

United Nations Working Group on Arbitrary Detention decision on Assange: the balanced view

Liora Lazarus

1 March 2016

The UN WGAD [Assange decision](#) was initially met with incredulity and general ridicule from British officials, [legal academics](#) and the [international press](#). [Noah Feldman](#) was astonished, calling the decision ‘unjustified’. Many of the decisions detractors don’t like Assange and what he stands for. They think he is exploiting his status to avoid prosecution for rape, suggesting he is guilty of the offence. His supporters argue that the rape allegations are part of a grand conspiracy against Assange, and that their hero has been vindicated by the UN. Serious discussion needs to lie somewhere between these polar positions and address the core questions of human rights reasoning and institutional protection. Cooler contributions have followed my own initial [intervention](#) ([Kirsty Brimelow](#) QC, [Dinah PoKempner](#) General Legal Counsel to Human Rights Watch, [Balakrishnan Rajagopal](#), MIT Professor, and [Julian Braithwaite](#), UK Ambassador and Permanent Representative to the UN). This piece seeks to continue this trend, by examining the content and standing of the WGAD decision from a human rights lawyer’s perspective.

Some preliminary points

Mr. Assange has lived in the Ecuadorian Embassy since June 2012, after 550 days of house arrest and 10 days of confinement in Wandsworth prison. There is still no formal charge laid against him in Sweden ([Assange No. 2](#)). He does not know the full case against him. He has under domestic and international law, the right to be presumed innocent until proven guilty (Stefan Lindskog, Chairman of Swedish Supreme Court, [lecture](#) 2013). He has previously co-operated with the prosecutorial investigation in Sweden, and has since offered to co-operate through the Council of Europe ‘[mutual assistance](#)’ process. He has also offered to co-operate fully if given a further guarantee of non-refoulement to the US.

The UK is operating pursuant to the European Arrest Warrant procedure which is not without criticism. Two dissenting [UK Supreme Court](#) justices considered this EAW invalid under UK law because it was issued by a prosecutor and not a judge, and one dissenting [Swedish Supreme Court](#) judge considered its continued use disproportionate. After extensive [parliamentary](#) scrutiny, the EAW conditions have been tightened since the initial Assange [ruling](#) by the Supreme Court. Two key requirements now apply: that the EAW is issued by a ‘judicial authority’ and that its use is ‘proportionate’. Despite the impact these safeguards could have, the UK government argue that they do not apply retrospectively to Assange.

The mandate and composition of the UN WGAD

[Matthew Happold](#) argues that the WGAD cannot ‘issue binding decisions’ but rather ‘opinions’ which States are only under a duty to take ‘due consideration’, resulting in ‘a rather *weak obligation*’. This strict formalistic reading of international law discredits the UN human rights system as a whole, which depends almost entirely on bodies like the WGAD.

The [mandate](#) of the WGAD is clear (see UN Commission on Human Rights Resolution 1991/42 and subsequent resolutions outlined in para 1 of [HRC Resolution 30/69](#)) and includes investigating individual cases (Para 15, [HRC Resolution 1997/50](#)). It discharges its tasks according to [Basic Principles](#) which draw on the full body of international law sources. These are applied in an independent and exacting standard of review to national authorities, precisely because it is instituted to provide the highest expression of the review of arbitrary detention that can be made by a human rights body.

HRC Resolution 20/16 ([A/HRC/RES/20/16](#)) ‘requests States to take account of the Working Group’s views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken’ (para 3). The resolution also ‘encourages all States to give due consideration to the recommendations of the Working Group’ (para 6). Importantly, the European Court of Human Rights has recognised that ‘in view of the composition, functions, process complaints and investigative powers of this body,

the WGAD should be viewed as “a procedure of international investigation or settlement” within the meaning of Article 35 of the Convention’ ([Peraldi v France](#)).

The composition of the WGAD flows from its mandate as a body under the UN ‘special procedures’ process which stipulate either that a person of specific expertise (‘Special Rapporteur’) or a ‘working group of experts’ shall conduct its task. Judges and academic specialists both meet this benchmark of expertise, which explains why WGAD has included former judges and professors of law. [Marina Hyde](#)’s complaint that the WGAD is made up of ‘academics seemingly devoid of judicial expertise’ misses the point of the special procedures system, which (as with UN treaty bodies) is based clearly on expertise broadly understood and not only on judicial office.

We may disagree with the content of its decisions, but to deny the legal standing of the WGAD is to do wider damage to the UN human rights system as a whole and fails to take a [long view](#) of the conditions upon which international institutions rely.

The UN WGAD decision

In essence, the WGAD had to decide two questions: first, whether there was a ‘deprivation of liberty’ as opposed to a ‘restriction of liberty’; second, whether that deprivation of liberty was ‘arbitrary’.

In response to the first question, although the WGAD clearly accepted the argument that Assange’s conditions are not ‘self-imposed’, its decision failed to address this point directly. The discussion does not explicitly endorse Assange’s argument that his detention is involuntary, nor does it directly refute the dissenting argument on the WGAD that Assange is self-confined. This weakness in the report has been exploited by critics, and the arguments require elaboration.

The line between a ‘restriction of liberty’ and ‘deprivation of liberty’ is finely drawn in European human rights jurisprudence ‘as a matter of degree or intensity, but not one of nature or substance’ ([Guzzardi](#)). As counterintuitive as it may seem, liberty deprivation doesn’t consist only in the easily recognizable conditions of state detention. The conceptual grounds for describing Assange’s conditions as a form of

deprivation of liberty are arguable. To be clear, liberty must be capable of being realized in practice. Where exercising liberty has considerable coercive results, this constitutes a restriction of liberty in actuality. Assange can hardly be said to be voluntarily ‘self-confined’. He will be extradited to Sweden and detained there if he leaves the embassy, and he fears further extradition to the US and prosecution there. The fact that Assange is deliberately resisting arrest doesn’t resolve this issue, as this would be to argue that liberty is a right contingent on his co-operation. But liberty is not a privilege gained for good behavior, it is a right which demands justifications from those seeking its restriction.

To argue that Assange’s conditions are a ‘deprivation of liberty’ is not to argue that this deprivation is necessarily ‘arbitrary’. It is essential to demonstrate here that the onus of justification on the UK and Sweden for restricting Assange’s liberty is fulfilled. This relates to due diligence grounds as well as proportionality, and the requirements of proportionality will change over time. I do not share the WGAD view that Assange’s initial arrest was arbitrary. But as time moved on, the grounds for maintaining the stand-off with Assange needed to remain proportionate to the ends sought. As events unfolded there could have been another, less restrictive way of proceeding. For example, before issuing a EAW, the Swedish authorities could have followed the normal practice of interviewing Assange in a British police interview room. After Assange took residence in the Ecuadorian embassy they could have relied on ‘[mutual assistance](#)’ protocols, questioned Assange by video link, and given him the chance to respond to the allegations against him. The proportionality of the process has to be read as a whole.

This approach is accepted in principle by the majority of the Swedish court which noted with approval at that time that steps were being taken to interview Assange in London ([Case No. Ö 5880.14](#) of May 11, 2015, see [summary translation](#)). With the passage of time, this Court may well join the dissenting judgment of Justice Svante Johansson, that the conditions of the investigation have become disproportionate. There is now growing support in Sweden for this dissenting view ([Anne Ramberg](#), head of Sweden’s Bar Association; [Hans Corell](#), former Legal Counsel to the United Nations and Legal Adviser to the Swedish Ministry of Foreign Affairs; and [Sven-Erik Alhem](#), former Swedish chief prosecutor).

Reasonable and judicial minds have evidently differed on these issues, and emotions have run high. No doubt the initial outcry was coloured by views on the integrity of Assange himself. But human rights are not meant to favour the popular amongst us; they are meant to favour us all. Importantly, human rights limitations demand rigorous State justifications. Over time, these justifications have looked less convincing, and the WGAD is the body best placed to say so.