular body.[102]

Specifically, the WGAD's complaints procedure aims to secure the release of people who are arbitrarily detained by communicating with governments and recommending that they remedy cases that fall short of international standards for detention. This mechanism stands apart from the UNHRC's other thematic mechanisms as the only one with a mandate to review individual cases in an adversarial procedure.[103] It must also distinguish between legal and arbitrary detention[104] and, in some cases, review the compliance of domestic legislation with international law.[105] The WGAD's opinions set forth the experts' factual determinations and, if they find the detention to be arbitrary, their recommendations for how the government can remedy the violation.[106]

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102. "The [Human Rights] Committee might, however, serve any or all of three purposes associated with adjudicatory bodies: (a) doing justice in the individual case within its jurisdiction and to that extent vindicating the rule of law; (b) protecting rights under the . . . [relevant international instruments] through deterrence and related behavior modification; and (c) expounding (elucidating, interpreting, and explaining) the Covenant so as to engage the . . . [WGAD] in an ongoing, fruitful dialogue with states parties, non-governmental and intergovernmental institutions, advocates, scholars and students." Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee*, *in* The Future of UN Human Rights Treaty Monitoring 15, 31 (Philip Alston & James Crawford eds. 2000).

103. Fact Sheet No. 26, *supra* note 7, pt. III(C); *see also* U.N. Doc. A/CONF.157/PC/60/Add.6, *supra* note 51, ¶ 42 (stating that the "[i]ndividual case mandate of the Working Group on Arbitrary Detention departs from the non-judgmental norm" of the country rapporteurs who are involved in fact-finding and reporting). While the Special Rapporteur on Torture receives complaints, transmits them to governments, and receives replies, it only publishes its results in an annual report, not on a specially mandated timeframe. *See, e.g.*, UNHRC, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 1, U.N. Doc. A/HRC/4/33/Add.2 (Mar. 15, 2007) (*prepared by* Manfred Nowak) (including "information supplied by Governments as well as nongovernmental organizations (NGOs), relating to the follow-up measures to the recommendations of the Special Rapporteur made following country visits").

104. U.N. Doc. E/CN.4/1992/SR.21, *supra* note 45, ¶ 22.

105. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 10; *see also* U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 20 (describing "deliberations" adopted by the WGAD that emphasize the "importance accorded to the national as compared to international standard[s]").

106. *See, e.g.*, ECOSOC, Comm'n on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Opinions Adopted by*

More generally, the WGAD seeks to encourage broader understanding of arbitrary detention and promote universal standards on this issue. Indeed, if releasing prisoners were the WGAD's only goal, it would be difficult to determine whether it was ever successful. As one scholar notes:

> [I]t is notoriously difficult to evaluate the effects of international pressure on the behavior of governments. If a government releases a political prisoner, it is usually impossible to tell why it decided to do so. Generally, a combination of factors will have contributed to this result. Few governments will openly admit that they have taken such an action in response to international pressure.[107]

By specifying that it "investigat[e]" cases and "seek and receive information," the WGAD's mandate emphasizes continued communication and information-sharing among other mechanisms, governments, and sources to develop a better understanding of arbitrary detention and promote a standard of human rights that universally prohibits arbitrary detention. The following discussion will evaluate whether the WGAD's current working methods are well-structured to achieve these goals.

1. Seek Release of Individuals

In addition to the WGAD's key features, discussed in Part II.A., a special thematic procedure like the WGAD, ratified by general consensus of the UNCHR and UNHRC, provides a forum available to all detainees worldwide, regardless of whether its authority has been expressly ratified by the detaining state. This distinguishes the WGAD from a treaty-based body like the Human Rights Committee established by the ICCPR. The Human Rights Committee can only review individual cases of the smaller number of countries that have ratified the Optional Protocol to the ICCPR.[108] The Optional Protocol also requires complainants to

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the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2006/7/Add.1 (Oct. 19, 2005) (including the opinions adopted by the WGAD at its forty-first, forty-second, and forty-third sessions).

107. Kamminga, *supra* note 92, at 317.

108. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302, art. 1 (entered into force Mar. 23, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_opt.htm [hereinafter ICCPR Optional Protocol] ("No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present

have exhausted their domestic remedies before filing such a claim.[109] The WGAD's mandate, on the other hand, authorizes it to review cases of deprivation of liberty anywhere in the world, "irrespective of whether a particular government is a party to any of the relevant human rights treaties."[110]

While it was clear from the outset that the WGAD's work would overlap with that of other human rights mechanisms, the WGAD does not turn away sources just because they have alternative remedies.[111] This duplication of efforts may be a drawback of the special procedure system because it can confuse those who seek recourse to the U.N. system.[112] To alleviate the burden of overlap among the various human rights monitoring bodies, the WGAD consults, cooperates, and coordinates with other relevant bodies, including, where appropriate, referring cases to the most competent body.[113] As long as the principal violation suffered by the detained person does not fall under another appropriate mechanism, such as the special rapporteurs for torture or summary or arbitrary execution or the Working Group on Enforced or Involuntary Disappearances, the WGAD will review the case.[114] While in some cases, it may be preferable to allow a treaty-based mechanism to examine the case, it is usually left up to the sources of the communications to choose their preferred forum.[115] By remaining available to sources despite other available remedies, the WGAD furthers its goal of helping as many individuals as possible. Furthermore, any overlap among the human rights thematic mechanisms and treaty bodies may ultimately contribute to a deeper understanding of certain areas

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Protocol.").

109. *Id.* art. 2 ("Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.").

110. Human Rights Special Procedures Manual, *supra* note 27, at 3.

111. Fact Sheet No. 26, *supra* note 7, pt. V(A).

112. U.N. Doc. A/CONF.157/PC/60/Add.6, *supra* note 51, ¶ 36.

113. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 20. In particular, the Working Group indicated that it "will not deal with situations of international armed conflict in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence." *Id.* ¶ 13.

114. Fact Sheet No. 26, *supra* note 7, pt. VII(A). In general, the fact that another special procedure has taken up the case does not necessarily preclude the Working Group from acting. *Id.*

115. *See* U.N. Doc. A/CONF.157/PC/60/Add.6, *supra* note 51, ¶ 61.

of human rights because these bodies will focus on different aspects of international law implicated by an individual's detention.

The WGAD's flexible mandate may also enable it to avoid direct political confrontation with governments and ultimately achieve more politically acceptable, lasting solutions to individual cases of arbitrary detention. Through its country visits, the WGAD gains a greater understanding of the situation in each country, enabling it to make more context-appropriate recommendations. While each opinion relates to an individual person's detention and merely calls a government's attention to its own failure to comply with international law, the opinions also give that government an opportunity to make changes and even release detainees without requiring the government to admit any wrongdoing.[116] Furthermore, by leaving the "enforcement" of its opinion to NGOs and a broader political process, the WGAD enables countries to choose to go beyond what is suggested in an opinion.[117] The WGAD's procedures may thus be an effective means for encouraging a government to release a particular detainee and bring its laws into compliance with international standards.

The structure of the WGAD as a thematic working group may make it a more suitable body to hear individual cases than country-specific rapporteurs, which often draw direct political

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116. *See, e.g.*, Masih v. Pakistan, Opinion, U.N. Working Group on Arbitrary Detention, No. 25/2001, at para. 21 (Nov. 30, 2001), *in* U.N. Doc. E/CN.4/2003/8/Add.1, at 22 (Jan. 24, 2003) [hereinafter Opinion No. 25/2001] ("[T]he Working Group requests the government to take the necessary steps to remedy the situation of Mr. Ayub Masih. The Working Group believes that under the circumstances a retrial, the granting of a pardon, or a commutation would be an appropriate remedy.")

117. *See generally* Olatunde C.A. Johnson, *Disparity Rules*, 107 Colum. L. Rev. 374 (2007) (arguing that a federal program requiring recipients of federal aid to take affirmative steps but allowing states flexibility to choose their methods of compliance often yields better results going farther than what is required). For example, "[w]hen [the disproportionate minority contact standard] succeeds, however, it is unlikely to be the result of coercion by the federal government, but by its potential to empower internal and external advocates concerned about the problem of racial disparity in the juvenile justice system. Some states have gone far in excess of what is required under the statute, either because of pressure by nongovernmental organizations or because internal advocates now have a hook to spur reform." *Id.* at 415.

opposition and are rejected out of hand by states.[118] Although substantial concerns have been raised over the years about the politicization and dysfunctionality of the UNCHR[119] and the new UNHRC,[120] the thematic procedures and Special Rapporteurs (including the WGAD) have generally been and continue to be viewed as objective and impartial.[121] Thematic mechanisms such as the WGAD are intended to monitor the observance of one right "by all states equally, in view of their universal obligation, and by measures employed impartially. It is, in short, an agent of the community to act on behalf of the whole community for a specified purpose on a global basis."[122] While violations may occur

118. Kamminga, *supra* note 92, at 301. Patrick James Flood, *The Effectiveness of UN Human Rights Institutions* 42 (1998).

119. *See, e.g.*, Jeremy Bransten, *UN Human Rights Council Comes Under Fire*, Radio Free Europe/Radio Liberty, Mar. 28, 2007, http://www.rferl.org/featuresarticle/2007/03/12727d56-6a7c-4515-bac8-56c5933cb25c.html ("The commission's main problem was that its members included some of the world's most notorious rights violators. Those states would often band together to block investigations into their own records—or those of their allies.").

120. *See, e.g.*, *UN's Ban Faults Rights Council Over Israel*, Reuters, June 20, 2007 (citing a statement from the United Nations that "the Secretary-General is disappointed at the council's decision to single out only one specific regional item given the range and scope of allegations of human rights violations throughout the world"). The same article noted that Cuba and Belarus, which had both been accused of ongoing human rights abuses, were removed from a list of nine special mandates, which included North Korea, Sudan, and Cambodia, which had been carried over from the prior Commission on Human Rights. *Id.*

121. Peggy Hicks, Global Advocacy Director for Human Rights Watch, described the system of independent experts on human rights issues as being "the greatest legacy" of the prior Commission on Human Rights, in an op-ed arguing that the Human Rights Council should be given further time to develop. *See* Hicks, *supra* note 28. Similarly, Yvonne Terlingen, Director of Amnesty International's U.N. Office has called for the Human Rights Council to "preserve and strengthen the system of Special Rapporteurs and to defeat attempts by some members to weaken their independence." Yvonne Terlingen, *The Human Rights Council: A New Era in UN Human Rights Work?*, 21 Ethics & Int'l Aff. 167, 177 (June 12, 2007). Nevertheless, this assessment does not apply equally to all Special Rapporteurs. For example, the U.N. Special Rapporteur for the Occupied Palestinian Territories has been criticized over the years by pro-Israel and more moderate human rights groups for his characterization of the situation in the Palestinian Territories as "resembl[ing] aspects of apartheid." Alan Johnston, *UN Envoy Hits Israel 'Apartheid,'* BBC News, Feb. 23, 2007.

122. Flood, *supra* note 118, at 42. This is not to say that the Working Group has not been criticized as politically motivated. In 1995, the Chinese representative stated that the WGAD had "gone beyond [its mandate] and had

more frequently in some countries than others,[123] the WGAD's mandate is to review those cases that come before it from anywhere in the world, not to examine the practices of a particular oppressive regime.[124]

Still, the WGAD has investigated cases of detention *sua sponte*, even where it is likely that the offending government will not heed the WGAD's recommendations, suggesting that the WGAD's actions may in fact be politically driven in some instances. For example, in 2002, the WGAD took up a case to investigate the situation of detainees held by the U.S. government in Guantánamo Bay.[125] Regardless of the merits of these claims, the fact that the WGAD only chose this particular situation and has not, *sua sponte*, addressed other situations of large-scale detentions—such as the Chinese *laogai*[126] or the massive network

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politicized the issues . . . [by] politiciz[ing] human rights issues and [making] arbitrary attacks against sovereign States." ECOSOC, Comm'n on Human Rights, 51st Sess., *Summary Record of the 27th Meeting*, ¶¶ 39–40, U.N. Doc. E/CN.4/1995/SR.27 (Feb. 22, 1995) [hereinafter U.N. Doc. E/CN.4/1995/SR.27]. Similarly, the Cuban representative warned the Commission that the WGAD "must be above all political considerations and pressures. Yet, those principles were being called into question by the actions of the Working Group." U.N. Doc. E/CN.4/1995/SR.32, *supra* note 67, ¶¶ 22–28. However, at the seventh meeting of the new Human Rights Council, the Cuban representative drew attention to the WGAD's finding that the detention of five political prisoners in the United States was arbitrary and encouraged those present at the meeting to join in promoting the prisoners' cause. W.T. Whitney, Jr., *UN Rights Council Deliberates on Cuban 5*, People's Weekly World Newspaper, Apr. 7, 2007.

123. In its second report, the WGAD lamented the fact that cases in certain states came before its review more often than others: "The list of countries concerned by the Working Group's decisions might none the less convey the impression of a selective approach. This—and the Working Group regrets this fact—is because the Group can pronounce only on cases about which it has received information. It is, therefore, dependent entirely on its sources . . . Yet situations of arbitrary deprivation of freedom do exist in other countries." U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶¶ 28–29. In 1993, the Commission expanded the WGAD's mandate to permit it to review cases on its own initiative. C.H.R. Res. 1993/36, *supra* note 39, para. 4.

124. The WGAD does, however, engage in country missions in which it visits countries at their invitation and makes country-specific recommendations.

125. *See supra* note 40.

126. Similar to the Soviet Gulag, *laogai* is the Chinese system of labor prison factories, detention centers, and re-education camps. *See generally* Ramin Pejong, *Laogai: Reform Through Labor in China*, 7 No. 2 Hum. Rts. Brief 22 (2000) (outlining the *laogai* system and presenting reasons why the system violates both domestic and international law); Hongda Harry Wu,

of North Korean political prisons[127]—has opened up the WGAD to charges of political bias.

The choice of a working group instead of a special rapporteur on arbitrary detention is also significant, especially in light of its mandate of objectivity.[128] Working groups arguably offer an added degree of political protection that special rapporteurs do not have:[129]

> It is understood that some Governments that agreed to the creation of the Working Group would not have agreed to the establishment of a special rapporteur on arbitrary detention. This may have been because of the novelty of a mandate clearly framed to cover the possibility of formal findings on individual cases. Of at least equal importance will have been the lack of clarity regarding the scope of "arbitrary detention' [sic] and its extra sensitive nature.[130]

This body thus may be more successful than others in convincing governments to release individuals from arbitrary detention. Furthermore, since the WGAD's opinions are non-binding (and legally unenforceable), countries may be less likely to actively oppose it than a formal mechanism.[131]

The WGAD's flexibility to review and update its working methods as necessary may also contribute to its ability to avoid debilitating scrutiny of hostile governments and encourage the release of individuals. Each year in its annual report to the UNCHR, the WGAD has had the opportunity to reflect on its work

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Laogai: The Chinese Gulag (1992) (explaining the ideological origins, structure, and living conditions of the *laogai* system).

127. *See generally* David Hawk, U.S. Comm. for Human Rights in North Korea, *The Hidden Gulag: Exposing North Korea's Prison Camps* (2003) (describing repressive forced-labor colonies, camps, and prisons administered by North Korean police agencies, where thousands of prisoners are worked to death).

128. In his report to the Sub-Commission, Louis Joinet recommended creating either a special rapporteur or a working group. U.N. Doc. E/CN.4/Sub.2/1990/29/Add.1, *supra* note 17, ¶ 89.

129. U.N. Doc. A/CONF.157/PC/60/Add.6, *supra* note 51, ¶ 37.

130. *Id.*

131. *Cf.* Gutter, *supra* note 22, at 98 (discussing the debate in the UNCHR concerning the WGAD's jurisdiction and the compromise that was ultimately made possible by adopting a more "flexible approach, leaving undetermined the particular categories of prisoners or detained persons falling under the mandate").

and make suggestions.[132] This has led to occasional expansions of the group's mandate, such as when the WGAD requested authority to initiate cases on its own.[133] Other times, this exchange between the WGAD and the UNCHR has helped identify other areas for improvement, like the need for a follow-up procedure.[134] This flexibility may enable the WGAD to "respond effectively to changing governmental strategies aimed at covering up abuses," thereby furthering its specific goal of releasing prisoners.[135] At the same time, by offering a forum, the WGAD makes it possible for other international actors to design a creative solution to the problem of arbitrary detention.[136] This flexibility is particularly useful in addressing a problem such as arbitrary detention, which may exist for a variety of reasons that are different in every situation, making a solution even more elusive.[137]

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132. When renewing the Working Group's mandate, the Commission on Human Rights has "[r]equest[ed] the Working Group to submit a report to the Commission, at its fifty-first session, and to make any suggestions and recommendations which would enable it to discharge its task even better, particularly in regard to ways and means of ensuring effective follow-up to its decisions, in cooperation with Governments and to continue its consultations to that end within the framework of its terms of reference." C.H.R. Res. 1994/32, para. 19, U.N. Doc. E/CN.4/RES/1994/32 (Mar. 4, 1994) [hereinafter C.H.R. Res 1994/32].

133. *See* E/CN.4/1993/24, *supra* note 9, ¶¶ 28–29 (expressing the Working Group's regret concerning its inability to initiate cases on its own); C.H.R. Res. 1993/36, *supra* note 39, para. 4 (recognizing that the WGAD "could take up cases on its own initiative"); U.N. Doc. E/CN.4/1994/27, *supra* note 39, ¶¶ 47–48, at 15–16 (describing the expansion of the WGAD's mandate to include undertaking cases on its own initiative).

134. *See* C.H.R. Res. 1994/32, *supra* note 132, para. 19; ECOSOC, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, para. 56(c), U.N. Doc. E/CN.4/1995/31 (Dec. 21, 1994) [hereinafter U.N. Doc. E/CN.4/1995/31].

135. "[T]he thematic procedures have carved out for themselves a distinct identity, separate from both the 1503-procedure and the Optional Protocol procedure. They have resisted pressures to simply copy the methods of work of those two mechanisms. They have also wisely resisted pressures to formalize their own working methods. It is precisely their flexibility which has enabled the thematic procedures to respond effectively to changing governmental strategies aimed at covering up abuses." Kamminga, *supra* note 92, at 307.

136. *See infra* text accompanying notes 270–271, 274–278 (detailing the efforts to release Yang Jianli using the WGAD opinion as a lever to garner the support of the U.S. Congress and the United Nations).

137. *See* Johnson, *supra* note 117, at 411–12 ("[A]llowing states some

It is important to note that the WGAD's lack of formal procedures may make it more susceptible to abuse by interest groups and governments seeking to manipulate other governments. However, the WGAD's reliance on the UNHRC—a highly politicized body—for its continuing mandate may make it more cautious in how it approaches offending governments. Though its mandate has been renewed every three years since it was created, the WGAD could be abolished at any time.[138] Therefore, despite the potentially tenuous nature of its existence, the WGAD's informal procedures serve an important purpose.

2. Communication to Promote Release of the Arbitrarily Detained and Set Universal Standards

The WGAD's broad scope and flexibility also facilitate communication among international actors that simultaneously promotes the release of individuals and initiates a broader discussion on arbitrary detention. For some, the WGAD's adversarial information-gathering process provides a unique opportunity to initiate an exchange of information with the government in question. The WGAD also may serve as an additional forum to call public attention to a particular case or a government's recurring problem of arbitrary detention. The WGAD makes the information it receives available to other organizations—as well as to the general public—in its annual report. This information sharing may help connect groups and create a network of international actors attuned to these issues.

By relying on soft international legal principles such as the UDHR and Body of Principles, the WGAD also furthers its goal of strengthening universal human rights standards. Its opinions are available for everyone to read and may be used in broader efforts at securing prisoners' release. By citing universally accepted (though non-binding) instruments, the WGAD not only suggests that these opinions reflect and advance broad legal principles such as the right to a fair trial and freedom of

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flexibility is responsive to the reality that the solution will differ depending on the cause of the disparity and the particular context, and that the solution might be informed by model programs from other states and localities, and the insights of governments, researchers, and nongovernmental organizations. Solutions to the problem of racial disparity stem from ongoing study and assessment of successful interventions by federal, state, and private actors.").

138. Gutter, *supra* note 22, at 80.

expression, but also furthers the argument that arbitrary detention violates a universal principle of human rights. In Part III, this Article considers cases in which the WGAD opinions were combined with international pressure in an effort to secure the release of individual prisoners.

III. USING WORKING GROUP OPINIONS AND INTERNATIONAL PRESSURE TO PROMOTE COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

On an anecdotal basis, many cases brought before the WGAD have resulted in the release of prisoners from arbitrary detention as well as improvements in the law that will make such detention less likely in the future. While the WGAD's opinions themselves are not binding, in some cases the opinions have served to catalyze others to take action and have helped initiate a chain of events leading to the prisoner's release. Nevertheless, as no comprehensive study of the WGAD's opinions and their impact on detainee release has been conducted and the WGAD has no formal follow-up mechanism, it is important not to over-generalize about the efficacy of WGAD opinions alone. Instead, the case studies below are offered to suggest a way that WGAD opinions can be used prospectively to the greatest effect as a tool in prisoner advocacy.

Section A describes the cases of four individuals—James Mawdsley, Ayub Masih, Dr. Yang Jianli, and Dr. Nguyen Dan Que. These cases demonstrate how the WGAD's procedures helped secure the release of prisoners.[139] Section B compares the experiences across these four cases to draw conclusions about

139. The first co-author of this Article served as lead counsel for each of these four detainees. The latter three are also former clients of Freedom Now, a non-governmental organization founded by the first co-author of this Article, whose mission is to "free prisoners of conscience through focused legal, political, and public relations advocacy effort." *See* Freedom Now website, *supra* note 90. Given its limited resources, Freedom Now focuses its efforts on prisoners of conscience, a subset of the group of people who appropriately could be categorized as arbitrarily detained. A prisoner of conscience—a term made popular by Amnesty International—is a person who is imprisoned for their beliefs or because of who they are (i.e., their identity), who has not used or advocated violence. *See* Amnesty Int'l USA, What is a Prisoner of Conscience?, http://www.amnestyusa.org/Individuals_at_Risk/Prisoners_of_Conscience/page.do?id=1106638&n1=3&n2=34&n3=53 (last visited Feb. 2, 2008). The model developed by Freedom Now to secure the release of such prisoners comprises six stages, shown in Appendix E, *infra*.

the effectiveness of involving the WGAD in individual cases.

A. Case Studies

1. James Mawdsley

James Mawdsley, a British and Australian citizen, became a human rights activist after learning first-hand of the Burmese military junta's abuses.[140] In 1997, Mawdsley taught English at the Pyo Pan Wai School in the Min Than Nee Camp in Burma.[141] There, he saw how the Burmese military raped, murdered, and inflicted forced relocation on the ethnic minority Karen people in southeastern Burma.[142] As the Burmese army was approaching to burn down the camp, Mawdsley helped evacuate women and children.[143] Six months later, after failing to persuade the British Government to take more concrete action against the military regime, he staged his first protest.[144]

Mawdsley was arrested three times in Burma. First, in 1997, he was arrested after spray painting the word *metta*[145] on a school wall, handing out pro-democracy pamphlets, and then handcuffing himself to a fence outside a public high school in Rangoon.[146] Instead of pressing charges, the Burmese Government immediately deported Mawdsley to Thailand.[147]

Mawdsley was arrested for the second time on April 30, 1998, after playing democratic songs on the streets of the city of Moulmein and distributing stickers that urged the release of the prominent student leader Min Ko Naing.[148] The police arrested Mawdsley, and though they refused to tell him why he was

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140. Peter Popham, *Teacher Became Dissident After Camp Was Razed by Troops*, Independent, Oct. 21, 2000.

141. *Id.*

142. *Id.*

143. *Id.*

144. Mawdsley v. Myanmar, Petition, U.N. Working Group on Arbitrary Detention, at 6 (Mar. 24, 2000) (on file with authors) [hereinafter *Mawdsley Petition*].

145. The Burmese word for love and kindness. Emma Wilkins, *Briton is Deported Over Burma Protest*, Times (London), Sept. 18, 1997, at 13.

146. *Id.*

147. *See Jailed Briton's Family Protest Over Burma*, BBC News, Feb. 14, 2000, http://news.bbc.co.uk/2/hi/uk_news/642947.stm (explaining how Mawdsley was immediately deported after his first arrest in 1997).

148. *Mawdsley Petition*, *supra* note 144, at 7.

arrested, they questioned and tortured him for over fifteen hours.[149] He was later transported to Rangoon and charged with entering the country illegally and associating with terrorist groups.[150] The government eventually dropped the latter charge.[151] He pled guilty to entering the country illegally and was sentenced to five years in prison.[152] After serving ninety-nine days in prison, his remaining sentence was commuted and Mawdsley was deported.[153]

Mawdsley was arrested for the third time on August 31, 1999 while handing out leaflets encouraging non-violent dissent.[154] He was held without access to legal counsel until his trial, which occurred only hours after the arrest.[155] He was sentenced to twelve years in prison, and later learned that his previously commuted five-year sentence—from the second arrest—was reinstated. Mawdsley was sentenced to serve a total of seventeen years in solitary confinement.[156]

a. The Opinion of the Working Group on Arbitrary Detention

On March 24, 2000, the first co-author of this Article filed a petition on behalf of Mawdsley and his family to the WGAD requesting urgent action.[157] Six months later, on September 14, 2000, the WGAD rendered an opinion in the Mawdsley case.[158] In its opinion, the WGAD noted that the Burmese government was asked to reply within ninety days to the WGAD communication dated May 5, 2000, but had failed to do so.[159] Based on the facts provided, the WGAD concluded that Mawdsley did nothing more than express his opinions, a right protected by Articles 18 and 19

149. *Id.*; *see also* Sue Carpenter, *Condemned to Hell*, Times (London), Aug. 15, 2000, at 4 ("James was blindfolded and tortured for 15 hours.").
150. *Mawdsley Petition*, *supra* note 144, at 7.
151. *Id.*
152. Carpenter, *supra* note 149.
153. *Id.*
154. *Id.*
155. Tim Jones & Andrew Drummond, *British Protester Jailed for 17 years in Burma*, Times (London), Sept. 3, 1999.
156. *Mawdsley Petition, supra* note 144, at 9; *see also* Carpenter, *supra* note 149.
157. *Mawdsley Petition, supra* note 144, at 9.
158. Opinion No. 25/2000, *supra* note 75.
159. *Id.* para. 2, at 124.

of the UDHR, which protect freedom of thought and expression.[160] The opinion further stated that Mawdsley's arrest, detention, and trial were "contrary to all considerations of due process."[161] The WGAD concluded that Mawdsley's detention was arbitrary and in contravention of Articles 9, 10, and 19 of the UDHR.[162] Although the WGAD opinion pointed out that Burma was not a party to the ICCPR, the opinion called on the Burmese Government to "take the necessary steps to remedy the situation, and bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights."[163]

b. International Community Involvement and Public Pressure

On the same day that Mawdsley's counsel released the WGAD opinion, then British Foreign Secretary Robin Cook invoked it to explain that his government was demanding Mawdsley's release.[164] Two days later, the U.S. State Department made a similar demand.[165] In addition, nearly forty British ambassadors requested their host governments to make similar demands on Burma.[166] On October 16, 2000, six days after the WGAD opinion became public, Mawdsley's family was told by the British government that the Burmese Government would release Mawdsley.[167] Five days later, on October 21, 2000, Mawdsley

160. *Id.* para. 12, at 126.
161. *Id.* para. 13, at 126.
162. *Id.* para. 14(a), at 126.
163. *Id.* para. 15, at 126.
164. British Foreign Secretary Robin Cook stated: "The UN decision confirms that James is being held unlawfully. Baroness Scotland is again summoning the Burmese Ambassador to demand his immediate release . . . The Burmese regime must realise that it cannot continue to ignore human rights and flout international opinion. It is clearer than ever that there is no justification for the detention of James Mawdsley." Press Release, Foreign & Commonwealth Office, U.K., Foreign Secretary Welcomes UN Decision on Detention of James Mawdsley (Oct. 10, 2000), *available at* http://www.ginfo.pl/more/254021,fco,press,release,decision,on,detention,of,james,mawdsley.html (last visited Feb. 16, 2008); *see also You Saved My Life*, 44.1 Law Quadrangle Notes, U. Mich. L. Sch. 61 (Spring 2001), *available at* http://deepblue.lib.umich.edu/bitstream/2027.42/55652/1/LQN.0044.001.pdf [hereinafter You Saved My Life] (describing sequence of events ultimately resulting in James Mawdsley's release from prison).
165. You Saved My Life, *supra* note 164, at 62.
166. *Id.*
167. *Myanmar To Release Jailed Activist*, Associated Press, Oct. 16, 2000.

returned to the United Kingdom.[168]

2. Ayub Masih – Pakistan

Ayub Masih is a Pakistani Christian who was sentenced to death under Pakistan's draconian blasphemy law.[169] He was incarcerated, attacked by prisoners, received minimal medical care, and ultimately spent six years in prison before being released.[170]

Masih was arrested on October 14, 1996 because his Muslim neighbor complained that Masih offended him by purportedly stating that Christianity was "right" and suggesting that he read Salman Rushdie's *Satanic Verses*.[171] Masih denied the charges.[172]

Masih's trial began more than a year after his arrest. During his trial, the same neighbor who had accused him of blasphemy shot and injured Masih in the halls of the court.[173] Despite the family members' eyewitness testimony, the police refused to charge the neighbor with any crime.[174] On the day of the verdict, extremists threatened the lives of Masih and his lawyers if the court ruled in Masih's favor.[175] On April 20, 1998, Masih was sentenced to death.[176]

Masih immediately appealed the sentence to Lahore High Court but his appeal was not heard until more than three years after his conviction.[177] Again, extremists crowded the court, threatening Masih and his lawyers as well as members of the Court with reprisal if Masih's appeal succeeded.[178] On July 24, 2001, the High Court affirmed the lower court's judgment.[179]

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168. *Freedom! After 417 Days in a Burmese Jail, North Campaigner is Released*, Journal (Newcastle, UK), Oct. 21, 2000.

169. Masih v. Pakistan, Petition, U.N. Working Group on Arbitrary Detention (Oct. 8, 2001) (on file with authors) [hereinafter Masih Petition].

170. Freedom Now, Past Campaigns: Ayub Masih, http://www.freedom-now.org/masih.php (last visited July 16, 2007) [hereinafter Masih Campaign].

171. Masih Petition, *supra* note 169.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Masih appealed again, this time to the Supreme Court of Pakistan.[180] In October 2001, while the appeal was pending, the non-governmental organization Freedom Now,[181] collaborating with the Jubilee Campaign,[182] filed a petition on Masih's behalf to the WGAD.[183]

a. The Opinion of the Working Group on Arbitrary Detention

On November 30, 2001, the WGAD issued an opinion finding that "[t]he deprivation of liberty of Ayub Masih is arbitrary" and in violation of Articles 9 and 10 of the UDHR.[184] While noting the Pakistani government's cooperation,[185] the WGAD held that the "procedure conducted against Ayub Masih did not respect the fundamental rights of a person charged."[186] The government failed to provide Masih with documentary and other evidence to be used against him at trial or inform him of the charges against him.[187] The verdict "was based on the testimony of a . . . biased witness,"[188] and the trial environment was hostile.[189] The requirement of a Muslim judge also contributed to a lack of procedural safeguards to ensure fairness.[190] The WGAD called for the government to remedy the situation by either retrying Masih or pardoning him[191] and recommended that the government consider ratifying the ICCPR.[192]

180. *Id.*
181. *See supra* note 139.
182. The Jubilee Campaign promotes "the human rights and religious liberty of ethnic and religious minorities in countries which imprison, terrorize or otherwise oppress them." *See* Jubilee Campaign, About Jubilee Campaign, www.jubileecampaign.org/vision_about.asp (last visited Feb. 12, 2008).
183. Masih Petition, *supra* note 169.
184. Opinion No. 25/2001, *supra* note 116, para. 20.
185. *Id.* para. 4.
186. *Id.* para. 19.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* para. 21.
192. *Id.*

b. International Community Involvement and Public Pressure

After the WGAD issued its opinion, Freedom Now and the Jubilee Campaign gathered support from eleven U.S. Senators who together, citing the Working Group opinion, called for Masih to be pardoned in a letter to President Pervez Musharraf.[193] Importantly, many of those Senators served on the Senate Foreign Relations Near Eastern & South Asian Affairs Subcommittee and the Senate Appropriations Subcommittee on Foreign Operations, which were responsible for oversight of U.S. relations in Pakistan and the appropriations of foreign aid.[194] In response to this increased pressure, the government of Pakistan accelerated the review of the case in the Supreme Court of Pakistan. On August 16, 2002, a three-judge panel heard the appeal, acquitted Masih of the charges, and ordered his immediate release.[195] The judges' oral opinion echoed the WGAD opinion, stating that the arrest, conviction, and sentencing violated the fundamental guarantees of due process.[196] Shortly thereafter, Masih was freed from prison, and Freedom Now and the Jubilee Campaign arranged for his safe exit from Pakistan. He arrived in the United States on September 4, 2002, where he was granted political asylum.[197]

Masih's case set a positive precedent for other prisoners convicted of violating Pakistan's blasphemy law. Welcoming Masih's acquittal, Amnesty International issued a press release calling on Pakistan to amend its blasphemy law, which was

193. The letter was organized by Senator Patrick Leahy (D-Vt.) and Senator Sam Brownback (R-Kan.). With reference to the WGAD, the letter stated: "The international community has also recognized that serious irregularities occurred in the proceedings. The United Nations Working Group on Arbitrary Detention concluded that Mr. Masih was deprived of his liberty in contravention [of] the Universal Declaration of Human Rights, and has asked the Government of Pakistan to take steps to remedy the situation." Letter from Patrick Leahy, Senator (D-Vt.), U.S. Senate, Sam Brownback, Senator (R-Kan.), U.S. Senate, to Pervez Musharraf, President, Pak. (July 2, 2002) (on file with authors). Two other, former senators—George Allen (R-Va.) and Paul Sarbanes (D-Md.)—also demonstrated their support by sending a separate letter to the Pakistani government. *See* Letter from Jared Genser, President, Freedom Now, to Sohail Mahmood, First Secretary, Pak. (July 10, 2002) (on file with authors).

194. *See* Michael Barone, Richard E. Cohen & Charles E. Cook, Jr., Almanac of American Politics 2002, 1711, 1715 (2001).

195. Masih Campaign, *supra* note 170.

196. *Id.*

197. *Id.*

frequently abused.[198] Amnesty also reminded the public that contrary to President Musharraf's promise in April 2000 to make procedural changes to limit the law's potential abuse, such amendments had not been made.[199] Since 2002, various changes have been made to improve the implementation of the blasphemy laws.[200] Nevertheless, much work remains.

3. Dr. Nguyen Dan Que – Vietnam

Dr. Nguyen Dan Que is a democracy activist and medical doctor in Vietnam whose political activism spans many decades.[201] In 1978, he was held without trial after criticizing Vietnam's political system.[202] After his release, he founded the High Tide Humanist movement, which called for moderate, non-violent means of establishing human rights for all Vietnamese people.[203] His commitment to human rights was recognized with numerous awards, such as the Raoul Wallenberg and the Robert F. Kennedy Human Rights awards.[204]

In 1990, Dr. Que was arrested, incarcerated without trial, and sentenced to twenty years in prison for attempting to overthrow the government.[205] In 1998, he was released under a

198. Press Release, Amnesty Int'l, Pakistan: Blasphemy Acquittal Welcome But Law Must Be Amended (Aug. 16, 2002) (on file with authors).

199. *Id.*

200. In September 2004, President Musharraf announced that the government would repeal the blasphemy law to stop its misuse against religious minorities. *President Rejects US Report on Lack of Religious Freedom in Pakistan*, Pakistan Press Int'l, Sept. 16, 2004. Later, rather than repeal the law, amendments to the blasphemy law were proposed instead. *Netherlands Envoy Calls on S.M. Zafar*, Pakistan Press Int'l, Oct. 29, 2004. Despite numerous protests and threatened demonstrations, President Musharraf signed the amendments to the blasphemy law on January 4, 2005. *Withdrawal of Amendments in Blasphemy Law Urged*, Pakistan Press Int'l, Nov. 8, 2004; *Pakistan President Signs Honour Crime, Blasphemy Law Amendment*, Associated Press, Jan. 4, 2005. These amendments require the superintendent of police to investigate blasphemy allegations, in the hopes that a higher standard of proof of evidence would help reduce abuses of the law. *Id.*

201. Freedom Now, Past Campaigns: Dr. Nguyen Dan Que, http://www.freedom-now.org/drque.php (last visited Feb. 10, 2008) [hereinafter Dr. Que Campaign].

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

general amnesty, yet he remained under virtual house arrest: his movement and communications were restricted and he was under constant government surveillance.[206] The government seized all his documents—including his medical license—and required Dr. Que to obtain written permission from security forces whenever he wanted to leave his home.[207]

On March 13, 2003, Dr. Que wrote a "Communiqué on Freedom of Information in Vietnam," criticizing the government's slow pace of reform in implementing the Bilateral Trade Agreement between the United States and Vietnam.[208] The Communiqué also endorsed proposed U.S. legislation—the Freedom of Information in Vietnam Act of 2003—to fund projects seeking to end broadcast jamming[209] by the Vietnamese government.[210] Dr. Que was arrested four days later.[211] Government officials seized his laptop, which the party newspaper later described as containing "documents that 'run[] against the State' to the 'High Tide Humanist Movement' organization."[212] Under Article 80 of the Penal Code, those found guilty of spying or gathering intelligence for foreign governments may be sentenced to penalties ranging from twelve years in prison to the death penalty.[213]

On June 3, 2004, Freedom Now filed a petition to the WGAD on Dr. Que's behalf.[214] The petition alleged that the government of Vietnam was detaining Dr. Que arbitrarily and in

206. *Id.*

207. Que v. Vietnam, Petition, U.N. Working Group on Arbitrary Detention, at 7 (June 3, 2004) (on file with authors) [hereinafter Que Petition].

208. Dr. Nguyen Dan Que, *Communiqué on Freedom of Information in Vietnam,* Mar. 13, 2003, *available at* http://www.freedom-now.org/documents/Statement.swf (unpublished Communiqué).

209. "Broadcast jamming" involves broadcasting at the same frequency as an incoming radio broadcast with the result that the incoming broadcast is drowned out substantially. Gary Thomas, *Broadcast Jammings Continues in Post-Cold War World*, Voice of America, Oct. 13, 2005. In this case, Dr. Que supported the funding of projects to stop the jamming of radio broadcasts coming into Vietnam. *Id.*

210. *See* Dr. Que Campaign, *supra* note 201; *see also* Que Petition, *supra* note 207, at 8 (discussing the events that led to Dr. Que's detention).

211. *See* Dr. Que Campaign, *supra* note 201.

212. *Id.*

213. Penal Code art. 80 (Vietnam), *available at* http://www.worldlii.org/vn/legis/pc66/s80.html.

214. *See* Dr. Que Campaign, *supra* note 201.

violation of Article 19 of the ICCPR and Article 19 of the UDHR, both of which guarantee freedom of opinion and speech.[215] The petition argued that Vietnam's enforcement of Article 80 serves as a tool to limit citizens' ability to exercise their freedom of opinion and expression under the guise of protecting national security: "[i]f an individual can be charged with espionage for criticizing his own government, the right to freedom of opinion and expression is meaningless."[216] The government's claimed goal of protecting national security was too vague for practical application and therefore subject to manipulation.[217]

The government of Vietnam issued a reply letter, denying the validity of all the allegations in the petition and arguing instead that Dr. Que had been arrested and detained because he violated Article 80 of the Penal Code.[218] He would be brought to trial, the government claimed, when the investigation was complete.[219]

Dr. Que was tried on July 29, 2004 without access to counsel and in a trial closed to everyone except his family.[220] The trial lasted half a day.[221] Dr. Que made a statement to the court saying that he did not commit any crimes and that his imprisonment was in violation of the ICCPR and the UDHR.[222] The court convicted Dr. Que of "abusing democratic rights to infringe upon the interests of the State," an entirely different charge from what the government alleged in its reply to the WGAD.[223] He was sentenced to fourteen additional months in prison and was told that he forfeited his right to a self-defense by having disrespected the government in his courtroom statements.[224]

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215. Que Petition, *supra* note 207, at 10.

216. *Id.* at 12.

217. *Id.*

218. Que v. Vietnam, Opinion, U.N. Working Group on Arbitrary Detention, No. 19/2004, at para. 13 (Sept. 16, 2004), *in* U.N. Doc.E/CN.4/2005/6/Add.1, at 72 (Nov. 19, 2004) [hereinafter Opinion No. 19/2004].

219. *Id.* The letter also noted that the defendant's right to a fair proceeding before a court "shall be guaranteed in strict accordance with law." *Id.*

220. *Vietnam Sentences Political Dissident*, Associated Press, July 29, 2004.

221. *Id.*

222. Que v. Vietnam, Response to the Government of the Socialist Republic of Vietnam in the Matter of Dr. Nguyen Dan Que, at 2–3 (Aug. 30, 2002) (on file with authors).

223. *Id.*

224. *Id.* at 3.

In response, Freedom Now submitted an updated petition to the WGAD arguing that Dr. Que's conviction under Article 258 of the Penal Code was in violation of Vietnam's Constitution, Article 19 of the ICCPR, and Article 19 of the UDHR.[225] The denial of a public hearing, access to counsel, the right to a defense, and an impartial tribunal constituted further due process violations.

a. The Opinion of the Working Group on Arbitrary Detention

The WGAD issued an opinion in the Que case on September 16, 2004 (made public in November 2004),[226] concluding that Dr. Que was indicted for making statements critical of the Vietnamese government.[227] These statements, however, "constitute[d] only the peaceful exercise of his freedom of opinion and expression, which is enshrined in Article 19 of the Universal Declaration of Human Rights and in Article 19 of the International Covenant on Civil and Political Rights, to which the Socialist Republic of Vietnam is a party."[228] The WGAD thus found that Vietnam was arbitrarily depriving Dr. Que of his liberty[229] and called for Vietnam to comply with its obligations under the two agreements.[230]

b. International Community Involvement and Public Pressure

Before Freedom Now filed a petition with the WGAD, important political advocacy on Dr. Que's behalf was already underway. On September 22, 2003, six months after Dr. Que's arrest, a group of twelve Nobel Laureates signed a letter

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225. *Id.*

226. There was substantial news coverage of Freedom Now's release of the Working Group opinion to the media. *See, e.g.*, Ben Rowse, *UN Accuses Vietnam of Violating International Law for Jailing Dissident*, Agence France Presse, Nov. 15, 2004 ("A copy of the judgment . . . was obtained by AFP from the US-based human rights group Freedom Now, which is providing legal counsel to Que."); Margie Mason, *UN Calls for Release of Vietnam Dissident Nguyen Dan Que*, Associated Press, Nov. 15, 2004 ("Freedom Now, a U.S.-based human rights organization representing Que, said it was encouraged by the working group's finding.").

227. Opinion No. 19/2004, *supra* note 218, para. 16.

228. *Id.*

229. *Id.* para. 17.

230. *Id.* para. 18.

petitioning the government of Vietnam to provide Dr. Que with access to his family, legal counsel, and medical care.[231] A few months later, on the first anniversary of Dr. Que's arrest, his brother, Quan Nguyen, authored an article entitled "Freedom for Vietnam, Freedom for My Brother" in the *National Review*.[232]

Shortly after the publication of Quan Nguyen's article, fifteen of the Robert F. Kennedy Human Rights Award laureates urged Vietnamese President Tran Duc Luong to immediately secure Dr. Que's release for medical treatment.[233] The press noted an outcry from the international human rights community.[234] On September 20, 2004, in a letter initiated by Freedom Now, forty-two members of the U.S. Congress wrote a letter voicing their concern about Vietnam's handling of Dr. Que's criminal proceeding.[235] Along with twelve U.S. Senators, who submitted a similar letter, the U.S. lawmakers urged the president of Vietnam to release Dr. Que on humanitarian grounds.[236]

After the WGAD issued its opinion, such efforts continued. Nine prominent international human rights organizations jointly wrote a letter to then U.N. Secretary-General Kofi Annan, invoking the WGAD's opinion—a decision issued by a U.N. body—to argue why he should intervene on Dr. Que's behalf.[237] Copies of this letter were also provided to seventeen

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231. Letter from Kenneth J. Arrow et al., Nobel Laureates, to His Excellency Phan Van Khai, Prime Minister, Vietnam (Sep. 22, 2003) (on file with authors).

232. Quan Nguyen, *Freedom for Vietnam, Freedom for My Brother, Human Rights in Vietnam*, Nat'l Rev. Online, Mar. 17, 2004, http://www.nationalreview.com/comment/nguyen200403171021.asp (last visited Mar. 6, 2008).

233. Letter from Lucas Benitez et al., Robert F. Kennedy Human Rights Award laureates, to His Excellency Tran Duc Luong, President, Vietnam (Mar. 30, 2004) (on file with authors).

234. *See, e.g.*, Amy Kazmin, *Outcry at Jailing of Vietnamese Dissident*, Fin. Times Asia Edition, Aug. 2, 2004 (noting the "outcry from international human rights groups" since "Vietnam's decision to jail an ailing, 62-year-old" Dr. Que).

235. *See* Letter from Christopher H. Smith et al., U.S. Members of Congress, to His Excellency Tran Duc Luong, President, Vietnam (Sep. 30, 2004) (on file with authors).

236. Letter from Sam Brownback et al., U.S. Senators, to His Excellency Tran Duc Luong, President, Vietnam (Oct. 6, 2004) (on file with authors) [hereinafter Letter from U.S. Senators].

237. Letter from Jared Genser, Freedom Now, Todd Howland, Robert F. Kennedy Mem'l, Alexandra Arriaga, Amnesty Int'l USA, Brad Adams, Human Rights Watch, Robert Ménard, Reporters Without Borders, Leonard

Vietnamese officials relevant to Dr. Que's case, as well as to the U.S. and the French Governments, which had previously been involved in the case.[238] Three days later, on January 31, 2005, the Vietnamese government announced it would release Dr. Que along with another dissident and several other prisoners.[239] He was released in early February 2005.[240] The combination of the WGAD opinion and political and public relations pressure made a substantial contribution to Dr. Que's release.

4. Dr. Yang Jianli – China

Dr. Yang Jianli is a citizen of China and a U.S. legal permanent resident.[241] He created the Foundation for China in the 21st Century, an organization that seeks to promote democracy in China.[242] Yang left China after his involvement in the Tiananmen Square protests in 1989.[243] Yang was subsequently "blacklisted" by the Chinese Government and forbidden entry into China.[244] Despite this prohibition, Yang used a friend's passport to enter China in April 2002 to observe labor unrest in the country.[245] Shortly thereafter, he was detained by the Chinese

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Rubenstein, Physicians for Human Rights, Svetlana Stone, N.Y. Acad. of Sciences, Abi Wright, Comm. to Protect Journalists, & Maud Kozodoy, Comm. of Concerned Scientists, to Kofi Annan, Secretary-General, United Nations (Jan. 28, 2005) (on file with authors). The letter invoked the WGAD opinion and stated in pertinent part: "Most recently, the United Nations Working Group on Arbitrary Detention concluded that 'Dr. Que's actions constitute only the peaceful exercise of his freedom of opinion and expression, which is enshrined in Article 19 of the Universal Declaration of Human Rights and in Article 19 of the International Covenant on Civil and Political Rights, to which the Socialist Republic of Vietnam is a party.'" *Id.*

238. *Id.*

239. Margie Mason, *Vietnam Frees Two Dissidents from Jail: Vietnam Releases Two High-Profile Dissidents from Jail in Lunar New Year Amnesty*, Associated Press, Jan. 31, 2005.

240. *Human Rights in Vietnam*, Voice of America, Mar. 14, 2005.

241. Opinion No. 2/2003, *supra* note 71, para. 5.

242. *Id.*

243. Jianli v. People's Republic of China, Petition, U.N. Working Group on Arbitrary Detention, at 3 (Dec. 9, 2002) (on file with authors) [hereinafter Yang Detention Petition].

244. *Id.* China has never formally acknowledged the existence of the blacklist. *Id.*

245. Joe McDonald, *Activist Released, Will Return to U.S.*, Associated Press, Apr. 29, 2007 (noting that Yang's family admitted that Yang used a friend's identity card to get into the country).

authorities.[246] After initial communications with his wife,[247] Yang was held *incommunicado* for more than a year.[248] Freedom Now became involved in Yang's case shortly after his detention and collaborated on his case with Professor Jerome A. Cohen of New York University Law School, who is a leading expert on Chinese criminal law.[249]

On June 13, 2002, Freedom Now filed a petition on Yang's behalf to the U.N. Working Group on Enforced or Involuntary Disappearances.[250] The petition argued that the Chinese government was violating its own laws by failing to notify Yang's family of his detention, the reasons for the detention, and the location where he was being held.[251] The petition further alleged that China was violating Yang's rights by not providing him with access to counsel and holding him for over thirty-seven days without filing formal charges.[252]

On June 21, 2002, the police authorities filed formal charges and informally notified Yang's brother of his arrest.[253] The informal notification, however, was communicated by telephone, and there was no official order presented regarding the arrest, pending charges against Yang, or his location.[254]

On December 9, 2002, Freedom Now filed another petition, this time to the WGAD, urging the panel to find that China was arbitrarily holding Yang in violation of Chinese and international law.[255] First, the petition argued that the notification, which occurred two months after the initial time of detention, did not satisfy the formal notice requirements under Chinese law.[256]

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246. Yang Detention Petition, *supra* note 243, at 3.
247. Opinion No. 2/2003, *supra* note 71, para. 5.
248. Yang Detention Petition, *supra* note 243, at 3.
249. *See, e.g.*, Jerome A. Cohen & Jared Genser, Op-Ed., *Tyranny in China: The Ongoing Quest to Free Yang Jianli*, Wash. Times, Apr. 25, 2003 (editorial co-authored by Freedom Now President Jared Genser and Professor Cohen detailing the circumstances and injustices surrounding Yang Jianli's detention).
250. Jianli v. People's Republic of China, Petition, U.N. Working Group on Enforced or Involuntary Disappearances (June 13, 2002) (on file with authors) [hereinafter Yang Disappearance Petition].
251. *Id.*
252. *Id.*
253. Yang Detention Petition, *supra* note 243, at 4.
254. *Id.*
255. *Id.*
256. *Id.* at 5.

Second, Yang was detained for two months before being formally charged, well past the thirty-seven day warrantless detention period permitted under Chinese law.[257] Finally, Yang was held without access to counsel, a right guaranteed by law.[258]

The petition further noted China's violations of international law, stating that detaining Yang without permitting him to communicate with family or legal counsel was a violation of Articles 7 and 10 of the ICCPR, prohibiting torture and inhuman, cruel, and degrading punishment.[259] Additionally, the petition alleged violations of Article 9 of the ICCPR because China did not bring Yang promptly before a judge, it did not bring Yang to trial within a reasonable time after the arrest, and it did not inform him of the charges against him or of his rights.[260] Finally, the petition alleged that by denying Yang an opportunity to consult with legal counsel, China violated Article 14 of the ICCPR.[261]

The Chinese Government filed a response explaining that (1) Yang was being held on the suspicion that he illegally entered the country; (2) his family was notified; and (3) he was being detained on the suspicion of having committed additional offenses, which were not enumerated in the reply.[262] The government, however, did not respond directly to the allegations made in the petition.

Freedom Now replied to the Chinese Government's response, pointing out that the government had failed to deny most of the specific charges alleged in the petition.[263] The reply rejected the claim that the notification satisfied due process, since the Chinese Government still had not provided Yang's family with a formal detention notice. Freedom Now's reply on Yang's behalf further stated that facts in the petition had been corroborated by independent observers.[264] Finally, the reply stated

257. *Id.* at 6.
258. *Id.*
259. *Id.* at 7.
260. *Id.* at 8.
261. *Id.* at 9.
262. Opinion No. 2/2003, *supra* note 71, para. 6.
263. Jianli v. People's Republic of China, Response to the Reply of the Government of the People's Republic of China, U.N. Working Group on Arbitrary Detention, at 2, U.N. Doc. E/CN.4/2004/3/Add.1 (Apr. 28, 2003) (on file with authors).
264. *Id.* at 3.

that even if the allegations of illegal entry into China were true, the maximum sentence for that violation under Chinese law was one year, and Yang had already been detained longer than that.[265]

a. The Opinion of the Working Group on Arbitrary Detention

On May 7, 2003, the WGAD issued its opinion in Yang's case.[266] It dealt with Yang's detention only, not his alleged crime, and did not evaluate facts or evidence since the actual criminal case was still pending.[267] Rather, the decision noted the government's failure to refute the following: that it only informally notified Yang's family; that Yang was in custody; and that the lack of a formal detention notice prevented Yang from obtaining legal counsel.[268] While noting that China did not deny that their law prevents the detention of a person beyond thirty-seven days without a warrant, it was clear that Yang had been detained beyond that period's expiration.[269] The WGAD concluded that "the non-observance of Mr. Yang Jianli's right to a fair trial is of such gravity as to give his deprivation of liberty an arbitrary character," which constitutes a violation of Article 9 of the UDHR and Article 9 of the ICCPR.[270] The WGAD requested that China "take the necessary steps to remedy the situation of Yang Jianli in order to bring it into conformity" with the UDHR and the ICCPR, and encouraged China to ratify the ICCPR.[271]

b. International Community Involvement and Public Pressure

Shortly after Yang's detention, at the urging of Freedom Now, members of the international community began inquiring about his ongoing detention.[272] In May 2002, members of the U.S.

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265. *Id.* at 4.
266. Opinion No. 2/2003, *supra* note 71.
267. *Id.* para. 5.
268. *Id.*
269. *Id.*
270. *Id.* para. 11.
271. *Id.* para. 12.
272. The first co-author, in representing Yang Jianli, requested that members of Congress make these inquiries. *See* Letter from Tom Lantos, Co-Chair, Cong. Human Rights Caucus, Frank Wolf, Co-Chair, Cong. Human Rights Caucus, Barney Frank, Member, Cong. Human Rights Caucus, Chris Smith, Member, Cong. Human Rights Caucus, to Yang Jiechi, Chinese

House and Senate sent letters to the Chinese Ambassador to the United States, expressing concern about Yang's detention, seeking information about his health and safety, and asking for his immediate release.[273] In June, members of Congress sent further requests seeking formal notice of charges on which he was being held.[274] And in August of that year, U.S. Senators urged then Chinese President Jiang Zemin to remedy Yang's situation and provide him with due process rights.[275]

On June 4, 2003, Freedom Now officially released the WGAD's opinion at a press conference with Yang's wife and several members of Congress.[276] This publicity marked a turning point in the ability to pressure China to resolve the case. Previously, due to Yang's illegal entry into China, many U.S. lawmakers were hesitant to press for his release directly and did no more than inquire about his treatment and call for respect of due process.[277] As a result of the WGAD opinion, that same month, members of the U.S. Congress increased their pressure on China to release Yang.[278] The House "unanimously passed a resolution condemning China and calling for Yang's release," and a similar resolution unanimously passed in the Senate.[279] Three

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Ambassador to the U.S. (May 8, 2002) (on file with authors).

273. *See* Letter from the U.S. Senate to the Honorable Yang Jiechi, Chinese Ambassador to the U.S. (May 22, 2002) (on file with authors); *see also* Letter from U.S. Congress to the Honorable Yang Jiechi, Chinese Ambassador to the U.S. (May 8, 2002) (on file with authors) (requesting that the People's Republic of China apply humanitarian considerations to Yang).

274. *See* Letter from U.S. Congress to the Honorable Yang Jiechi, Chinese Ambassador to the U.S. (June 28, 2002) (on file with authors).

275. *See* Letter from the U.S. Senate Comm. on Foreign Affairs to His Excellency Jiang Zemin, President, P.R.C. (Aug. 13, 2002) (on file with authors).

276. Freedom Now, Past Campaigns: Dr. Yang Jianli, http://www.freedom-now.org/jianli.php (last visited Feb. 10, 2008) [hereinafter Dr. Jianli Campaign].

277. This is based on the first co-author's conversations with staff to several members of Congress.

278. Previously, there had been some reluctance among members of Congress to press for Yang's release because he had entered China illegally. However, once the WGAD had issued its opinion declaring Yang's detention in violation of international law, the question of how Yang entered China was substantially overshadowed by the Chinese Government's treatment of him since he was initially detained. This enabled the first co-author to ask for greater support than would previously have been given without such a U.N. opinion.

279. *Congress Condemns China for Detaining Massachusetts Activist*, Associated Press, June 25, 2003.

members of the European Parliament also sent letters to Chinese President Hu Jintao, expressing concern for Yang and urging China to release him.[280]

In June 2003, over a year after his initial detention, the City of Beijing Bureau of National Security issued an opinion recommending Yang's prosecution for illegal entry into the country and suspected espionage.[281] Yang's trial consisted of a one-day closed meeting of the court on August 4, 2003.[282] As evidence of the espionage, the government cited Yang's "confession," materials from the National Department of State Security, and applications Yang submitted to the "Chinese Youth Development Foundation," a group on whose behalf Yang allegedly accepted assignments from a Taiwanese espionage agency in the United States.[283] As evidence of the crime of illegal entry, the government cited Yang's confession, his American re-entry permit, a friend's passport, a forged identification card, an entry card, and several witnesses' testimony.[284]

The international call for Yang's release continued and intensified following his trial. Members of Congress and the media urged President Bush to raise the issue of Yang's detention during a meeting in the United States with President Hu in December 2003.[285] Yang's family petitioned the Chinese

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280. *See* Letter from Lennart Sacrédeus, Member, European Parliament, to His Excellency Hu Jintao, President, P.R.C. (June 12, 2003) (on file with authors); Letter from Martin Callanan, Member, European Parliament, to His Excellency Hu Jintao, President, P.R.C. (June 11, 2003) (on file with authors); Letter from Roger Helmer, Member, European Parliament, to His Excellency Hu Jintao, President, P.R.C. (June 13, 2003) (on file with authors).

281. City of Beijing Bureau of National Security Opinion Recommending Prosecution, 2003 Beijing Bureau of National Security Prosecution #3, June 4, 2003 (on file with authors) [hereinafter Beijing Prosecution #3].

282. The court later noted that during the trial, per the prosecutor's request, the court postponed the hearing so as to allow additional investigation. According to the judgment issued on May 4, 2004, the court twice postponed the trial date, citing complexity and severity of the case as reasons for the continuation. The trial resumed on May 13, 2004 when the judgment of the court was issued. Penal Judgment of the Second Intermediate People's Court of Beijing, ICP2 No. 1224 (May 13, 2004) (on file with authors) [hereinafter Beijing Court Judgment].

283. Beijing Prosecution #3, *supra* note 281.

284. *Id.*

285. John Pomfret, *Bush Asked to Press China on Jailed Activist*, Wash. Post, Oct. 17, 2003, at A20; Lolita Baldor, *Bush Urged to Ask Chinese Premier to Release Jailed Activist*, Associated Press, Dec. 5, 2003.

Government to release Yang in March 2004.[286] The media reported that prison guards were allegedly abusing Yang on account of his complaint that he had not received a verdict following his trial in August 2003.[287] Sixty-six members of Congress signed a letter to China's president "expressing outrage over the treatment of U.S.-based dissident Yang Jianli."[288] The Chinese Foreign Ministry spokesman issued a statement in response, labeling the letter "an interference in the judicial process of China."[289]

The Second Intermediate People's Court of Beijing finally handed down Yang's five-year sentence on May 13, 2004, nearly a year following his in-court hearing on August 4, 2003.[290] The court stated that Yang was being punished for illegally crossing the border into China and engaging in espionage.[291]

Yang's sentence prompted sharp criticism from U.S. lawmakers, who called the sentence unjustified and urged Beijing to release him, again invoking the WGAD opinion.[292] In October 2004, members of the U.S. House and Senate again petitioned President Hu Jintao for Yang's parole.[293] Nevertheless, despite strong international pressure, China refused to grant parole.[294] In

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286. Ted Anthony, *Family of Democracy Activist Imprisoned in China Petitions for His Freedom*, Associated Press, Mar. 13, 2004.

287. *See, e.g.*, *US Queries China over Alleged Mistreatment of Dissident in Prison*, Agence France Press, Apr. 20, 2004 (further describing allegations of abuse of Yang Jianli and U.S. efforts to obtain further information); Lolita Baldor, *State Department Rebukes China for Treatment of Jailed Activist*, Associated Press, Apr. 20, 2004 (explaining how Jianli "was kept in handcuffs in solitary confinement and denied exercise and reading materials after he began a small protest of his involvement").

288. Elaine Kurtenbach, *U.S. Officials Await Response from China on Protest over Jailed Activist*, Associated Press, Apr. 27, 2004.

289. *Id.*

290. Beijing Court Judgment, *supra* note 282.

291. *Id.*

292. *U.S. Lawmakers Criticize China for Jailing U.S.-Based Dissident,* Voice of America, May 13, 2004; *see also U.S. Lawmakers Condemn Sentencing of Leading Chinese Dissident*, Agence France Press, May 13, 2004 (quoting various Members of Congress and their reactions to Yang's sentencing).

293. On October 6, 2004, 85 members of Congress sent a letter to Chinese President Hu Jintao on Yang Jianli's behalf. Letter from Members of U.S. House of Representatives to His Excellency Hu Jintao, President, P.R.C. (Oct. 6, 2004). A similar letter was sent on the same day by 21 U.S. Senators. Letter from Members of U.S. Senate to His Excellency Hu Jintao, President, P.R.C. (Oct. 6, 2004).

294. *See U.S. Lawmakers Petition Chinese Leader to Grant Dissident Parole*, Agence France Press, Oct. 6, 2004.

prison, Yang's health declined sharply.[295]

In January 2005, after Yang had suffered a stroke in prison, the U.S. Congress again petitioned the Chinese Government to release him, this time urging that he be released on medical parole.[296] On the third anniversary of Yang's detention, Congress marked Yang's struggle by holding a press conference; one member even condemned the Chinese Government's actions as "barbari[c]."[297] Two months later, on June 15, 2005, the U.S. Senate sent another letter to President Hu urging him to grant Yang medical parole, stressing the hard conditions of his imprisonment, and reaffirming that the United Nations found him to be held in violation of international law.[298] The letter pointed out the hypocrisy in Yang's treatment in light of a human rights report released by the Chinese Government in 2005, which declared that China was making special efforts to combat human rights abuses against individuals in custody.[299]

In April 2006, nearly four years after Yang's initial detention, lawmakers urged President Bush to raise Yang's case with President Hu.[300] During Hu's visit to the United States, the press noted that "[p]rotestors followed Hu everywhere, waiting at street corners along his route."[301] It is estimated that the U.S. Embassy brought Yang's case to "Beijing's attention more than 60 times."[302]

Yang was finally released on April 27, 2007, after serving his full five-year sentence,[303] despite having been eligible for parole since late 2004.[304] Although Yang served his full sentence, it is important to note the effect the international pressure had

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295. *U.S. Lawmakers Demand China Grant Dissident Medical Parole,* Agence France Press, Jan. 20, 2005.

296. *Id.*

297. *U.S. Slams China's Detention of Yang*, Agence France Press, Apr. 27, 2005.

298 Letter from the U.S. Senate to His Excellency Hu Jintao, President, P.R.C. (June 15, 2005) (on file with authors).

299. *Id.*

300. *119 U.S. Lawmakers Urge Bush to Raise Chinese Dissident's Case*, Agence France Press, Apr. 10, 2006.

301. *Protests Dog China's Hu Wherever He Goes*, Agence France Press, Apr. 19, 2006.

302. *119 US Lawmakers Urge Bush to Raise Chinese Dissident's Case*, Agence France Presse, Apr. 10, 2006.

303. *Activist Released Will Return to U.S.*, Associated Press, Apr. 29, 2007.

304. *Id.*

on his detention. Within days of the public release of the WGAD's opinion, Yang received access to counsel. Yang's trial was also likely held in response to the many criticisms of his detention and demands for his release. Significantly, given that the conviction rate for political crimes in China is virtually one hundred percent, the fact that Yang received the minimum five-year sentence rather than the death penalty or life in prison was in all likelihood another important result of constant international pressure on the Chinese Government.

B. Lessons Learned

The four case studies above reaffirm that although the WGAD is a quasi-judicial body lacking its own enforcement mechanism, it can still be a valuable tool for helping free the arbitrarily detained. The impact of WGAD opinions, moreover, can vary significantly. Closer review of these case studies suggests four factors that can be helpful in assessing ex ante the potential impact of WGAD involvement in a case: (1) who is being detained; (2) what accusation underlies the detention; (3) where the individual is being detained (country of detention); and (4) how the WGAD opinion is leveraged. These factors can substantially affect the degree of success achieved in using a WGAD opinion to secure the release of an arbitrarily detained person.

1. Who: The Person Being Detained

A WGAD opinion's effectiveness is often substantially influenced by who is being detained. In the case of James Mawdsley, a Westerner arrested in Burma, the time frame between the WGAD opinion becoming public and Mawdsley's release was only eleven days.[305] For Masih and Dr. Que, citizens of the countries in which they were detained, the process was slower: Que was released almost four months after the WGAD released its opinion, while Masih was not acquitted by the Supreme Court of Pakistan until eight months after the WGAD opinion had been released.[306] And in Yang Jianli's case, his

305. You Saved My Life, *supra* note 164, at 62.

306. In Masih's case, however, Freedom Now decided not to publicly release the opinion because it could have been more difficult for President Musharraf to facilitate Masih's release if he were viewed as bowing to Western pressure. Instead, the WGAD opinion was used to leverage political

compelling personal biography—including that he was a former Tiananmen Square activist and had two PhDs from prestigious American universities[307]—helped attract people to his cause.

2. What: The Accusation

A second important factor in determining a WGAD opinion's effectiveness in securing the freedom of a detainee is the reason for which that person is detained. As the case studies demonstrate, the more compelling the facts of a case, the more likely that the international community will get involved and pressure the offending country to release the detainee. Each of the cases presented here was based on compelling facts. Mawdsley's situation was bound to evoke sympathy from human rights activists because he was a Westerner who was arrested, tortured, and sentenced to seventeen years in prison for non-violently promoting democracy. Masih's case was likewise dramatic: he was convicted of blasphemy and sentenced to death based on one highly biased witness's testimony. Que, a non-violent democracy activist, was arrested and tried for sending an e-mail criticizing the government. Yang's case, however, was somewhat different because he had entered China illegally and had thereby actually committed a crime. This made it more difficult to garner public sympathy before the WGAD issued its opinion.

3. Where: The Detaining Country

A WGAD opinion's success in securing the detainee's freedom may also be influenced by the country of detention. While assessing this factor is highly subjective, a country's sensitivity to international pressure may affect whether or not it is willing to release a detainee. Pakistan and Vietnam yielded reasonably quickly to international pressure, as did Burma—though it is more intransigent regarding detentions of its own citizens.[308] China, unsurprisingly, adhered firmly to its position.

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support, which was then applied quietly through diplomatic channels.

307. *See* Background on Dr. Yang Jianli, http://www.yangjianli.com/about/yangbrief1_en.htm (last visited Feb. 15, 2008).

308. *See generally* Assistance Ass'n for Political Prisoners (Burma), Number of Political Prisoners Increases in 2007; Crackdown in Burma Continues (Jan. 31, 2008), http://www.aappb.org/release100.html (last visited

While the results of a WGAD opinion on a country like China may not be as profound, Yang's case demonstrated that even China can be influenced by the effective use of the WGAD opinion combined with political and public relations pressure.

4. How: Leveraging of the WGAD Opinion

The final—and probably most important—factor in securing the freedom of a detainee is how the WGAD opinion is leveraged to produce the desired result. The WGAD opinion on its own is likely insufficient for securing the release of most arbitrarily detained persons because, as described previously, unless the source publicizes the opinion, it only will appear in an appendix to the WGAD's annual report at the end of the year.[309]

Furthermore, as each case study discussed here illustrates, the WGAD opinions usually do not result directly in the release of the detainee. Among the four case studies illustrated above, the quickest response occurred for Mawdsley, and even there the government's response was not immediate; the WGAD's opinion was issued in September and Burma received a copy of the opinion three weeks before its public release. Yet once the decision became public and the international community became aware of and interested in the situation, the process moved very quickly and Burma released Mawdsley.

A similar although less direct correlation was apparent in Masih's case. Masih was arrested in 1996, sentenced in 1998, and denied on appeal in 2001. He was in jail for five years prior to the WGAD's involvement. Once his WGAD petition was filed in October 2001, the Pakistani appellate process was accelerated and Masih was acquitted within about eight months, whereas his prior appeal had taken three years.

Similarly, in the Que case, the WGAD petition and public pressure—which started shortly after his arrest—appear to have had an impact on the speed of his criminal proceedings. While no direct causal link has been established, there is a clear correlation between the filing of the WGAD petition and the commencement of his trial. Que was arrested in March 2003, and although various advocates lobbied the government on Que's behalf in 2003 and

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Feb. 22, 2007) (detailing ongoing detentions of more than one thousand political prisoners in Burma).

309. *See supra* note 84 and accompanying text.

early 2004, his trial only occurred shortly after the WGAD petition was filed in June 2004. The WGAD opinion was issued in September, made public in November, and international pressure continued. Vietnam's decision to release Que was announced just days after international organizations called on the United Nations to pressure Vietnam to release him. It is instructive to note that while Que's case received international attention prior to the WGAD involvement, he was detained for over a year before the WGAD petition was filed. Once his WGAD petition was filed, Que was tried within two months and released just three months after the WGAD opinion was announced.

Finally, in Yang's case, the petitions to the Working Group on Enforced or Involuntary Disappearances and the WGAD were key in determining where Yang was being held, what he was being charged with, and ensuring that he was provided with access to legal representation. Initially, the WGAD opinion finding his detention to violate international law enabled his advocates to overcome the challenges presented by his illegal entry into China. Over the next four years, the WGAD opinion was invoked by numerous parties pressing for Yang's release, including in U.S. House and Senate Resolutions and a letter from the European Parliament to the Chinese president. The continued international pressure coupled with the WGAD's involvement likely accelerated the Chinese criminal process against Yang.

IV. SUGGESTIONS FOR REFORM

Having examined the WGAD's history and practical functioning, it is now appropriate to examine how the mechanism can be improved. Any substantive improvements to the WGAD will require further financial support from the United Nations and its donors. The WGAD may be able to further both its specific goal of securing the release of detainees and its general goal of facilitating communication and promoting universal standards by adopting reforms that build on its strengths of informality and accessibility. One scholar has cited three factors that make the U.N. thematic procedures most effective:

> (1) professionalism (both in assessing information, transmitting allegations and reporting to the Commission on Human Rights); (2) perseverance (demonstrated by non-acquiescence in governmental silence or simple denials); and (3) feedback to the

> sources of information (in order to obtain further information and to ensure their future co-operation).[310]

As described above, the WGAD's composition and status make it more likely than alternative structures (e.g., country rapporteurs, special rapporteurs, domestic courts) to maintain professionalism and objectivity since its experts are independent and its procedures are simple and straightforward.[311] While the WGAD's informal procedures enable it to minimize politicization and therefore to persevere in the face of government silence or indifference,[312] follow-up procedures could be strengthened to improve both perseverance and feedback. This section will propose three categories of potential improvement: follow-up, quality of judgments, and outreach.

These suggestions take into account the WGAD's limited resources and the fact that it must continue carefully to balance potential confrontations with the UNHRC's members. As one scholar notes, the WGAD must not forget that it "function[s] in a political environment where small advances are always hard-fought, but easily undone or amended through a resolution of the Commission [now the Council]."[313] Indeed, the main obstacle to improving the WGAD is that it is a subsidiary body of the UNHRC, which itself is highly politicized. Illustrative of such concerns are U.S. Assistant Secretary of State Kristen Silverberg's characterization of the Council's first year as a "grave disappointment," citing, *inter alia*, that "[m]ember states abandoned their responsibility to defend suffering people in countries such as Sudan, Burma, Zimbabwe, and Cuba and instead devoted their energies to attacking Israel."[314] Alongside government and NGO criticism worldwide, some even seek to cut off financial support for the UNHRC.[315]

A. Follow-Up Procedure

The most important reality posed by the WGAD's limited

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310. Kamminga, *supra* note 92, at 319.
311. *See supra* Parts II.A.1–2.
312. *See supra* Part II.A.2.
313. Gutter, *supra* note 22, at 180.
314. Fred Frommer, *Coleman Wants to Revoke U.S. Funding for U.N. Human Rights Council*, Associated Press, July 26, 2007.
315. Senator Norm Coleman (R-Minn.) has proposed withholding the United States' three million dollar contribution to the Human Rights Council. *Id.*

resources is that upon issuance of an opinion, it views its work as complete. "Formally speaking, the process ends with the adoption of the opinion and its transmission to the Government concerned."[316] The onus then shifts almost completely onto the petitioner to secure his or her own release.[317] The WGAD has not taken the opportunity to apply periodic pressure on detaining governments, at least through its annual reports.

With a more robust follow-up procedure, the WGAD could track the status and progress of cases, significantly increasing the pressure on governments to release detainees and contributing to a broader awareness about the global problem of arbitrary detention. In 1993, the WGAD first noted a need "to ensure follow-up to the recommendations made in the Group's decisions"[318] and proposed that "the Commission on Human Rights should recommend to the Government that it report those measures to the Working Group within a period of four months following notification of the decision."[319] The UNCHR responded by requesting the WGAD "to make all suggestions and recommendations for better fulfillment of its task, particularly in regard to ways and means of ensuring the follow-up to its decisions, in cooperation with Governments."[320] Since then, the WGAD revisited this topic several times and engaged in consultations with governments, NGOs, and other sources to determine how a robust follow-up procedure may be achieved.[321] In December 1994, the WGAD specifically recommended a follow-up mechanism:

> [A] Government which has been the subject of a Working Group decision deeming a detention to be arbitrary should be requested to inform the Working Group, within four months from the date of transmittal of the decision, of the measures adopted in compliance with

316. Gutter, *supra* note 22, at 251.

317. The WGAD's mandate does not provide for any further procedures once the opinion has been published. *See* Fact Sheet No. 26, *supra* note 7.

318. U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 42(b).

319. *Id.* ¶ 43(d).

320. C.H.R. Res. 1993/36, *supra* note 39, para. 18.

321. *See* U.N. Doc. E/CN.4/1994/27, *supra* note 39, ¶¶ 62, 76; C.H.R. Res. 1994/32, *supra* note 132, para. 19; U.N. Doc. E/CN.4/1995/31, *supra* note 134, ¶ 26, 32–37, 56(c); U.N. Doc. E/CN.4/1995/SR.27, *supra* note 122, ¶ 21; U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 52, U.N. Doc. E/CN.4/1996/40, (Dec. 15, 1995) [hereinafter U.N. Doc. E/CN.4/1996/40].

> the Group's recommendations. For the time being, it is suggested that this procedure should be applied only in cases in which the prisoner has not been released. Should the Government fail to abide by the Group's recommendations, the Group might proceed to recommend to the Commission on Human Rights that it should request that Government to report to the Commission on the matter, in accordance with the modalities deemed most appropriate by the Commission.[322]

This proposal, however, received a hostile response from some of the UNCHR's member states.[323] The government of Egypt, for instance, suggested the WGAD focus instead on "develop[ing] its dialogue and cooperation with Governments instead of seeking to impose counter-productive measures against them."[324] The UNCHR did not adopt the proposal, and to date, the WGAD has taken no concrete steps toward creating a formal follow-up procedure. Nevertheless, the WGAD remains hopeful that it will establish an effective method at some point.[325]

A renewed attempt at formulating a follow-up procedure could track the status of ongoing cases and results from prior cases to promote the accountability of governments in adhering to the WGAD's opinions and to enhance the WGAD's ability to measure its own success in achieving its publicly stated objectives. At the very least, the WGAD could add a sentence to the end of every opinion, asking governments to keep it informed about steps taken to remedy the situation.[326] The WGAD could also request that the source stay in touch regarding the case's

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322. U.N. Doc. E/CN.4/1995/31, *supra* note 134, ¶ 56(c).

323. *See id.* ¶¶ 34–36. Among the thirteen governments who commented on the proposal, six generally supported the proposal but were concerned that the deadline for governments to respond was too short. Several other governments felt that the follow-up proposal would create difficulties with the WGAD's mandate, including politicization and the issue of consent. *Id.*; *see also* Gutter, *supra* note 22, at 250 (explaining how the proposal "received a rather hostile response in the Commission").

324. U.N. Doc. E/CN.4/1995/31, *supra* note 134, ¶ 36.

325. *See* U.N. Doc. E/CN.4/1996/40, *supra* note 321, ¶ 52 (stating that "the Group hopes that it will be possible to establish an effective procedure to this effect . . . ").

326. In its 2006 report, the WGAD indicated that it had "sought to engage in continuous dialogue with those countries visited by the WGAD, in respect of which it had recommended changes of domestic legislation governing detention." U.N. Doc. E/CN.4/2006/7, *supra* note 42, at 2.

status or contact every government annually to request an update on outstanding cases.[327]

Establishing a systematic follow-up procedure could greatly increase government accountability, improve information sharing, and provide feedback to guide future decisions on policy and procedure. By naming governments and the cases brought against them, this list could shame governments into releasing arbitrarily detained prisoners. It would also enable NGOs and other frequent petitioners to follow up on longstanding cases that have not been resolved and try to spur governments to take action. Making this information readily and clearly available could prompt further action, such as public statements of disapprobation, against those governments by the UNHRC, individual governments, and human rights groups. Finally, keeping track of the status of cases would enable the WGAD to see whether there is any correlation between its opinions and the release of prisoners. While such correlation would not prove that the WGAD directly caused the release, it could at least help the WGAD generate statistics with respect to the status of detainees around the world, which could in turn help advance both its specific goal of securing the release of detainees and raise public awareness by promoting transparency and government accountability.

Two major challenges to implementation exist, however. First, governments and sources might not comply with a request for further information. Sources have not always informed the WGAD of the status of their cases, perhaps because they know the WGAD has no direct power to enforce an opinion once issued. Governments, on the other hand, may wish to be acknowledged when they release a prisoner, but may also prefer to avoid drawing attention to the fact that they detained the person and may continue to detain others. Nevertheless, evidence suggests that many states are willing to engage in discussions with the WGAD about their practices.[328] Government responses to WGAD requests for information and invitations for WGAD country visits

327. Ideally, the WGAD would trace all of its prior decisions. However, even if this were not possible because of the lack of staff resources, the WGAD could begin tracking information going forward, which could then be published as an appendix to its annual report.

328. *See* U.N. Doc. A/HRC/2/SR.7, *supra* note 88, ¶ 32 (Oct. 10, 2006) ("Few Governments refused to respond to approaches made concerning individual communications.").

are signs that they recognize the importance of communications from the WGAD and feel compelled to respond.[329] Therefore, it is possible that the WGAD could make progress in collecting significant information from governments and sources merely by asking them to follow up on each case.

Second, the WGAD's staff and resources are limited.[330] The five experts who make up the WGAD volunteer their time, and they are supported by only a few full-time staff members in Geneva. Their caseload has increased since the WGAD was created in 1991. Given these limitations, it would be important to begin with modest reforms going forward. Asking governments and sources to complete a simple questionnaire to provide information about the status of current and prior cases may reduce the amount of paperwork that the staff members must sift through to find the relevant information. In addition, this type of work could be assigned to volunteer interns or outsourced to appropriate institutions willing to provide pro bono assistance.

B. Quality of Judgments

The WGAD's opinions should be given the imprimatur of legal authority by emulating carefully reasoned decisions issued by courts, especially given its lack of formal enforcement authority. Lawrence Helfer and Anne-Marie Slaughter argue that numerous factors contribute to the efficacy of supranational adjudicatory bodies, including the quality of legal reasoning, judicial cross-fertilization, and the forms of the opinions.[331]

Like the WGAD, the Human Rights Committee has been criticized as failing to achieve its full potential because its opinions are not binding.[332] Despite its non-binding nature, some

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329. Kamminga, *supra* note 92, at 317 ("One indicator [of the impact of procedures on governments' behavior] is the response rate, i.e., the extent to which governments respond to communications from the thematic procedures. A substantive response—even if it does not provide the information requested—is at least a sign of respect for the procedure in question.").

330. Gutter, *supra* note 22, at 327–28.

331. Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 318–29 (1997). They look closely at the European Court of Human Rights and the European Court of Justice as examples of successful supranational adjudicatory bodies. *Id.*

332. Murat Metin Hakki, *The Silver Anniversary of the UN Human Rights*

have suggested that the Human Rights Committee could be more effective by improving the quality of its reasoning:

> [T]he [Human Rights] Committee could make its most significant contribution to the ICCPR and the human rights movement by concentrating on expounding the ICCPR—that is, exploring and explaining it, justifying its own decisions and acting as a deliberative body seeking to illuminate and advance understanding of the Covenant rather than to apply it summarily case by case. The Committee would thereby facilitate a dialogue about its content with states, other international organs, and non-governmental actors participating in the movement.[333]

Formalizing the WGAD's opinions could also increase predictability and reduce the risks of fragmentation and politicization by decreasing the likelihood of inconsistent opinions with respect to different countries.

Even without enforcement powers, the WGAD's existing adversarial complaint procedure and tradition of issuing opinions are quasi-judicial,[334] and this undoubtedly gives its opinions a degree of hortatory force. However, the flexibility of the WGAD's procedures and its minimal requirements for standing, which foster a reputation for informal, ad hoc decision-making, may restrict that persuasive force and hamper its effectiveness as a supranational adjudicatory body with the goal of ensuring compliance with its opinions.[335]

The factual analysis and legal reasoning in the WGAD's opinions are often less rigorous than one would find in a decision by a court of law or some other international bodies. Its opinions follow a simple drafting plan, adopted in one of the WGAD's first reports.[336] They do not include a clear application of the law to the facts or a full explanation of the experts' reasoning.

The American Association of Jurists has criticized the

Committee: Anything to Celebrate?, Int'l J. of Hum. Rts., Jan. 23, 2002, at 85, 89 (2002) ("The non-binding nature of the suggestions [of the Human Rights Committee] leaves a considerable amount of discretion to the countries concerned in implementing them and this remains as a serious defect that needs to be remedied.").

333. Steiner, *supra* note 102, at 17–18.

334. *See* Allison L. Jernow, Note, *Ad Hoc and Extra-Conventional Means for Human Rights Monitoring*, 28 N.Y.U. J. Int'l L. & Pol. 785, 786–87 (1996).

335. *See* Hakki, *supra* note 332, at 96–97.

336. U.N. Doc. E/CN.4/1993/24, *supra* note 9, ¶ 21.

WGAD's determination that some violations of the right to a fair trial constitute arbitrary detention while others do not,[337] calling this reasoning "dangerous . . . because of the subjective nature of the criterion of distinction (the seriousness of the violation)."[338] Instead, it argued that the violation of any aspect of the right to a fair trial renders a detention arbitrary.[339] Further explanation and legal reasoning in the WGAD's opinions could help mitigate this kind of criticism. Although the WGAD does, on occasion, rely on its prior opinions as persuasive authority,[340] doing this more systematically and consistently would enhance the credibility of its opinions by developing further case law regarding international standards on arbitrary detention. Alternatively, the WGAD could issue more "deliberations" in its annual report to the UNHRC, identifying recurring issues from cases it has considered and drawing conclusions of law that it subsequently would apply in future cases.[341]

Moreover, critics may argue that reliance on soft law instruments such as the UDHR and the Body of Principles both stretches the legal authority of these instruments and diminishes the power of the WGAD's opinions.[342] Yet on the one hand, if the WGAD is attempting to utilize (and institutionalize) the UDHR as binding customary international law, it could only do so effectively by clearly stating where it derives its authority and how it determines that the UDHR is customary international law.

On the other hand, increased formality in the WGAD's opinions may give rise to political opposition as governments insist that the legal principles the WGAD applies are not binding. Given past criticisms of the WGAD's application of the ICCPR to non-party states,[343] more formal application of other legal principles that states have not expressly implemented into domestic law may create a backlash against the WGAD. Furthermore, given that the WGAD's opinions are non-binding,

337. U.N. Doc. E/CN.4/1992/20, *supra* note 25, ¶ 23.
338. U.N. Doc. E/CN.4/1994/NGO/18, *supra* note 81, ¶ 13.
339. *Id.* ¶ 14.
340. *See, e.g.*, Aung San Suu Kyi v. Myanmar, *supra* note 82, para. 8 (opinion details previous decision of the WGAD, using the other ruling—Decision 8/1992—as support for its current opinion).
341. *See, e.g.*, U.N. Doc. E/CN.4/1993/24, *supra* note 9 (issuing four deliberations together with general conclusions and recommendations in this 1993 WGAD report to the HRC on issues relevant to decision-making).
342. *See supra* notes 62–64 and accompanying text.
343. *See supra* note 67 and accompanying text.

they may better facilitate political and public relations if they remain brief and succinct, and therefore more accessible for public reference. Since experience suggests that the WGAD's opinions often have their greatest effect through a broader public effort, these opinions may serve as the strongest catalyst when they are concise, direct, and reach the clear conclusion that a particular deprivation of liberty is arbitrary.

Enhancing the quality of opinions is a question both of will and resources. Even if the WGAD makes a determination to proceed in this direction, the opinions are currently drafted by the volunteer experts themselves during their brief trips to Geneva. Improving the quality of the opinions would, therefore, require greater resources and some willingness to rely on staff support. In addition, as there is currently a 10,700 word limit for special procedures reports to the Human Rights Council, it is likely that the longer the annex of written opinions becomes, the more difficult it will be for the WGAD to obtain the requisite waiver to exceed the word limit.[344]

C. Outreach

Since the WGAD's opinions do not have binding force, they are only effective insofar as individuals, organizations, and governments receive and publicize them. To take the WGAD into account in making future choices, governments must be aware of the WGAD's opinions and the political consequences of inaction. The WGAD could better achieve its goals by reaching out to individuals, organizations, and governments to educate them about its work as well as the universal norms it advances.

Initially, a more robust follow-up procedure may pave the way for the WGAD to engage in further outreach, as it will generate statistics and information that the WGAD and NGOs can use to raise public awareness about the issue of arbitrary detention. Once it gathers this information, public outreach will be critical to spreading awareness about arbitrary detention and combating indifference.[345]

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344. *See, e.g.*, UNHRC, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 14, U.N. Doc. A/HRC/4/28/Add.2 (Feb. 28, 2007).

345. *See* Johnson, *supra* note 117, at 416 ("The [disproportionate minority contact standard] regime responds to the problem of *public indifference* to racial disparities by requiring that states become conscious of

Even in the absence of a follow-up mechanism, by publicizing information about its ongoing cases, the WGAD can help connect its most frequent sources to build an informal network of individuals, NGOs, and states that support its efforts and can "enforce" its recommendations through constituency building, benchmarking, and shaming. The WGAD may also reach out to prisoners to inform them about how its procedures work. One reason prisoners do not seek the WGAD's opinion more frequently may be because they do not know about it.

To date, there is very little literature available about the WGAD and since it does not clearly publish aggregated statistics on arbitrary detention or directly enforce its judgments, international attention is limited. It is virtually impossible to systematically research prior cases of the WGAD because they are available only *en masse* in the WGAD's annual reports. Thus, for example, a person seeking all cases brought against China or all cases involving alleged infringement on freedom of expression would have to skim through all prior annual reports and every WGAD opinion ever issued. This major problem could be easily addressed with technology by creating an online searchable database that would enable searches by name, country, or reason for detention. This would be an invaluable tool for practitioners to be able to research and then invoke as persuasive authority prior WGAD opinions on cases with facts analogous to their own.

Finally, the WGAD could initiate further investigations where it suspects there are abusive practices. Because of the WGAD's limited resources, this is an area where NGOs, academic institutions, international organizations, governments, and even private law firms with a significant pro bono program could provide substantial support. Joint investigatory and publicity efforts might not only leverage the WGAD's resources, but also enlarge its footprint in the international community and thereby improve crucial processes of gathering and supplying information and framing effective remedies.[346]

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racial harm.") (emphasis added).

346. *See id.* at 411–12. Johnson notes that "allowing states some flexibility is responsive to the reality that the solution will differ depending on the cause of the disparity and the particular context, and that the solution might be informed by model programs from other states and localities, and the insights of governments, researchers, and nongovernmental organizations. Solutions to the problem of racial disparity stem from ongoing study and assessment of successful interventions by federal, state, and

V. CONCLUSION

The United Nations Working Group on Arbitrary Detention is an example of a body seeking to enforce international human rights. In the absence of a global administrative system, many international norms, including human rights, are advanced by a network of smaller, independent mechanisms of experts focused on a particular region or thematic issue. Though some of these bodies have binding power, the WGAD does not and its impact depends on combining its opinions with political and public relations pressure. Nevertheless, its mandate is broad and flexible, providing an opportunity for detainees and their representatives to submit their cases to the WGAD and also permitting it to review and update its working methods as necessary.

There are, however, some ways the WGAD could capitalize on its flexible mandate to increase its effectiveness. First, the WGAD can develop a more robust follow-up procedure by requesting governments and sources to update it on the status of detainees and publishing this information. Second, it can enhance the quality of its opinions, increasing their transparency and thereby helping international actors use these opinions in broader legal and political campaigns. Finally, it can reach out to sources and other international actors to educate them about arbitrary detention and how the WGAD seeks to vindicate the rights of individual detainees.

By developing a uniform, systematic follow-up procedure, the WGAD can generate a body of information and statistics that can be used to pressure governments into action, and catalyze other international actors to address the problem of arbitrary detention. Ultimately, the success of WGAD and similar groups in effectively combating violations of human rights may result from "empower[ing] internal and external advocates concerned about the problem" to take action.[347] Producing reliable information and educating actors about how to use such information will empower them to engage in a broader process to enforce international law.

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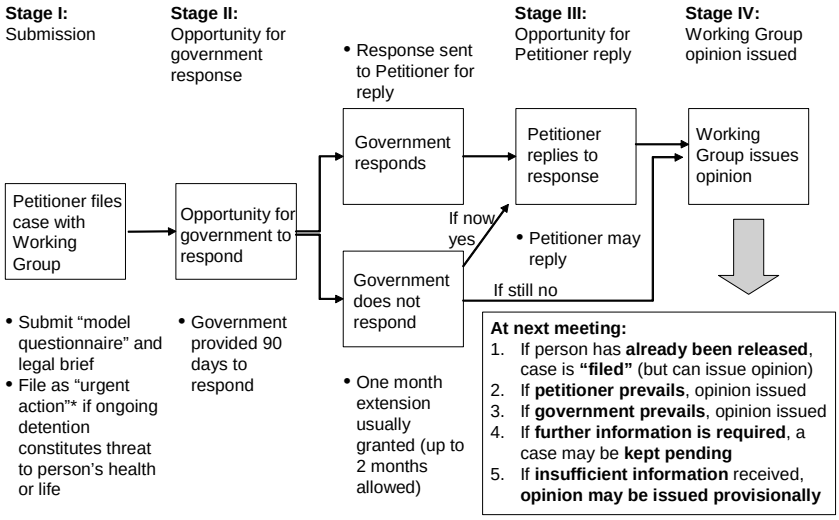
private actors."

347. *Id.* at 415.

APPENDIX A

PROCESS FOR TAKING A CASE TO THE UN WORKING GROUP ON ARBITRARY DETENTION



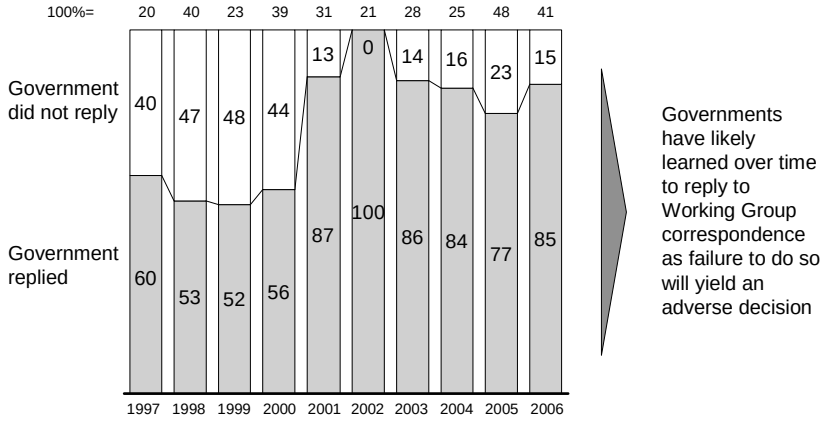
* "Urgent action" cases follow same process, but unlike a regular case, the Working Group immediately contacts the government to request that the detainee's well-being be assured

Source: Authors' visual depiction of information in Fact Sheet No. 26 of the UN Working Group on Arbitrary Detention

APPENDIX B

GOVERNMENTS REGULARLY CHOOSE TO REPLY TO WORKING GROUP COMMUNICATIONS ON CASES DESPITE THE INFORMAL PROCESS

Total number of opinions issued in given year*



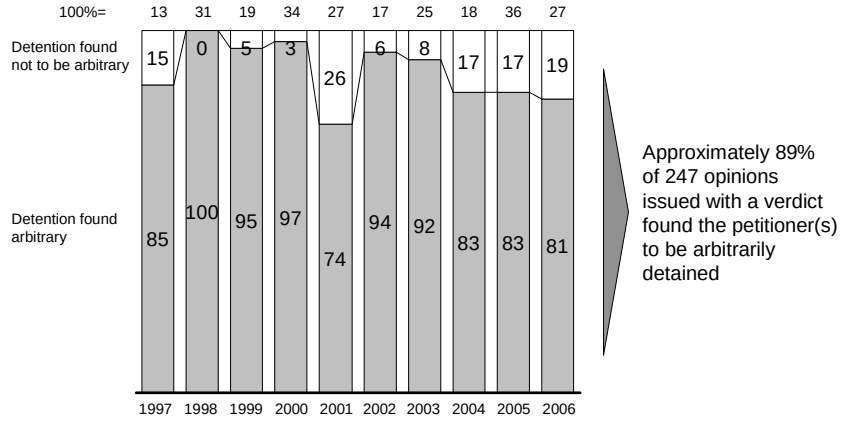
* Petitions can be submitted for multiple individuals

Source: Authors' analysis from data compiled from annual reports of the UN Working Group on Arbitrary Detention

APPENDIX C

A HIGH PERCENTAGE OF CASES BROUGHT TO THE WORKING GROUP RESULT IN A DETERMINATION OF ARBITRARY DETENTION

Number of opinions issued by the Working Group on Arbitrary Detention*

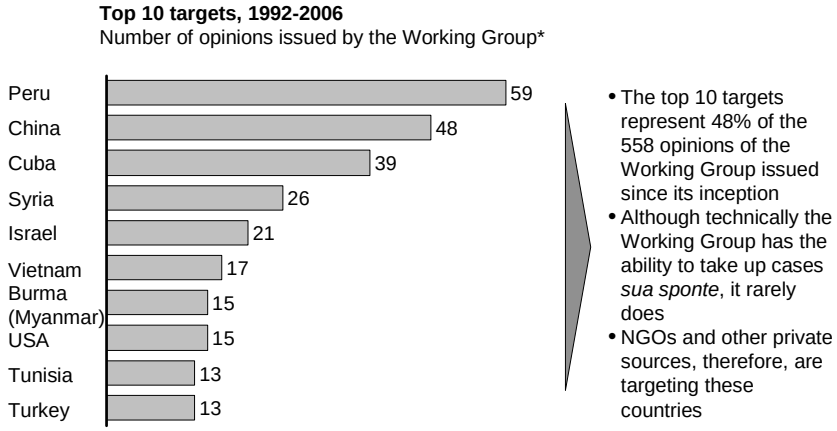


* Opinions may refer to the detention of one or more individuals – these opinions are only those during the time period where a determination was made about the detention in question, not opinions where the case was filed (e.g., the person had already been released) or where a determination was postponed pending the receipt of further information

Source: Authors' analysis from data compiled from annual reports of the UN Working Group on Arbitrary Detention

APPENDIX D

A SMALL NUMBER OF COUNTRIES HAVE MULTIPLE OPINIONS ISSUED ABOUT THEIR CONDUCT



* A single opinion can represent an individual or multiple cases, depending on how the petition is submitted

Source: Authors' analysis from data compiled from annual reports of the UN Working Group on Arbitrary Detention

APPENDIX E

Freedom Now Process for Freeing Prisoners of Conscience

PROCESS FOR FREEING PRISONERS OF CONSCIENCE

ILLUSTRATIVE