

THE UN WORKING GROUP ON ARBITRARY DETENTION

The United Nations Working Group on Arbitrary Detention is the first comprehensive review of the contributions of this important institution to understanding arbitrary detention today. The Working Group is a body of five independent human rights experts that considers individual complaints of arbitrary detention, adopting legal opinions as to whether a detention is compatible with states' obligations under international law. Since its establishment in 1991, it has adopted more than 1,200 case opinions and conducted more than 50 country missions. But much more than a jurisprudential review, these cases are presented in the book in the style of a treatise, where the widest array of issues on arbitrary detention are placed in the context of the requirements of multilateral treaties and other relevant international standards. Written for both practitioners and serious scholars alike, this book includes five case studies and a foreword by Archbishop Desmond M. Tutu.

Jared Genser is Managing Director of Perseus Strategies, a public interest law firm, and an adjunct professor of Law at Georgetown University Law Center. He also founded Freedom Now, an independent nongovernmental organization, and has been referred to by the *New York Times* as “The Extractor” for his work freeing political prisoners around the world. Previously, he was a partner in the government affairs practice of the global law firm DLA Piper LLP and a management consultant with McKinsey & Company. Genser is a recipient of the American Bar Association’s International Human Rights Award.

Reviews and Endorsements for *The UN Working Group on Arbitrary Detention*:

Commentary and Guide to Practice

Jared Genser is the leading attorney in the world on arbitrary detention in international law and established this reputation during the years I was a Member and Chair-Rapporteur of the UN Working Group on Arbitrary Detention. His book makes an important contribution to understanding international law on arbitrary detention and offers a wealth of materials and clear and convincing analysis of the law and the major challenges that arbitrary detention poses to the international community today.

Mads Andenas Q.C.

Professor, University of Oslo and Institute of Advanced Legal Studies,
 School of Advanced Study, University of London

Member and Chair-Rapporteur, UN Working Group on Arbitrary Detention (2009–2015)

Director, British Institute of International and Comparative Law, London (1999–2006)

I have a rather unusual perspective on arbitrary detention because having been subjected to it by various authoritarian rulers of The Maldives has been a central and defining set of experiences in my life. Indeed, I've been arrested more than twenty times, repeatedly tortured, and have served more than three years in prison over various periods of arbitrary detention. . . . [A]t that point in 2015, [when I had been convicted on manufactured terrorism charges], I hired this book's author, Jared Genser, to serve as my pro bono counsel, alongside Amal Clooney and Ben Emmerson. The story of their extraordinary efforts is described in a compelling case study chapter in this book. The team submitted my case to the Working Group in April 2015 and in October 2015 it issued Opinion No. 33/2015, a scathing twenty-page judgment that rejected the Government's arguments on every point and demanded my immediate release. Hundreds marched in the streets of Malé supporting the Working Group's decision. With my team's relentless advocacy, the Government could not withstand the political pressure and it was forced to release me. I was greeted by Amal and Jared when I arrived in London on January 21, 2016. But that was not the end of the story . . . in September 2018 our country succeeded in defeating Yameen in a democratic election. My close friend and co-founder of our political party Ibrahim Mohamed Solih was elected President. I returned to The Maldives in November 2018 and was especially pleased that Jared was with me in our Supreme Court on the day it reversed my conviction and acquitted me on all charges, citing to the opinion of the Working Group as a key reason for its decision. In April 2019, I was elected to our Parliament, the People's Majlis, and in May 2019, I was elected and sworn in to be its new Speaker. . . . The greatest fear of any political prisoner is that they will be forgotten. This exceptional and meticulous work of scholarship will be an invaluable tool for advocates to make sure that doesn't happen.

The Honorable Mohamed Nasheed

Speaker of the People's Majlis, The Maldives (2019–Present)

President of The Maldives (2008–2012)

We have seen substantial progress in reducing the phenomenon of arbitrary detention in the Americas but there still remain too many countries in our region with serious challenges to the rule of law and where especially repressive governments stubbornly persist in imprisoning their opponents against the tide of history. While the Inter-American Commission and Court of Human Rights have taken up many of these cases, the UN Working Group on Arbitrary Detention has also highlighted some of the worst. This impressive book, authored by Jared Genser, who over the years has represented prominent political prisoners in countries like Bolivia, Colombia, Cuba, Nicaragua, and Venezuela, shines an important spotlight on a major gap between the commitments of states in the American Convention on Human Rights to end the practice of arbitrary arrest and imprisonment and their implementation in practice.

The Honorable Luis Almagro

Secretary General, Organization of American States

Kudos to Jared Genser for bringing to life the inner workings and substantial accomplishments of one of the key UN human rights bodies – the Working Group on Arbitrary Detention. . . . Genser not only presents an analysis of the legal significance of its jurisprudence over the past twenty seven years, but then reveals to his reader what it really means to submit a case for a decision, to fight for the unjustly imprisoned, and to succeed in securing their freedom. . . . It's easy to criticize “the UN” and its member states for its inconsistent defense of human rights in its politicized forums; but the real achievements of the UN human rights system lie in the norms it has adopted and the independent mechanisms like the Working Group that fight independently to uphold these standards in real world situations, for real people. Genser opens our eyes to what's needed to make a good case – and how to fight for individual freedom, successfully.

Felice D. Gaer
 Director, Jacob Blaustein Institute for Human Rights
 Vice-Chairperson, UN Committee against Torture

Having spent over a decade in solitary confinement as a political prisoner, I have come to appreciate with great intensity that the subtle aspects of freedom – to read, to walk about, and to sleep – are actions that can easily be taken for granted. The persistent denial of access to family, to information and to human interaction induces a profound loneliness in the prisoner, coupled with the dreadful feeling as though your life's contributions are slowly being excised from public consciousness. This is why, when a sympathetic prison guard tapped on my cell gate one morning and whispered to me with hushed excitement that “the UN just called for your release!,” I felt a renewed sense of hope that the wheels of justice were still churning. I learned a short time later that my international lawyer Jared Genser, the book's author, had just made public Opinion No. 22/2015. In a detailed decision, the Working Group unanimously agreed I was being held in violation of international law and it urged my immediate release . . . for the United Nations to have spoken out in this unequivocal way had struck an irrecoverable blow to the former prime minister's efforts to try to justify my detention. . . . Jared Genser is a pioneer in the area of human rights law and a courageous and indefatigable representative of political prisoners around the world. This book represents his singular expertise in this area and should be required reading for all who seek a deeper understanding of the Working Group's activities and inner mechanisms.

Dato' Seri Anwar Ibrahim
 President of the People's Justice Party and Member of Parliament (2018–Present)
 Deputy Prime Minister of Malaysia (1993–1998)

There are those for whom words have meaning and those who issue hollow promises. This is as true of people as it is of states. . . . It is precisely to ensure that these words were not empty that France, with Robert Badinter and Louis Joinet, has played a leading role in the establishment of an original mechanism to ensure concretely the proper application of the intentions proclaimed by these nations. . . . It is in this spirit that Jared Genser has produced this exceptional work, so rigorous in both legal and methodological terms. This book will surely become an indispensable tool for all those who believe that human rights are nothing if they are not concretely applied to individual situations. . . . Thanks to the author for allowing us to better defend those persecuted around the world by so usefully assisting their advocates, without whom the universality of fundamental rights would be a vain hope.

The Honorable François Zimeray
 Ambassador of France for Human Rights (2008–2013)
 Lawyer

As someone engaged in the defense of political prisoners over the years, I regard *The United Nations Working Group on Arbitrary Detention* as a tour de force and seminal scholarly work, which makes an enormous contribution to understanding the phenomenon of arbitrary detention in our world today. In particular, it is also a comprehensive and practical guide for freeing the arbitrarily detained, infused with the author's experiences as an international lawyer in this

complex, interdisciplinary, and specialist field, where his exceptional work is widely known and respected for its unique and effective contributions.

The Honorable Irwin Cotler, P.C., O.C.
Chairman, Raoul Wallenberg Centre for Human Rights
Minister of Justice and Attorney General of Canada (2003–2006)

Up until the Working Group adopted Opinion No. 2/2003 on my case, I had been detained with total impunity and incommunicado by China for more than fourteen months. Within a day of this decision being made public, I was finally given access to my local lawyer and my hope was restored, learning the world had not forgotten my plight. Despite still having faced a potential death sentence on spurious charges of endangering national security, this invaluable opinion from the United Nations combined with the relentless advocacy of this book's author Jared Genser resulted in my early release, enabling me to dedicate the balance of my life pursuing freedom, democracy, and human rights for the Chinese people.

Yang Jianli
President, Initiatives for China

The UN Working Group on Arbitrary Detention

COMMENTARY AND GUIDE TO PRACTICE

Jared Genser

Perseus Strategies *and* Georgetown University Law Center

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About the Author

Jared Genser is Managing Director of Perseus Strategies, a public interest law firm. He also founded Freedom Now, an independent nongovernmental organization, and has been referred to by the *New York Times* as “The Extractor” for his work freeing political prisoners around the world. Although past success is no guarantee of future performance, over the course of his career Genser has taken more than forty-five cases to the UN Working Group on Arbitrary Detention and never lost. Those cases have been brought against many governments, including those of Bolivia, China, Cuba, Egypt, Iran, Iraq, Kazakhstan, Myanmar, Nicaragua, North Korea, Pakistan, Russian Federation, South Sudan, Sudan, Malaysia, Maldives, Turkey, and Viet Nam. The cases were filed on behalf of a total of 309 detainees, of whom 300 have had their cases resolved.

Before founding Perseus Strategies, Genser was a partner in the government affairs practice of the global law firm DLA Piper LLP and a management consultant with McKinsey & Company. He has taught semester-long seminars about the UN Security Council at Georgetown University Law Center and the University of Michigan and University of Pennsylvania law schools. He was an associate of the Carr Center for Human Rights Policy at Harvard University from 2014 to 2016, a visiting fellow with the National Endowment for Democracy from 2006 to 2007, and earlier in his career was named by the *National Law Journal* as one of “40 Under 40: Washington’s Rising Stars.”

Genser’s pro bono clients have included former Czech Republic President Václav Havel and Nobel Peace Prize Laureates Liu Xiaobo, Aung San Suu Kyi, Desmond M. Tutu, and Elie Wiesel. He holds a BS from Cornell University, an MPP from Harvard University’s John F. Kennedy School of Government, where he was an Alumni Public Service Fellow, and a JD cum laude from the University of Michigan Law School.

He is coeditor of *The UN Security Council in the Age of Human Rights* (Cambridge University Press, 2016) and *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (2011).

Genser is the recipient of the American Bar Association’s International Human Rights Award, Liberty in North Korea’s Freedom Fighter Award, and the Charles Bronfman Prize. He is a member of the Council on Foreign Relations and Fellow of the Royal Society of the Arts. In addition to being qualified to practice law in Maryland and the District of Columbia in the United States, he is also a Solicitor of England and Wales.

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Foreword

Dear Friends,

Since the beginning of recorded history, people in positions of political and economic power have wielded detention and imprisonment as weapons – often arbitrarily and brutally – to reduce the influence of those who disagree with them. Depending on prevailing environmental circumstances, these “dissenters” are sometimes labeled political detainees, political prisoners, or prisoners of war.

Power can prove more fleeting than we think. As the Reverend Martin Luther King observed, “The arc of the moral universe is long, but it bends towards justice.” Yet powerful people keep committing the same mistakes. They keep locking up those who hold different views to their own, hoping that the prison bars will make their problems go away, and proving over and over the truth of Spanish philosopher George Santayana’s point: “Those who cannot remember the past are condemned to repeat it.”

Two of the people widely regarded as among the brightest lights of the twentieth century, Winston Churchill and Nelson Mandela, have in common that their journeys to the helm of their countries were defined by their confinements in South Africa. Churchill was not held for long, but his derring-do escape from a prisoner-of-war camp during the second Anglo–Boer War was regarded as heroic and a turning point in his career. Mandela, on the other hand, absorbed the pressures of his twenty-seven-year incarceration in apartheid prisons to emerge fully formed, a giant sparkling diamond of humanity – virtually without flaws.

Suffering embitters some people, while ennobling others. But this does not detract from the fact that, whatever the eventual outcome, society must hold those who abuse power to account.

I am not a pacifist; nor do I believe that in situations of wrongfulness claiming neutral ground is morally defensible. I have long said that if you are neutral in situations of injustice then you have chosen the side of the oppressor.

To its enormous credit, since its establishment in 1991, the United Nations Working Group on Arbitrary Detention has been a candle in the darkness, relentlessly shining a bright light on the grave injustice of the arbitrary deprivation of liberty around the world. It has issued more than 1,000 legal opinions regarding the detentions of more than 5,000 people. In many cases these opinions, when combined with effective advocacy, have proved key factors in helping secure freedom for the arbitrarily detained. The group has also conducted more than fifty field visits to nations around the world to better understand the situation of deprivations of liberty and the underlying reasons for arbitrary detentions.

This book is both the first comprehensive review of the Working Group's jurisprudence and activities and a practical guide designed to assist advocates for the arbitrarily detained to be more effective in their efforts. I am especially pleased to recommend it to you because I worked with its author, the tenacious human rights lawyer Jared Genser, on political prisoner cases for more than a dozen years.

If you are reading this foreword, it probably means that you can put the information in the book to good use – in your own way – to contribute to securing the release from prison of someone who has been arbitrarily deprived of their liberty. The greatest fear of any political prisoner is that they will be forgotten. By taking up this cause you can ensure the world will remember.

God bless you.



Archbishop Emeritus Desmond M. Tutu
Cape Town, South Africa
January 2019

Acknowledgments

The research and writing of this book took three years and an enormous amount of effort. That is because it is much more than a treatise about the jurisprudence of the UN Working Group on Arbitrary Detention. It was also written to serve as a guide to how to most effectively address the phenomenon of arbitrary detention in our world today, grounded in my personal experiences helping the courageous detainees who I have had the privilege to represent. Although the Working Group remains a little-known quasi-judicial body overseen by the United Nations Human Rights Council, its opinions, country missions, and broader efforts serve an invaluable function in assisting advocates for the arbitrarily detained in securing their ultimate release and helping governments improve their adherence to their obligations under international law. The Working Group's volunteer expert members and professional staff deserve enormous credit for performing small miracles every day, despite the small budget, that often help save people's lives.

This book would not have been possible without the superb research, drafting, and editorial assistance that I have received from numerous staff, interns, externs, and part-time consultants to my public interest law firm Perseus Strategies, including Emad Ansari, Elise Baranouski, Maraya Best, Sara Birkenthal, Mary Brooks, Michael Cullen, Phoebe Dantoin, Sara Deibler, Skylar Gleason, Csaba Gondola, Anli Jiao, William Juhn, Claire Lynch, Ashley McLaughlin-Leen, Luladay Mengistie, Juan Miramontes, Laura Notess, George O'Connor, Charles Orta, Samuel Ritholtz, Nicole Santiago, Brian Tronic, and Daniel Wassim. And I have also been truly blessed to have extraordinary mentors who inspired and challenged me over the course of my career, including Jerome A. Cohen, Irwin Cotler, Lawrence Levinson, Kathleen Kennedy Townsend, and Desmond M. Tutu, among others.

I would like to dedicate this book to the clients and their families that I have been honored to represent, going back to my time as a law student. Their resilience in the face of adversity, their suffering, and their willingness to put their lives in my hands have been both a sacred trust and enormous responsibility.

I would also like to dedicate this book to my parents, Lyne Taylor Genser and Sander Genser, who inspired my commitment to public service. And I would also like to dedicate it to my children, Alexandra and Zachary, who bring such joy and inspiration to my life. It is for them that I have sought as best I could to leave the world a little better off than how I found it. I also want to extend my profound thanks to my wife, Elaine, whose unyielding love and support truly make everything possible.

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Jared Genser
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Abbreviations

ACHPR	African Charter on Human and Peoples’ Rights
ACHR	American Convention on Human Rights
AKP	Justice and Development Party (“Adalet ve Kalkınma Partisi,” Turkey)
BHRC	Bar Human Rights Committee of England and Wales
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CSRT	Combatant Status Review Tribunal
DEA	Drug Enforcement Administration
DPRK	Democratic People’s Republic of Korea
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ETA	Basque Homeland and Liberty (“Euskadi Ta Askatasuna,” Spain/France)
EU	European Union
FIDH	International Federation for Human Rights
HR Committee	UN Human Rights Committee
HRC	UN Human Rights Council
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labor Organization
KEGOC	Kazakhstan Electricity Grid Operating Company
LTTE	Liberation Tigers of Tamil Eelam
MDP	Maldivian Democratic Party
MNDF	Maldives National Defence Force
NGO	Non-Governmental Organization
NLD	National League for Democracy
OAS	Organization of American States

OHCHR	UN Office of the High Commissioner for Human Rights
PJAK	Kurdish Free Life Party (“Partiya Jiyana Azad a Kurdistanê,” Iran)
TICC	“Títulos de Interés y Capital Cubiertos,” Venezuela
TÜBİTAK	Scientific and Technological Research Council of Turkey (“Türkiye Bilimsel ve Teknolojik Araştırma Kurumu,” Turkey)
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	UN Commission on Human Rights
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNOG	UN Office at Geneva
UPR	Universal Periodic Review
VCCR	Vienna Convention on Consular Relations
WGAD	UN Working Group on Arbitrary Detention