

# The Recent Free Expression Jurisprudence of the Working Group on Arbitrary Detention

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## Abstract

The Working Group on Arbitrary Detention is one of the lesser-known United Nations Special Procedures. While its name does not indicate a focus on freedom of expression, it has defined “arbitrary” detention to encompass detention based on conduct protected under the free expression provisions of Article 19 of the International Covenant on Civil and Political Rights (for States Parties) and the corresponding text of the Universal Declaration of Human Rights. As such, the WGAD can serve as a critical forum for protecting free expression—particularly for individuals whose free expression rights may be violated by states not parties to the ICCPR or its Optional Protocol I.

This Essay describes the contributions of the WGAD’s recent free speech jurisprudence to the understanding of protected free expression in international law. It first explains the sources of protected free expression in international law, then summarizes the WGAD’s establishment and functioning, and then identifies key developments in the WGAD’s recent caselaw on the subject. It concludes that the WGAD is a valuable forum for people detained on the basis of free expression.

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## I. INTRODUCTION

*In all my years, I ain't never heard, seen, nor smelled an issue that was so dangerous it couldn't be talked about.*<sup>1</sup>

Free expression is internationally recognized as a fundamental human right, essential to human development; the free and democratic functioning of society; and transparent and accountable government.<sup>2</sup> Nonetheless, states around the world have detained their political opponents and other perceived troublemakers on the basis of mere utterances, often on the grounds that those utterances insult public officials or endanger public order.<sup>3</sup> To illuminate some of these violations, this Essay describes the recent free expression jurisprudence of the Working Group on Arbitrary Detention (WGAD) based on a review of every WGAD opinion issued in 2021 and 2022.<sup>4</sup>

The WGAD has defined “arbitrary” detention to encompass detention on the basis of free expression protected by the Universal Declaration of Human Rights (UDHR) and, for States Parties to the International Covenant on Civil and Political Rights (ICCPR), by that treaty as well. As such, WGAD can serve as a critical forum for protecting free expression—particularly for individuals whose free expression rights may be violated by states that are not parties to the ICCPR or its Optional Protocol I.

This Essay describes the contributions the WGAD’s recent free speech jurisprudence has made to the understanding of protected free expression in international law. Part II lays out the basic sources of protection for free expression in international law. Part III describes the history and functions of the WGAD, including its role in the protection of free expression. Part IV reviews the recent free expression jurisprudence of the WGAD. The Essay concludes the WGAD serves as a valuable forum for people who are detained based on their protected expression.

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<sup>1</sup> 1776 (Warner Brothers 1972) (attributed to Stephen Hopkins, Rhode Island Delegate to the 1776 Continental Congress).

<sup>2</sup> U.N. Hum. Rts. Comm., General Comment No. 34 to ICCPR Article 19, ¶¶ 2–3, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment 34].

<sup>3</sup> See, e.g., Amal Clooney & Philippa Webb, *The Right to Insult in International Law*, 48 COLUM. HUM. RTS. L. REV. 1, 2 (2017).

<sup>4</sup> This Article relies on WGAD opinions that were reported on the website of the High Commissioner for Human Rights as of January 26, 2023. See generally *Opinions Adopted by the Working Group on Arbitrary Detention*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://perma.cc/6WEP-8LSM>.

## II. THE INTERNATIONAL RIGHT TO FREE EXPRESSION

The UDHR provides that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>5</sup> While the UDHR, as a non-binding instrument, does not bestow enforceable rights or obligations on any person or state,<sup>6</sup> it “has nevertheless had substantial indirect effect on international law.”<sup>7</sup> The right to free expression provides a paradigmatic example of this effect.

The ICCPR reaffirmed the UDHR’s commitment to free expression, using almost identical language.<sup>8</sup> Given that the ICCPR (like any treaty) *does* impose obligations on states which are party to it,<sup>9</sup> it made the obligation to respect free expression binding on its 173 States Parties. On the regional level, the European and inter-American human rights conventions use similar language to the UDHR and the ICCPR, while the Arab and African human rights charters protect expression but provide slightly greater scope for domestic regulation.<sup>10</sup>

None of these protections are absolute. The ICCPR, for instance, permits States Parties to limit free expression to protect the rights and reputations of others, national security, public order, public health, or public morals,<sup>11</sup> and indeed requires them to prohibit war propaganda and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>12</sup> Similarly, States Parties to the Genocide Convention have agreed to criminalize direct and public incitement to genocide.<sup>13</sup> Nonetheless, “deeply offensive” speech that does not fit any of these specific criteria remains protected.<sup>14</sup>

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<sup>5</sup> U.N. G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948) [hereinafter UDHR].

<sup>6</sup> See Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights* (Dec. 9, 1948), <https://perma.cc/4HHW-XQKR>; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

<sup>7</sup> See *Sosa*, 542 U.S. at 735 n.23.

<sup>8</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>9</sup> See, e.g., Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

<sup>10</sup> See European Convention on Human Rights art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 2889; American Convention on Human Rights (Pact of San Jose, Costa Rica) art. 13(1), Nov. 22, 1969, 1144 U.N.T.S. 123; Arab Charter on Human Rights art. 32, May 22, 2004; African Charter on Human and Peoples’ Rights art. 9, June 27, 1981, 1520 U.N.T.S. 217.

<sup>11</sup> ICCPR art. 19(3).

<sup>12</sup> *Id.* art. 20.

<sup>13</sup> Convention on the Prevention and Punishment of the Crime of Genocide arts. III, V, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>14</sup> General Comment 34, *supra* note 2, ¶ 11.

State practice in this area varies, making it difficult to identify the customary international law contours of the right to free expression. For instance, U.S. law does not permit the government to criminalize “hate speech,” while many European states’ laws do so in at least some circumstances.<sup>15</sup> Moreover, there is no single authoritative international court that adjudicates allegations that a state has violated its treaty obligations to protect freedom of expression.

As a result, human rights bodies issue most of the international decisions regarding free expression. As set forth below, the WGAD considers dozens of free expression cases every year. And the Human Rights Committee (HRC) was established, in part, to monitor State Party compliance with the ICCPR.<sup>16</sup> But the authority of such bodies is limited. The HRC, for example, primarily has jurisdiction over claims involving states that have joined the ICCPR’s Optional Protocol I—and only 117 of the 173 ICCPR States Parties have done so.<sup>17</sup> (The approximately twenty states that have not joined the ICCPR have, of course, also not ratified Optional Protocol I, and so also fall outside the HRC’s jurisdiction.) Moreover, the HRC is not a court and cannot issue binding decisions. Instead, it issues “Views” that states are called upon to take “into consideration in good faith.”<sup>18</sup>

Substantively, international human rights bodies have typically held that, for a restriction on free expression to be justifiable under international law, it must both be implemented for one of the legitimate purposes identified in Articles 19 and 20 of the ICCPR<sup>19</sup> and meet three further requirements. First, it must be *legal*, in that it is prescribed by law and sufficiently clear for officials to implement and citizens to follow.<sup>20</sup> Second, it must be *necessary* to achieving that legitimate purpose. Third, it must be *proportional*, in that the legitimate purpose could not be achieved with any measure that is less restrictive of free expression.<sup>21</sup> A state seeking to restrict expression bears the burden of establishing that the restriction in question satisfies all three of those requirements.<sup>22</sup>

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<sup>15</sup> See, e.g., Roni Cohen, *Regulating Hate Speech: Nothing Customary About It*, 15 CHI. J. INT’L L. 229, 238, 244 (2014).

<sup>16</sup> See ICCPR arts. 28, 40, 41.

<sup>17</sup> See Optional Protocol to the International Convention on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR Optional Protocol]. The HRC may also acquire jurisdiction over certain inter-state complaints, as set forth in Article 41 of the ICCPR.

<sup>18</sup> European Commission for Democracy through Law (Venice Commission), *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts* ¶ 78, Study No. 690/2012 (Dec. 8, 2014) [hereinafter Study No. 690/2012], <https://perma.cc/M7P9-Z3C7>.

<sup>19</sup> See ICCPR arts. 19, 20.

<sup>20</sup> See General Comment 34, *supra* note 2, ¶ 25.

<sup>21</sup> See *id.* ¶¶ 22, 33.

<sup>22</sup> See *id.* ¶ 27.

### III. THE WORKING GROUP ON ARBITRARY DETENTION

The WGAD, created in 1991 by the since-disbanded Commission on Human Rights, is one of the lesser-known United Nations Special Procedures. The Commission established a five-member working group, initially empowered to act for a three-year period.<sup>23</sup> The Commission gave the group two primary mandates: (i) “investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant legal standards,” and (ii) present reports to the Commission on its findings.<sup>24</sup> Advocates of establishing a body like the WGAD had pushed for “a thematic mechanism on the wrongful deprivation of liberty,” reasoning that this was “the most widespread violation of individual civil rights.”<sup>25</sup>

After its initial three-year term, the WGAD’s mandate has been continually extended, and it has now operated for over thirty years.<sup>26</sup> When the Commission was replaced with the Human Rights Council,<sup>27</sup> the WGAD came under the Council’s supervision.<sup>28</sup> It is presently working under a three-year extension promulgated in October 2022.<sup>29</sup>

Because the WGAD was not established by treaty or by a body authorized to issue binding determinations, its decisions do not legally bind states.<sup>30</sup> The Human Rights Council has, however, called on states to give “due consideration” to the WGAD’s Opinions and Appeals.<sup>31</sup>

WGAD is an unusually quasi-judicial Special Procedure: unlike others, it does not merely “engage in dialogic processes with States.” Instead, it provides

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<sup>23</sup> U.N. Comm’n on Hum. Rts., *Question of Arbitrary Detention*, U.N. Doc. E/CN.4/RES/1991/42 (Mar. 5, 1991).

<sup>24</sup> *Id.* ¶¶ 2, 5; see also U.N. Hum. Rts. Council, *Methods of Work of the Working Group on Arbitrary Detention* ¶ 1, U.N. Doc. A/HRC/36/38 (July 13, 2017) [hereinafter WGAD Methods of Work].

<sup>25</sup> Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT’L L. 709, 710 (1991).

<sup>26</sup> See Human Rights Council Res. 42/22, U.N. Doc. A/HRC/RES/42/22 (Sept. 26, 2019) [hereinafter Resolution 42/22] (reaffirming the WGAD’s mandate).

<sup>27</sup> See Rosa Freedman, *The U.N. Human Rights Council: More of the Same?*, 31 WISC. INT’L L.J. 208, 209 (2013) (explaining that the Commission was replaced due to perceptions that “selectivity, bias, and partiality increasingly dominated its proceedings”).

<sup>28</sup> See U.N. G.A. Res. 60/251 ¶ 6 (Mar. 15, 2006).

<sup>29</sup> See Human Rights Council Res. 51/8, U.N. Doc. A/HRC/RES/51/8 (Oct. 12, 2022) [hereinafter Resolution 51/8].

<sup>30</sup> See Jared Genser & Margaret Winterkorn-Meikle, *The Intersection of Politics and International Law: The Working Group on Arbitrary Detention in Theory and Practice*, 39 COLUM. HUM. RTS. L. REV. 687, 688–89 (2008) (WGAD “relies on communication among states, policy-makers, and advocates to encourage governments to implement its recommendations”).

<sup>31</sup> See, e.g., Resolution 51/8, *supra* note 29, ¶ 8(a); see also Resolution 42/22, *supra* note 26, ¶ 5(a).

both complainants and states the opportunity to make submissions in an adversarial process and then “make[s] its own factual or legal determinations.”<sup>32</sup>

While the resolution establishing the WGAD did not exhaustively define “arbitrary detention,” the rejection of arbitrary detention had already been a prominent feature of both the UDHR and the ICCPR.<sup>33</sup> Since its inception, the WGAD has further clarified the prohibitions on arbitrary detention by promulgating a four-factor test for determining when detention is arbitrary, which requires findings of (1) inappropriateness, (2) injustice, (3) lack of predictability, and (4) lack of due process.<sup>34</sup> Detention that is consistent with both domestic law and international standards is not legally arbitrary.<sup>35</sup>

The WGAD has identified five categories of detention which may be arbitrary:

- Category I: when it is “clearly impossible” to invoke any legal basis for a person’s detention;<sup>36</sup>
- Category II: when the “deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13–14 and 18–21 of the [UDHR] and, insofar as States Parties are concerned, by articles 12, 18–19, 21–22 and 25–27 of the [ICCPR]”;<sup>37</sup>
- Category III: when a person’s fair trial rights have been violated so gravely as to render their detention arbitrary;<sup>38</sup>
- Category IV: when a migrant has been subjected to prolonged administrative detention without the possibility of review;<sup>39</sup> and
- Category V: when a person has been deprived of their liberty on a basis that is discriminatory under international law.<sup>40</sup>

Free expression claims fall under Category II, which addresses detention in violation of human rights protections including the free expression provisions of the ICCPR and UDHR, among others.<sup>41</sup>

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<sup>32</sup> Beth van Schaak, *Teaching International Law in Pursuit of Justice*, 54 CASE W. RES. J. INT’L L. 201, 215–16 (2022).

<sup>33</sup> See UDHR art. 9; see also ICCPR art. 9.

<sup>34</sup> See Leigh Toomey, *The Declaration Against Arbitrary Detention in State-to-State Relations*, 35 HARV. HUM. RTS. J. 233, 234 (2022) (citing WGAD, *Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under Customary International Law* ¶ 61, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012)).

<sup>35</sup> See U.N. Off. of the High Comm’r for Hum. Rts., *Fact Sheet No. 26, The Working Group on Arbitrary Detention* 5 (May 1, 2000) [hereinafter *Fact Sheet No. 26*], <https://perma.cc/6CF4-KREK>.

<sup>36</sup> WGAD Methods of Work, *supra* note 24, ¶ 8(a).

<sup>37</sup> *Id.* ¶ 8(b).

<sup>38</sup> *Id.* ¶ 8(c).

<sup>39</sup> *Id.* ¶ 8(d).

<sup>40</sup> *Id.* ¶ 8(e).

<sup>41</sup> See generally Part II *supra*.

Under WGAD precedent, detention of a person based on their exercise of protected free expression is always arbitrary: “Any law that has the effect of criminalizing the exercise of a fundamental right can never serve as the adequate legal basis for an arrest or detention because it is a *per se* violation of customary international law.”<sup>42</sup> Consequently, analyzing free expression claims has become an important part of the WGAD’s work.<sup>43</sup>

#### IV. RECENT WGAD OPINIONS

Indeed, free expression claims are addressed in a majority of the WGAD’s recent opinions.<sup>44</sup> Between 2021 and 2022, the WGAD issued opinions on 144 cases.<sup>45</sup> Of those 144 cases, 83 (59%) addressed freedom of expression.<sup>46</sup> Of those 83 cases, at least one detainee won in 75 cases (90%), the government prevailed in four cases (5%), and four had no clear ruling on the expression claim (5%).<sup>47</sup> All told, a clear majority of *all* WGAD opinions (52%) included findings that a detainee’s free expression rights had been violated.<sup>48</sup> The sheer quantity of WGAD cases addressing free expression demands attention.

Beyond the quantity of opinions, the WGAD merits particular attention from detainees and their counsel for two reasons. First, as international forums go, the WGAD is valuable: it has broader jurisdiction, exercises it more quickly, and carries similar weight to other human rights bodies. Second, WGAD’s recent cases reflect strong protections for free expression. This Part addresses each of those factors in turn.

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<sup>42</sup> AM. UNIV. CTR. FOR HUM. RTS. AND HUMANITARIAN L., THE LEGAL METHODS AND JURISPRUDENCE OF THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION (2015–2018): AN INTRODUCTION FOR PRACTITIONERS 40 (2021) [hereinafter LEGAL METHODS 2015–2018], <https://perma.cc/C5GB-QZW4> (“Cases considered under Category II often include the exercise of the fundamental rights of . . . freedom of opinion and expression . . .”).

<sup>43</sup> *See id.*; *see also* JARED GENSER, THE U.N. WORKING GROUP ON ARBITRARY DETENTION: COMMENTARY AND GUIDE TO PRACTICE 168–69 (2020), <https://perma.cc/EMG6-KKTY>.

<sup>44</sup> Data is based on the author’s original review of opinions available on the WGAD online repository. *Opinions Adopted by the Working Group for Arbitrary Detention*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://perma.cc/6WEP-8LSM>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> In one case, the WGAD found that one detainee’s detention was based on protected expression but was unable to conclude that the other detainee’s expression could not legitimately be restricted. *See generally* WGAD Opinion No. 50/2022 concerning Sultana Khaya and Laurant Khaya (Morocco), U.N. Doc. A/HRC/WGAD/2022/50 (Jan. 24, 2023).

<sup>48</sup> *Opinions Adopted by the Working Group for Arbitrary Detention*, *supra* note 44.



## A. The WGAD Is a Valuable Forum

The first lesson from recent opinions is practical: the WGAD is a valuable forum for detainees, whose counsel should make broader use of it. By comparison to the HRC or other mechanisms, the WGAD has three critical advantages for a detainee.

First, the WGAD asserts universal jurisdiction: it “accepts complaints concerning deprivations of liberty by any State.”<sup>49</sup> States do not need to opt into the WGAD’s jurisdiction before it can review claims against them, as is true for other international bodies. So whereas the WGAD reviews claims against any country in the world, the HRC, for instance, has jurisdiction over claims against only 117 states, which themselves are home to less than half of the world’s population.<sup>50</sup>

Second, the WGAD has immediate jurisdiction. It “does not require local remedies to be exhausted in order for a communication to be declared admissible.”<sup>51</sup> Because satisfying other mechanisms’ exhaustion requirements may require years of litigation in domestic courts, the WGAD is “often the only swift route to an international legal opinion.”<sup>52</sup>

Third, the WGAD exercises its jurisdiction efficiently. Compared to other U.N. bodies and regional human rights courts, the WGAD resolves cases very quickly: it decides a typical case in six months to one year.<sup>53</sup>

Moreover, WGAD’s decisions are entitled to similar legal weight to those of the HRC itself: its Opinions receive “due consideration,” while the HRC’s Views are entitled to “consideration in good faith.”<sup>54</sup> Indeed, while the WGAD’s Opinions are by no means binding, they had resulted in the release of more than 1,600 detainees by 2018.<sup>55</sup>

In sum, compared to other forums, the WGAD has structural advantages in providing detainees with access to justice and a record of prompting the release of individuals who have been arbitrarily detained, and it has no concrete disadvantages.

And when WGAD publishes an opinion, detainees win. As noted above, a review of every WGAD opinion issued in 2021 and 2022 reflected that in more than 90% of cases in which detainees asserted that their detention was arbitrary because it was based on protected free expression and the WGAD issued a

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<sup>49</sup> LEGAL METHODS 2015–2018, *supra* note 42, at 10.

<sup>50</sup> See ICCPR Optional Protocol.

<sup>51</sup> *Fact Sheet No. 26*, *supra* note 35, at 5.

<sup>52</sup> GENSER, *supra* note 43, at 15.

<sup>53</sup> *Id.* at 9.

<sup>54</sup> Study No. 690/2012, *supra* note 18, ¶ 78.

<sup>55</sup> GENSER, *supra* note 43, at 100.

published opinion, the detainees prevailed.<sup>56</sup> The WGAD issued an opinion rejecting such claims in only four cases.<sup>57</sup> On closer examination, those four cases do not significantly diminish the broad free expression protections in the WGAD’s jurisprudence. Indeed, in three of the four cases the WGAD simply did not accept the detainee’s assertion that their detention had been based on expression as a matter of *fact*—they did not permit any government restriction of the right.<sup>58</sup>

Only one WGAD opinion seemed to affirm detention that the WGAD acknowledged had been based on expression. In that case, the WGAD concluded the defendant had been part of an organization’s “Central Executive Committee” at the time that Committee issued statements that, according to the state, incited violence and caused “considerable loss of life.”<sup>59</sup> In the circumstances of that case, the WGAD did not second-guess the state’s interpretation of the evidence.<sup>60</sup> As set forth above, it is well-established that states may prohibit incitement of violence,<sup>61</sup> so although this case was about expression, it was not about *protected* expression. In the remaining seventy-five cases that involved free expression claims—the overwhelming majority, detainees prevailed on such claims.<sup>62</sup>

## B. Robust Interpretation of the Right of Free Expression

Those detainees prevailed because the WGAD took a broad approach to protected free expression: protecting expression in various media; providing

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<sup>56</sup> The WGAD’s jurisprudence reflects a supermajority of published opinions in favor of detainees on other types of claims as well. *See, e.g.*, Toomey, *supra* note 34, at 234 (noting that in all of the relevant opinions Toomey reviewed, “the Working Group found that foreign and dual nationals had been arbitrarily detained due to discrimination based on their nationality, or because they were not afforded their right to consular assistance”).

<sup>57</sup> While there is no conclusive data, it appears that the WGAD may issue opinions in respect of only a small percentage of the communications it receives. *See* LEGAL METHODS 2015–2018, *supra* note 42, at 7–8.

<sup>58</sup> *See, e.g.*, WGAD Opinion No. 19/2021 concerning Theodory Faustine Giyan (Tanzania) ¶ 52, U.N. Doc. A/HRC/WGAD/2021/19 (June 30, 2021); WGAD Opinion No. 14/2022 concerning Teresita Naul (Philippines) ¶ 87, U.N. Doc. A/HRC/WGAD/2022/14 (June 14, 2022); WGAD Opinion No. 48/2022 concerning Roland Carreño Gutiérrez (Venezuela) ¶¶ 76–78, U.N. Doc. A/HRC/WGAD/2022/48 (Nov. 11, 2022).

<sup>59</sup> WGAD Opinion No. 38/2021 concerning Cihan Erdal (Turkey) ¶ 87, U.N. Doc. A/HRC/WGAD/2021/38 (Oct. 1, 2021).

<sup>60</sup> *See id.* ¶ 87.

<sup>61</sup> *See* Part II *supra*; notes 11–14 and accompanying text.

<sup>62</sup> The only other case where WGAD seemed to accept the possibility of detention was in its Opinion No. 50/2022. *See generally* Opinion No. 50/2022, *supra* note 47. In that case, both detainees prevailed. One detainee’s expression was found to be based on protected expression, among other violations. The WGAD was not able to find that the other detainee’s expression had been entirely exempt from permissible restriction, though it also did not explicitly find that the expression *could* be restricted.

heightened protections to those most at risk; and going beyond the literal language of treaty law to effectuate protections. Its substantive rulings on matters of free expression indicate that it strongly favors expansive interpretations of international law that broadly protect free expression and narrow states' legal rights to restrict it, at least in the context of detention.

### 1. Broad conception of protected free expression

The WGAD has repeatedly affirmed a very broad conception of what constitutes protected free expression. In particular, its opinions seem to suggest that only violent expression or expression that incites violence may be criminalized. In one notable case, considering the detention of Tajikistani lawyer Abdulmajid Rizoiev, the WGAD rejected the state's claim that Facebook posts by Rizoiev were sanctionable "extremist materials."<sup>63</sup> Explaining that the posts were neither "violent [n]or incited violence," it deemed Rizoiev's detention a violation of Article 19 of the ICCPR.<sup>64</sup> While the ICCPR provides for other limitations on protected free expression, the WGAD did not consider those before finding Rizoiev's detention arbitrary.<sup>65</sup>

The WGAD conducted similar analyses in other cases. When considering the detention of Vietnamese blogger and human rights defender Nguyen Ngoc Anh, it held that the government had not shown that his online posts criticizing government responses to natural disasters were "intended or had the potential to incite violent behavior."<sup>66</sup> In the case of Indian activist Gokarakonda Naga Saibaba, it held that Saibaba's conviction for aiding and abetting terrorism by criticizing counterterrorist operations violated his right to free expression, relying on the fact that he had called for nonviolence as evidence of the state's wrongful conduct.<sup>67</sup> It also ruled in favor of several Kazakhstanis who had used WhatsApp to discuss Muslim religious doctrine, holding that their convictions for propaganda of terrorism and inciting religious discord violated freedom of expression because their messages had been quotes (or paraphrases of quotes) from religious scholars, and because there was no evidence either that the quotes had been intended to incite violence or that they actually did so.<sup>68</sup> Similarly, in

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<sup>63</sup> WGAD Opinion No. 39/2022 concerning Abdulmajid Rizoiev (Tajikistan) ¶ 22, U.N. Doc. A/HRC/WGAD/2022 (Sept. 29, 2022).

<sup>64</sup> *Id.* ¶¶ 58–61.

<sup>65</sup> *See* ICCPR arts. 19–20.

<sup>66</sup> WGAD Opinion No. 43/2022 concerning Nguyen Ngoc Anh (Vietnam) ¶ 95, U.N. Doc. A/HRC/WGAD/2022/43 (Nov. 10, 2022).

<sup>67</sup> *See* WGAD Opinion No. 21/2021 concerning Gokarakonda Naga Saibaba (India) ¶ 79, U.N. Doc. A/HRC/WGAD/2021/21 (June 17, 2021).

<sup>68</sup> *See* WGAD Opinion No. 33/2021 concerning Azamat Umbetaliyev, Beket Mynbasov, Samat Adilov, Zhuldzybek Taurbekov, Zhasulan Iskakov, Nazim Abdрахmanov, Ernar Samatov, and Bolatbek Nurgaliyev (Kazakhstan) ¶ 69, U.N. Doc. A/HRC/WGAD/2021/33 (Dec. 14, 2021).

condemning the detention of a Kazakhstani activist who had criticized the government's COVID policy, the WGAD emphasized that there was no evidence he had incited violence or unrest.<sup>69</sup>

The WGAD's trend of holding *all* non-violent expression protected notably goes further than the ICCPR requires; indeed, the ICCPR authorizes States Parties to restrict not only expression that incites hatred, discrimination, and discriminatory violence, but also expression that threatens public health, public morals, or public order.<sup>70</sup>

## 2. Recognition of free expression's intersectionality

WGAD jurisprudence reflects a broad understanding that free expression is an intersectional right, particularly essential to people who are otherwise marginalized by their own governments. WGAD cases have involved the arbitrary detention of members of religious groups targeted by their governments for persecution;<sup>71</sup> advocates for the political self-determination of minority groups;<sup>72</sup> women's rights advocates;<sup>73</sup> a reporter deemed "anti-State";<sup>74</sup> opponents of government COVID policies;<sup>75</sup> and political dissidents,<sup>76</sup> among many others. Relevant to the content of their expression, the WGAD has emphasized the

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<sup>69</sup> See WGAD Opinion No. 2/2022 concerning Alnur Ilyashev (Kazakhstan) ¶¶ 76, 80, U.N. Doc. A/HRC/WGAD/2022/2 (May 13, 2022).

<sup>70</sup> ICCPR arts. 19–20.

<sup>71</sup> See, e.g., WGAD Opinion No. 33/2021, *supra* note 68, ¶¶ 66–67, 69; WGAD Opinion No. 22/2022 concerning Ahnaf Jazeem (Sri Lanka) ¶¶ 74–80, U.N. Doc. A/HRC/WGAD/2022/22 (June 7, 2022); WGAD Opinion No. 80/2021 concerning Jagtar Singh Johal (India) ¶ 105, U.N. Doc. A/HRC/WGAD/2021/80 (May 4, 2022).

<sup>72</sup> See, e.g., WGAD Opinion No. 25/2022 concerning Nwannekaenyi Nnamdi Kenny Okwu-Kanu (Nigeria and Kenya) ¶¶ 51–52, U.N. Doc. A/HRC/WGAD/2022/25 (Aug. 17, 2022); WGAD Opinion No. 57/2021 concerning Stan Swamy (India) ¶¶ 59–64, U.N. Doc. A/HRC/WGAD/2021/57 (Feb. 14, 2022); WGAD Opinion No. 50/2022, *supra* note 47, ¶ 90.

<sup>73</sup> See, e.g., WGAD Opinion No. 54/2022 concerning Nina Taghavi (Iran) ¶ 83, U.N. Doc. A/HRC/WGAD/2022/54 (Nov. 29, 2022); WGAD Opinion No. 15/2021 concerning Nasibe Shamsaei (Iran and Turkey) ¶ 60, U.N. Doc. A/HRC/WGAD/2021/15 (June 23, 2021).

<sup>74</sup> WGAD Opinion No. 17/2022 concerning Kilwe Adan Farah (Somalia) ¶ 55, U.N. Doc. A/HRC/WGAD/2022/17 (May 31, 2022). The WGAD has considered journalists to be "human rights defenders" whose speech is entitled to particular protection. See, e.g., WGAD Opinion No. 11/2021 concerning Le Huu Minh Tuan (Vietnam) ¶¶ 79–80, U.N. Doc. A/HRC/WGAD/2021/11 (June 7, 2021); WGAD Opinion No. 40/21 concerning Pham Doan Trang (Vietnam) ¶¶ 78–79, U.N. Doc. A/HRC/WGAD/2021/40 (Oct. 25, 2021).

<sup>75</sup> See, e.g., WGAD Opinion No. 2/2022, *supra* note 69, ¶¶ 76, 80.

<sup>76</sup> See, e.g., WGAD Opinion No. 48/2021 concerning Sharofiddin Gadoev (Russia and Tajikistan) ¶ 68, U.N. Doc. A/HRC/WGAD/2021/48 (Dec. 15, 2021); WGAD Opinion No. 79/2021 concerning Zyad el-Elaimy and Louaya Sabri Alshahat Abdelhalim (Egypt) ¶ 76, U.N. Doc. A/HRC/WGAD/2021/79 (July 7, 2022); WGAD Opinion No. 81/2021 concerning Paul Rusesabagina (Rwanda) ¶ 92, U.N. Doc. A/HRC/WGAD/2021/81 (Mar. 18, 2022).

“particularly high” value of “uninhibited expression” in the context of public debate about political figures and political issues.<sup>77</sup>

In such cases, the WGAD has emphasized that expression by human rights defenders and other types of political and humanitarian expression must be particularly protected. At times, it has stated that these types of expression are entirely exempt from permissible regulation. For instance, it has written that ICCPR Article 19(3)’s limitations on the right to free expression could not justify restrictions on “advocacy of multiparty democracy, democratic tenets and human rights,”<sup>78</sup> and has approvingly quoted an HRC statement asserting that numerous categories of speech should “never” be subject to legal restrictions, including

“[d]iscussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations, or political activities, including for peace or democracy; and the expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.”<sup>79</sup>

More commonly, WGAD has articulated the protections for such expression as “heightened.”<sup>80</sup> For instance, when considering the cases of “human rights defenders,” the WGAD declared that restrictions on their expression would be subject to “particularly intense review”<sup>81</sup> and “strict scrutiny,”<sup>82</sup> adding that to detain human rights defenders because of their work would violate their rights to equality under the law.<sup>83</sup>

### 3. Protecting expression online

The WGAD has emphasized that online expression carries the same protection from government interference as expression through other, more

<sup>77</sup> See, e.g., WGAD Opinion No. 19/2021, *supra* note 58, ¶ 51; WGAD Opinion No. 23/2021 concerning Sergey Tihanovski (Belarus) ¶ 84, U.N. Doc. A/HRC/WGAD/2021/23 (Oct. 14, 2021).

<sup>78</sup> See WGAD Opinion No. 23/2021, *supra* note 77, ¶ 82.

<sup>79</sup> WGAD Opinion No. 36/2021 concerning Nguyễn Năng Tĩnh (Vietnam) ¶ 79, U.N. Doc. A/HRC/WGAD/2021/36 (Nov. 4, 2021); WGAD Opinion No. 75/2021 concerning Roz Sokhet (Cambodia) ¶ 57, U.N. Doc. A/HRC/WGAD/2021/75 (Jan. 27, 2022).

<sup>80</sup> See, e.g., WGAD Opinion No. 40/2022 concerning Tran Duc Thach (Vietnam) ¶ 26, U.N. Doc. A/HRC/WGAD/2022/40 (Nov. 4, 2022); WGAD Opinion No. 43/2022, *supra* note 66, ¶ 97.

<sup>81</sup> See, e.g., WGAD Opinion No. 40/2022, *supra* note 80, ¶ 76; WGAD Opinion No. 43/2022, *supra* note 66, ¶ 97; WGAD Opinion No. 11/2021, *supra* note 74, ¶ 79; WGAD Opinion No. 40/2021 concerning Pham Doan Trang (Vietnam) ¶¶ 78–79, U.N. Doc. A/HRC/WGAD/2021/40 (Oct. 25, 2021).

<sup>82</sup> WGAD Opinion No. 53/2022 concerning Haytam Fawzy Mohamden (Egypt) ¶ 78, U.N. Doc. A/HRC/WGAD/2022/53 (Oct. 5, 2022); WGAD Opinion No. 80/2021 concerning Jagtar Singh Johal (India) ¶ 105, U.N. Doc. A/HRC/WGAD/2021/80 (May 4, 2021).

<sup>83</sup> See, e.g., WGAD Opinion No. 37/2021 concerning Muhammad Ismail (Pakistan) ¶ 82, U.N. Doc. A/HRC/WGAD/2021/37 (Oct. 1, 2021).

traditional media. It set out this principle most clearly in its Deliberation Number 8,<sup>84</sup> but has repeatedly reaffirmed it and issued opinions condemning detention based on online expression over the past two years.<sup>85</sup>

Although WGAD's opinions on online speech have largely focused on the messages themselves and not the media through which they were transmitted, they have nonetheless had the effect of robustly protecting free expression on the internet. Among them, the WGAD found that the use of a secure messaging application—in this case, ByLock—constituted protected expression;<sup>86</sup> that detention as a sanction for nonviolent posts on various social media platforms was arbitrary;<sup>87</sup> that detention based on messages shared in a WhatsApp group was arbitrary;<sup>88</sup> that pundits who used the internet for their work were entitled to the same heightened protection as traditional journalists;<sup>89</sup> and that the detention of the editor-in-chief of a Telegram channel violated his right to free expression.<sup>90</sup>

#### 4. Willingness to reevaluate factual findings

Cases involving persons detained pursuant to a criminal conviction typically come to the WGAD after a full domestic criminal process, including the pressing of formal charges, introduction and testing of evidence, and adjudication by a judge or jury. Some reviewing bodies might give significant deference to factual

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<sup>84</sup> WGAD, *Deliberation No. 8 on Deprivation of Liberty Linked to/Resulting from the Use of the Internet*, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005).

<sup>85</sup> *See, e.g.*, WGAD Opinion No. 71/2021 concerning Sherwan Amin Naou, Kahdar Hammad Amin Zebari, Ayaz Karam Rachid, Hariwan Issa Mohammad, and Mulla Shafan Saeed Omar Brushki (Iran) ¶ 74, U.N. Doc. A/HRC/WGAD/2021/71 (Dec. 15, 2021); WGAD Opinion No. 81/2021, *supra* note 76, ¶ 94; WGAD Opinion No. 83/2021 concerning Ahmed Samir Santawy (Egypt) ¶ 77, U.N. Doc. A/HRC/WGAD/2021/83 (Jan. 28, 2022).

<sup>86</sup> WGAD Opinion No. 8/2022 concerning Alettin Duman and Tamer Tibik (Malaysia and Turkey) ¶¶ 99–100, U.N. Doc. A/HRC/WGAD/2022/8 (June 7, 2022).

<sup>87</sup> *See, e.g.*, WGAD Opinion No. 53/2021 concerning Ahmed Majed Ahmed al-Atoum (United Arab Emirates) ¶¶ 90–92, U.N. Doc. A/HRC/WGAD/2021/53 (Dec. 17, 2021); WGAD Opinion No. 54/2021 concerning Zhang Baocheng (China) ¶¶ 71–75, U.N. Doc. A/HRC/WGAD/2021/54 (Feb. 16, 2022); WGAD Opinion No. 64/2021 concerning Anchan Preelerd (Thailand) ¶¶ 60–69, U.N. Doc. A/HRC/WGAD/2021/64 (Jan. 27, 2022); WGAD Opinion No. 71/2021, *supra* note 85, ¶ 75; WGAD Opinion No. 75/2021, *supra* note 79, ¶ 56; WGAD Opinion No. 83/2021, *supra* note 85, ¶ 78.

<sup>88</sup> *See, e.g.*, WGAD Opinion No. 33/2021, *supra* note 68, ¶¶ 66, 69; WGAD Opinion No. 22/2022 concerning Ahnaf Jazeem (Sri Lanka) ¶¶ 74–80, U.N. Doc. A/HRC/WGAD/2022/22 (June 7, 2022).

<sup>89</sup> *See, e.g.*, WGAD Opinion No. 36/2021, *supra* note 79, ¶ 82.

<sup>90</sup> *See, e.g.*, WGAD Opinion No. 50/2021 concerning Raman Pratasevich (Belarus) ¶¶ 72–83, U.N. Doc. A/HRC/WGAD/2022/22 (Dec. 9, 2022).

findings arising out of such a process and indeed, at times, the WGAD has articulated a similarly restrained approach.<sup>91</sup>

But in several cases, WGAD has declined to follow domestic courts' conclusions. For example, it has rejected domestic court findings that speech was intended to overthrow the Vietnamese government;<sup>92</sup> accepted sources' claims that charges were "not supported by detailed evidence" and therefore rejected the resulting conviction;<sup>93</sup> and found there was no evidence to support a conviction for colluding to violate Vietnamese law.<sup>94</sup> In one case, it found detention on the basis of murder convictions to be arbitrary because, after reevaluating the evidence in the domestic trial, it found that the detention was actually based on the defendants' exercise of freedom of expression and the evidence did not show that they were involved in the murders.<sup>95</sup>

This more searching standard of review may open the door to stronger protection of expression by facilitating review of cases where a detainee is not directly prosecuted for their expression, but state opposition to the detainee's expression motivates the use of other charges as a pretext for detention. However, in many of the cases listed above, the WGAD also found that detention was arbitrary because there was no legal basis to justify it or because the defendant's fair trial rights had been violated. It remains to be seen whether WGAD's close factual review will become common in cases without similar procedural flaws.

### 5. Willingness to evaluate government intentions

The WGAD has also expressed willingness to "look behind" charges in some cases, considering whether a state intended to target a defendant based on that defendant's free expression, and—if the government *did* intend to do so—deeming detention arbitrary even if the expression did not form the gravamen of the charges against the detainee.

In some cases, the WGAD has found direct evidence of intentional targeting. In a case arising in Somalia, WGAD noted that it had received uncontroverted allegations that, at the defendant's trial, the prosecutor had called the defendant a "bad critic" and said "the only way the authorities can get revenge is to put [him] to the military court which will sentence him to death so that [he]

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<sup>91</sup> See, e.g., WGAD Opinion No. 38/2021, *supra* note 59, ¶ 88; WGAD Opinion No. 2/2022, *supra* note 69, ¶ 74.

<sup>92</sup> See, e.g., WGAD Opinion No. 40/2022, *supra* note 80, ¶ 79.

<sup>93</sup> See, e.g., WGAD Opinion No. 41/2022 concerning Qin Yongpei (China) ¶ 51, U.N. Doc. A/HRC/WGAD/2022/41 (Sept. 28, 2022).

<sup>94</sup> See, e.g., WGAD Opinion No. 11/2021, *supra* note 74, ¶ 77.

<sup>95</sup> See WGAD Opinion No. 4/2021 concerning Mohamed Ramadhan Isa Ali Husain and Husain Ali Moosa Hassan Mohamed (Bahrain) ¶¶ 90–97, U.N. Doc. A/HRC/WGAD/2021/4 (May 31, 2021).

will not criticize the state in the future.”<sup>96</sup> WGAD noted that evidence and found the defendant’s detention arbitrary.

The WGAD has also been willing to rely on circumstantial evidence that defendants were targeted based on their expression. In one opinion, the WGAD considered the case of a Kazakh labor rights activist convicted on charges similar to aggravated assault due to a fight with four other men, one of whom he had seriously injured.<sup>97</sup> Given that the government had unsuccessfully tried to prosecute the activist previously, that there was uncontested evidence that the alleged victims were pressured to request that the case be reopened, and that the victims themselves were not prosecuted for their role in the fight, the WGAD determined that “the basis for [the activist’s] arrest and detention” was his exercise of freedom of expression and other protected rights—not the assault itself.<sup>98</sup> And in another case concerning the detention of a Tanzanian political dissident, the WGAD similarly took into account the Tanzanian government’s arrests of many members of his political party in concluding that he had been detained because of his exercise of protected free expression, rather than for the conduct that supported his conviction.<sup>99</sup> In both cases, it found the detention arbitrary.

#### 6. Rejection of detention based on vague and overbroad laws

The WGAD repeatedly concluded that national laws restricting free expression which it deemed vague or overbroad violated the principle of legality, and it has therefore deemed detention based on such laws to be arbitrary.<sup>100</sup> In several instances, it has even gone so far as to reject laws that seem to directly adopt restrictions on free expression permitted by the ICCPR.

For instance, while the ICCPR authorizes restrictions on free expression “for the protection of national security,”<sup>101</sup> the WGAD has determined that national statutes criminalizing “colluding against national security,” “propaganda against the State,” publishing “distorted information against the government,” “undermining the unity of the country,” or endangering “social order” were vague and overbroad, and has consequently found prosecutions and detentions under them to be arbitrary.<sup>102</sup> Similarly, it has deemed laws prohibiting the dissemination

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<sup>96</sup> WGAD Opinion No. 17/2022, *supra* note 74, ¶ 59.

<sup>97</sup> See WGAD Opinion No. 5/2021 concerning Erzhon Elshibayev (Kazakhstan) ¶¶ 9, 12–13, U.N. Doc. A/HRC/WGAD/2021/5 (June 4, 2021).

<sup>98</sup> *Id.* ¶¶ 48–49.

<sup>99</sup> WGAD Opinion No. 3/2022 concerning Freeman Mbowe (United Republic of Tanzania) ¶ 61, U.N. Doc. A/HRC/WGAD/2022/3 (June 16, 2022).

<sup>100</sup> See, e.g., WGAD Opinion No. 25/2021 concerning Zhan Zhang, Mei Chen, and Wei Cai (China) ¶ 53, U.N. Doc. A/HRC/WGAD/2021/25 (Oct. 26, 2021).

<sup>101</sup> ICCPR art. 19(3)(b).

<sup>102</sup> See, e.g., WGAD Opinion No. 46/2022 concerning Arash Ganji, Keyvan Bajan, Baktash Abtin, and Reza Khandan Mahabadi (Iran) ¶¶ 63, 68, U.N. Doc. A/HRC/WGAD/2022/46 (Dec. 7, 2022);



of “false news or information” to be vague and consequently found detention on the basis of those laws to be inconsistent with the principle of legality.<sup>103</sup> And while the ICCPR permits restrictions on expression to protect public order—and, indeed, requires States Parties to restrict expression that advocates certain types of hatred or incites listeners to discrimination, hostility, or violence<sup>104</sup>—the WGAD has deemed laws criminalizing expression that incites discord on the same bases to be unlawfully vague.<sup>105</sup> The WGAD has even appeared to condemn laws prohibiting “propaganda for terrorism” on this basis.<sup>106</sup>

## V. CONCLUSION

The WGAD is a valuable yet underappreciated forum for the protection and definition of the right to free expression under international law. Its recent jurisprudence reflects high numbers of free expression cases as a percentage of its overall docket, robust interpretation of the right, and a high rate of success for detainees claiming their rights had been violated. Its recent jurisprudence highlights key developments in international free expression law, including rejecting the criminalization of nonviolent expression and expanding the protection of expression into new media. Both counsel for detainees (particularly dissidents and political prisoners) and scholars of international free expression law should pay close attention to its work.

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WGAD Opinion No. 54/2022 concerning Nina Taghavi (Iran) ¶¶ 78–79, 82, U.N. Doc. A/HRC/WGAD/2022/54 (Nov. 29, 2022); WGAD Opinion No. 64/2022 concerning Yalqun Rozi (China) ¶¶ 32–36, U.N. Doc. A/HRC/WGAD/2022/64 (Sept. 29, 2022); *see also* WGAD Opinion No. 6/2021 concerning Houayheuang Xayabouly (Laos) ¶ 60, U.N. Doc. A/HRC/WGAD/2021/6 (May 31, 2021); WGAD Opinion No. 11/2021, *supra* note 74, ¶¶ 67, 72–73; WGAD Opinion No. 15/2021, *supra* note 73, ¶¶ 64–65; WGAD Opinion No. 20/2022 concerning Vahid Afkari and Habib Afkari (Iran) ¶ 95, U.N. Doc. A/HRC/WGAD/2022/20 (June 16, 2022); WGAD Opinion No. 53/2021, *supra* note 87, ¶ 93; WGAD Opinion No. 71/2021, *supra* note 85, ¶ 81; WGAD Opinion No. 75/2021, *supra* note 79, ¶ 62–67.

<sup>103</sup> *See, e.g.*, WGAD Opinion No. 1/2021 concerning Esraa Abdel Fattah, Solafa Magdy, Hisham Fouad, Hossam Moanis, Adel Sabry, Moataz Wednan, Badr Mohammed Badr, Mahmoud Hussein, Mohamed Ibrahim Radwan, and Ismail al-Sayed Mohamed Omar Tawfik (Egypt) ¶ 91, U.N. Doc. A/HRC/WGAD/2021/1 (June 10, 2022); WGAD Opinion No. 11/2022 concerning Omar al Mukhtar Ahmed Al Dagueel (Libya) ¶ 52, U.N. Doc. A/HRC/WGAD/2022/11 (June 9, 2022); WGAD Opinion No. 35/2022 concerning Nguyen Bao Tien (Vietnam) ¶ 84, U.N. Doc. A/HRC/WGAD/2022/35 (June 2, 2022); *see also* WGAD Opinion No. 6/2021, *supra* note 102, ¶ 60; WGAD Opinion No. 18/2021 concerning Mohamed Abdiwahaab Nuur (Somalia) ¶¶ 50–51, U.N. Doc. A/HRC/WGAD/2021/18 (July 19, 2021); WGAD Opinion No. 25/2021, *supra* note 100, ¶ 60; WGAD Opinion No. 42/2021 concerning Hisham Abdelaziz Gharib and Bahaeldin Ibrahim Nemaala Elsayed (Egypt) ¶¶ 67–68, U.N. Doc. A/HRC/WGAD/2021/42 (Jan. 20, 2022); WGAD Opinion No. 17/2022, *supra* note 74, ¶¶ 62–63; WGAD Opinion No. 83/2021, *supra* note 85, ¶ 79.

<sup>104</sup> *See* ICCPR art. 19(3)(b).

<sup>105</sup> *See, e.g.*, WGAD Opinion No. 33/2021, *supra* note 68, ¶¶ 62–63.

<sup>106</sup> *Id.*