



INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICE FOR LAWYERS IN KAZAKHSTAN

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PROGRAMME

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



THE RIGHT TO LIBERTY AND PREVENTING ARBITRARY DETENTION



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ARTICLE 9, ICCPR

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

ARTICLE 5, ECHR:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following circumstances and in accordance with the procedure prescribed by law

- (a) The lawful detention of a person after conviction by a competent court;
- (b) The lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

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WHAT IS THE RIGHT TO LIBERTY?

The right to liberty is the right to test the legality of detention and a series of procedural guarantees.

The key protections are two-fold:

- The right of all persons deprived of their liberty to challenge the lawfulness of their detention before a court (through the legal procedure known as habeas corpus) and to have the detention reviewed on a regular basis; and
- The rights of detainees, including the physical conditions, disciplinary systems, use of solitary confinement and the conditions under which contacts are ensured with the outside world (including family, lawyers, social and medical services and non-governmental organisations)

UNDERSTANDING THE RIGHT TO LIBERTY: GUIDING PRINCIPLES

- The right is engaged when there is any loss of liberty for whatever reason: crime, mental health, immigration, administrative etc. It governs all elements of loss of liberty from initial detention to release
- Any limits or restrictions to the right to liberty must be interpreted narrowly
- Any deprivation of liberty should be:
 - exceptional
 - objectively justified
 - of no longer duration than absolutely necessary
 - the justification for loss of liberty must be closely scrutinised
- A judge should start with the proposition that the person should be free

UNDERSTANDING THE RIGHT TO LIBERTY: GUIDING PRINCIPLES

Places of detention are broadly defined and include:

- Police stations
- Security force stations
- All pre-trial centres
- Remand prisons and prisons for sentenced persons
- Juvenile centres
- Immigration centres
- Transit zones at international ports
- Centres for detained asylum seekers
- Psychiatric institutions
- Military detention centres and
- Places of administrative detention
- Individuals may also be detained in vehicles



WHEN DETENTION IS LAWFUL

1. Test One: Has the individual been detained?
2. Test Two: Is it prescribed by law?
3. Test Three: Can detention be justified?

The following are the accepted justifications for detention:

- Detention following conviction
- Detention to enforce court orders or to fulfil an obligation prescribed by law
- Detention following arrest to bring the individual before the competent legal authorities
- Detention of children for educational supervision or to bring them before the competent legal authorities
- Detention of alcoholics, drug addicts, vagrants and persons of unsound mind
- Detention pending deportation or extradition

If detention cannot be justified under one of these heads, then it is arbitrary and unlawful.

SCENARIO

M is a journalist and democracy activist. He is arrested following a BBC broadcast in which he criticised the President and Government. This is a criminal offence under national law. M is arrested and detained in accordance with the rules of criminal procedure and his detention is reviewed by an examining magistrate. He lodges a communication with the Human Rights Committee complaining that, despite the fact that all domestic criminal procedure had been complied with, his detention breached his rights under the ICCPR.

Which rights are in issue and has there been a breach?

SCENARIO

G has four previous convictions and is currently awaiting trial on further charges. The Italian authorities suspect him of being a Mafioso, so, in accordance with Italian anti-mafia legislation, they apply for, and obtain, a court order requiring G to live on a restricted part of a small island off the coast of the mainland. He is detained there because he is suspected of being a member of the Mafia. Whilst there, G is placed under special supervision. Can G's detention be justified under the right to liberty?

Which Human rights are in issue in this case and have they been breached?

PROCEDURAL SAFEGUARDS

- Reasons for detention must be given
- Right to challenge the lawfulness of the detention and judicial supervision of the detention
- Trial within a reasonable time and the right to bail
- Are there positive obligations to protect the right to liberty?

SCENARIO

A lieutenant-colonel ordered that D be placed under open arrest for 21 days for disobeying military orders. He served his sentence at a prison for commissioned and non-commissioned officers. He unsuccessfully lodged a number of appeals against the decision.

The applicant complained that the sentence had been imposed by his military superior and not by a competent court.

Is he correct?

SCENARIO

S fled Iraq and arrived in London on 30 December where he immediately claimed asylum and was granted “temporary admission”. On 2 January, on reporting to the immigration authorities, he was detained and transferred to a Reception Centre. Whilst it was possible to walk around the Centre, it was not possible to leave.

On 5 January, S was told that the reason for his detention was that he was an Iraqi who met the criteria to be detained at the Centre. The applicant’s asylum claim was initially refused on 8 January and he was formally refused leave to enter the UK. He was released the next day. He appealed against the decision and was subsequently granted asylum.

Was S’s detention lawful?

DETENTION ON REASONABLE SUSPICION OF HAVING COMMITTED AN OFFENCE:

For the detention to be lawful the following three-stage test must be met:

1. The offence must exist in national law;
2. The objective must be to bring the individual before the competent legal authority;
3. There must be reasonable suspicion to arrest someone:
 - requires objective justification, but can be based on anonymous informants;
 - past convictions are not enough;
 - it is not necessary for there to be sufficient evidence to charge someone in order to be able to establish reasonable suspicion, if detention is justified to further investigations;
 - honesty and good faith is required on the part of the law enforcement officers;
 - blanket arrests are unlikely to be proportionate.

SCENARIO

B is arrested by police on suspicion of being involved with acts of terrorism. He is detained under special anti-terrorism legislation and questioned about a serious criminal offence. After five days he is released without charge and without ever having been brought before a court. B complains to the European Court of Human Rights, arguing that his detention was in breach of his Convention rights because it was for the purpose of gathering information, rather than for the lawful purpose of preventing a specific crime, or for bringing him before a court.

Did the detention breach B's Convention rights?



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PROCEDURAL SAFEGUARDS

Judicial Supervision of Detention

- Delay before being brought before a tribunal should be no more than is genuinely required to process a suspect
- A delay of four days, six hours is too long even when made under terrorist legislation
- The tribunal must satisfy all the requirements of independence and impartiality
- The tribunal must have power to order release
- A power to recommend release is insufficient

PROCEDURAL SAFEGUARDS

Right to Challenge the Lawfulness of Detention (Habeas Corpus)

- The degree of scrutiny required varies with the context but must be able to review the lawful detention
- Must be independent and impartial and able to take binding decisions, but not necessarily in public
- Detaining authority must prove legality of the detention
- It may be necessary to provide legal assistance/legal aid
- Principles of equality of arms apply, which implies adversarial proceedings
- Detention is to be reviewed speedily. This is a less exacting test than promptness.
- Fixed-term sentences incorporate this protection
- Indeterminate sentences require proceedings to determine release



PREVENTING TORTURE AND INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT

The UN and International Framework to Prevent Torture and Prohibited Ill
Treatment in Places of Detention



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GENERAL MEASURES AT THE UN LEVEL TO PREVENT TORTURE

- Article 7 and Article 10, ICCPR are the most specific human rights provisions at the UN level other than CAT
- All UN human rights treaties contain a prohibition on torture
- Also of specific relevance are:
 - The UN Convention for the Protection for All Persons from Enforced Disappearances
 - The Rome Statute establishing the International Criminal Court (not yet signed or ratified by Kazakhstan)
- Widespread and systematic acts of torture are also prohibited under international humanitarian law (the Geneva Conventions)

TREATMENT OF DETAINEES

Article 10, ICCPR builds upon the right to liberty by dealing with the treatment of prisoners whilst in detention:

- ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’ (Article 10(1));
- provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones and that juvenile persons shall be separated from adults (Article 10(2)); and
- states that the ‘essential aim’ of imprisonment should be ‘the reform and social re-adaptation of prisoners’ (Article 10(3)).

SCENARIO

Pending his trial K is detained. At least 14 inmates normally share K's cell, which was designed for 8. At any given time there is no more than 2 m² of space per inmate. K shares his bed and takes it in turn to sleep. The ventilation in the cell is inadequate. Inmates are permitted to smoke. K is allowed outdoors for one or two hours a day. The cell is also infested with pests. There is no partition of the lavatory from the living area. K is detained for just under five years.

The Government recognises that the conditions are not ideal and they are doing their best to improve them. They also point out that even if the conditions are below standard, they are not intended to humiliate or debase K.

Do the conditions amount to inhuman and degrading treatment? If so, is this just the cumulative effect of them? Could any single-issue amount to inhuman and degrading treatment?

What difference does it make that the Government is improving conditions?

SCENARIO

V is a paraplegic. He cannot move around without a wheelchair. Since 2002 he has been detained both as a remand and convicted prisoner. For a four-month period he is detained in an old prison which the government accepts is not suitable for people in wheelchairs, although his cell has been adapted. However, doors are too narrow for a wheelchair to pass, therefore V is dependent upon others to leave his cell and to move around. The government point out that there is no intention to humiliate V.

V complains that the conditions in which he was detained were not adapted to his disability and violated the prohibition of inhuman or degrading treatment.

THE UN STANDARD MINIMUM RULES FOR TREATMENT OF PRISONERS

The Mandela Rules 2015 require:

- Recognition of the inherent dignity of all those detained;
- The maintenance of a register of prisoners;
- Separation of categories of prisoner & protection of vulnerable groups;
- The right of access to legal advice and medical services;
- Independent investigation in to deaths in custody & allegations of prohibited ill treatment & torture;
- The right of detainees to visits by family members and an adequate opportunity to communicate with outside world;
- Provision of a complaint mechanism for detainees and/or detainee's family, legal representative in relation the detainee's treatment