



# INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICE FOR LAWYERS IN KAZAKHSTAN

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# PROGRAMME

PROGRAMME				
Date	Time	Topic	Speakers	Manual references
<b>Tuesday 9 February</b>	19:00	Derogation from human rights during a pandemic; Right to a fair trial	Jonathan Cooper OBE Grainne Mellon	<ul style="list-style-type: none"> <li>Chapters I, II, III and IV</li> <li>Chapter V, Section B</li> <li>Chapter IX</li> </ul>
	20:00	Implementation of fair trial standards in the COVID-19 environment in Kazakhstan.	TBC	
<b>Wednesday 10 February</b>	19:00	Freedom of Expression and Assembly	Jonathan Cooper OBE Grainne Mellon	<ul style="list-style-type: none"> <li>Chapter XI</li> </ul>
	20:00	The realisation of freedom of peaceful assembly in Kazakhstan. How has the law and practice changed in the COVID-19 environment?	TBC	
<b>Tuesday 16 February</b>	19:00	Detention	Jonathan Cooper OBE Kate Stone	<ul style="list-style-type: none"> <li>Chapter VI</li> <li>Chapter VII</li> <li>Chapter VIII</li> </ul>
	20:00	Health care access and denial for pre-trial and custodial detainees in Kazakhstan during the COVID-19 period	TBC	
<b>Wednesday 16 February</b>	19:00	Discrimination	Jonathan Cooper OBE Kate Stone	<ul style="list-style-type: none"> <li>Chapter V, Section A</li> </ul>
	20:00	Migrants and asylum seekers. Protection issues in the Covid-19 period in Kazakhstan.	TBC	
<b>Tuesday 23 February</b>	19:00	Privacy	Jonathan Cooper OBE Professor Bill Bowring	<ul style="list-style-type: none"> <li>Chapter X</li> </ul>
	20:00	Protecting workers' rights and modern slavery in Kazakhstan	TBC	

DEROGATING FROM  
HUMAN RIGHTS  
PROTECTION DURING  
A PANDEMIC:  
IS THERE A STATE OF  
EMERGENCY?

# DEROGATING FROM CIVIL AND POLITICAL RIGHTS IN TIME OF EMERGENCY

*Article 4, ICCPR (see also Article 15, ECHR)*

- 1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

# RIGHTS WHICH PERMIT NO DEROGATION

- Certain rights are explicitly non-derogable, regardless of the situation.
- Other rights are accepted as being non-derogable, regardless of the situation.
- Additionally rights are non-derogable on the basis that to derogate from them would undermine the principle of legality
- See ICCPR General Comment No. 29: Article 4: Derogations during a State of Emergency



# A DEROGATION MUST BE LAWFUL

**Derogation from human rights standards can undermine them. Therefore certain principles must be satisfied for a derogation to be lawful.**

These can be summarised as follows:

- Principle of exceptionality
- Principle of publicity
- Principle of proportionality
- Principle of consistency
- Principle of non-discrimination
- Principle of notification

# THE ROLE OF THE COURTS IN REVIEWING THE LEGALITY OF A DEROGATION

Courts will defer to the executive in relation to the existence of an emergency threatening the life of the nation; However, the courts will not give government a carte blanche and will retain the power to review the need to derogate; certain rights are non-derogable;

- the derogation needs to be made publicly and its nature, extent and purpose explained;
- the derogation can be reviewed;
- that review includes scope, duration and manner of implementation.

Once it has been established that there is a threat to the nation requiring derogation, that response must still be a proportionate and necessary one. If it goes too far, the derogation will be unlawful.



# THE RIGHT TO A FAIR TRIAL: GIVING EFFECT TO THE RULE OF LAW

# THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL HUMAN RIGHTS TREATIES

- **Article 10 UDHR;**
- **Article 14 ICCPR;**
- **Article 5 CERD;**
- **Article 15 CEDAW;**
- **Article 40 CRC;**
- **Article 13 CRPD; and**
- **Article 6 ECHR**

**Article 14, ICCPR states:**

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

## **Article 14, ICCPR**

**(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**

- a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- c) to be tried without undue delay;
- d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) to have free assistance of an interpreter if he cannot understand or speak the language used in court;
- g) not to be compelled to testify against himself or to confess guilt.

## Article 14, ICCPR

- (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
- (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
- (6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
- (7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

# THE RIGHT TO A FAIR TRIAL AND HOW IT WORKS

- The right to a fair trial applies to criminal or civil cases
- The right to a fair trial is considered to be fundamental to the whole scheme of human rights.
- It needs to be given a wide and broad interpretation.

# THE RIGHT TO A FAIR TRIAL AND HOW IT WORKS: OBLIGATIONS UPON THE STATE

Governments must put into place a legal and institutional framework to protect, and guarantee, it.

Particularly in the context of criminal law, the right to a fair trial requires as a minimum the State to provide:

- availability of legal assistance, including legal aid;
- an independent prosecution service; and
- a trained and independent judiciary.

# THE NECESSARY INGREDIENTS OF A FAIR TRIAL INCLUDE THE RIGHT TO:

- a public hearing and access to court
- an independent and impartial tribunal
- trial within a reasonable time
- access to a lawyer and legal advice
- be present and to an adversarial hearing
- participate effectively in the hearing
- equality of arms
- public judgment and reasoned decision



# UNDERSTANDING THE ELEMENTS OF A FAIR CRIMINAL TRIAL:

**What is a criminal charge?**

**What is an independent and impartial tribunal?**

**What is a trial within a reasonable time?**

**What is a fair hearing?**

# SCENARIO

S, aged 11 with low intellectual ability, attempted with another boy to rob an old woman. He was tried in an adult court before a judge and a jury. He was convicted and sentenced to two-and-a-half years' detention. However, he did not understand the role of the jury or the need to make a good impression on them. Also, S did not understand that a custodial sentence meant that he could not go home. But an expert assessment stated that he did understand that his actions were wrong and that he was fit to stand trial.

***Do you think S had a fair trial?***

# WHAT IS A CRIMINAL CHARGE?

A criminal charge is the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence

Fair trial rights can also be engaged when someone is significantly disadvantaged, or prejudiced, by an investigation

A criminal charge is an autonomous concept; whether something amounts to a criminal charge depends on:

- its domestic classification;
- the nature of the offence; and
- the severity of the penalty.

If the offence can be committed by everyone and not just a restricted group, such as doctors or accountants, and the purpose is to punish and deter, this suggests that the offence is criminal.

# SCENARIO

Five applicants were conscript soldiers. They were disciplined for various offences against military discipline including circulating prohibited writings, leaving the barracks without permission, being late and driving irresponsibly. The penalties for these offences included:

***light arrest***: not locked in but confined, off-duty, to barracks

***aggravated arrest***: off duty not locked in, but kept in designated place

***strict arrest***: locked in a cell thus no duties performed - detention for 1 - 14 days

***committal to a disciplinary unit***: detained with convicted prisoners for 3 - 6 months

**Did the disciplinary offences amount to a criminal charge?**

**Has there been a deprivation of liberty?**

# WHAT IS AN INDEPENDENT AND IMPARTIAL TRIAL?

A tribunal charged with the responsibility of making decisions in a case must be:

- Established by law
- Competent
- Independent and impartial
- Free from any interference by the State, the parties and external influences.

An independent and impartial tribunal requires independence of the executive and of the parties.

The composition of its members and how they are appointed, including the length of term of office will be relevant.

# WHAT IS AN IMPARTIAL TRIBUNAL?

Impartiality demands that:

- judges (and juries) are unbiased;
- proceedings are conducted fairly; and
- decisions are made solely on the evidence.

There is a general assumption that a judge (and jury) is impartial unless proof is raised to the contrary.

Appearance of impartiality is as important as actual impartiality.

Any allegations of impartiality must be properly investigated, unless they are manifestly devoid of merit.

The fact that a judge has dealt with the accused on a previous occasion will not necessarily cause the proceedings to be unfair. The key issue will be the nature and character of the previous decision.

The tribunal must also be able to give a binding decision.

# SCENARIO

S, a British national of Indian origin, is charged with several counts of fraud which he denies. During his trial, one of the jurors is heard by other members of the jury to make a racist joke. The jurors inform the judge of the remark made. The judge then reminds all members of the jury of their duty to be impartial, but does not dismiss any members of the jury. The jurors sign a collective letter to the judge stating that they are impartial and will consider the case without any racial bias. S is convicted of fraud. He appeals, arguing that the jury in the case was biased and that his Convention rights have been breached.

**What rights are involved in this case?**  
**Has there been a breach of S's rights?**

# WHAT IS A TRIAL WITHIN A REASONABLE TIME?

Time begins to run when an individual is charged (or significantly disadvantaged by an investigation).

Time ends when the proceedings are over, including any appeal.

When assessing whether a length of time can be considered reasonable, the following factors are relevant:

- the complexity of the case;
- the conduct of the applicant;
- the conduct of the judicial and administrative authorities of the State; and
- what is at stake for the applicant (i.e. whether they are being detained).

The authorities cannot seek to justify delays because of the workload of the court or shortages of resources.

*Is the pandemic justification for delays?*



# SPECIFIC GUARANTEES IN RELATION TO CRIMINAL TRIALS INCLUDE:

- a) Right to be informed promptly of charge
- b) Adequate time & facilities to prepare defence
- c) Right to legal assistance of choice
- d) Right to examine witnesses
- e) Right to an interpreter

# SCENARIO

O is the leader of proscribed organisation. He is arrested on 15 February and held in custody. He is denied access to his lawyer. On 22 February O makes a confession. On 23 February O is brought before a judge. On 25 February, O talks to his lawyer for 20 minutes in the presence of a judge and members of the security forces. From the time of his arrest until his trial, O sees his lawyers twelve times for no more than one hour, always within the hearing of security forces.

On 24 April, an indictment is filed accusing O of serious offences in relation to terrorism. On 7 May, O's lawyers are given access to the indictment and the case file. This is over 17,000 pages. O is tried before the State Security Court which includes a military judge, although that judge is later replaced. He is found guilty on 29 June and is sentenced to death.

Is O's trial fair?

# SCENARIO

H is arrested for trafficking in large quantities of heroin. The evidence against him comes from an informer, P. At his trial the prosecution make an application that P's statement be read to the court, without P having to appear to give his evidence orally. They allege that his life would be endangered if H discovered his identity. In addition, the police officers involved assert that they and their family's lives may be threatened if they give evidence without the use of screens in court to hide their appearance. They point out that in previous cases gangs of drug traffickers have been involved in violence against police.

**What rights, and of whom, are engaged in this scenario?**

# UNDERSTANDING THE ELEMENTS OF A FAIR CIVIL TRIAL:

What is a determination?

What is an independent and impartial tribunal?

What is a trial within a reasonable time?

What is a fair hearing?

# WHY IS A FAIR TRIAL IMPORTANT? |

# THE IMPORTANCE OF THE RIGHT TO A FAIR TRIAL

The right to a fair trial plays a crucial role in the maintenance of order, the rule of law and confidence in the State authorities.

If there is a system of fair trial in place, before independent and impartial judges, there is an assurance, in principle:

- that convictions are safe;
- that the executive arm of government can, if necessary, be held to account; and
- there is an effective dispute resolution system between private parties.

The right to a fair trial is the corner stone of a democratic society and is one of the main bulwarks against chaos, anarchy and arbitrary government.

# IS THE RIGHT TO A FAIR TRIAL AN ABSOLUTE RIGHT?



BAR HUMAN RIGHTS  
COMMITTEE OF  
ENGLAND & WALES

# THE RIGHT TO A FAIR TRIAL IS IN AND OF ITSELF AN ABSOLUTE RIGHT

- The state can't organise an unfair trial
- The constituent elements of the right to a fair trial can be subject to certain limitations or interpretations
- Any such limitation must not interfere with the right to a fair trial as a whole
- It is also subject to a test of strict necessity and proportionality
- It is permissible to derogate from certain aspects of the right to a fair trial
- Does the pandemic require a derogation is put in place?



# ISSUES IN RELATION TO THE RIGHT TO A FAIR TRIAL:

- Right to silence
- Unlawfully obtained evidence
- Disclosure of evidence
- Special court procedures
- Special advocates

# SCENARIO: RIGHT TO SILENCE

M argues that his right to remain silent and his right to a fair trial have been violated by counter terrorism legislation that permitted inferences to be drawn by the court from a failure to mention facts when questioned. During a counter-terrorism operation, M was caught by the police destroying evidence. He was arrested and questioned and refused to answer any questions or give any explanation concerning his conduct. He was also denied access to a lawyer during this initial stage of the investigation.

Did M receive a fair trial?

# SCENARIO

Under the customs code there is a presumption of criminal liability for persons found in possession of prohibited goods. S argues that the code places upon him an almost irrebuttable presumption of guilt in violation of his right to be presumed innocent until proven guilty. He is discovered by customs to have a large quantity of cannabis in his luggage.

Is S correct?

# SPECIAL PROCEDURES

- Use of closed material
- Hearing in the absence of the applicant
- *In camera* hearings
- Anonymity of witnesses
- Use of special advocates
- UN Security Council Resolutions resulting in the denial of a fair trial

# FAIR TRIAL PRINCIPLES AND THE RIGHT TO JUSTICE ALSO INCLUDES:

- An effective remedy. Is a fair trial enough to be able to guarantee an effective remedy?
- Independent and impartial investigations into serious human rights violations
- The ability to challenge the legality of detention: *habeas corpus*
- Victim's rights
- Proportionality and procedural fairness
- Good administration
- Fair complaints mechanisms (ombudsman)