

Chapter 5

Human rights and arrest, pretrial detention and administrative detention

Facilitator's Guide

Learning objectives I

- To familiarize the participants with the existing international legal standards regarding the right to the liberty and security of the person and which protect human rights both in connection with, as well as during, arrest, pretrial and administrative detention

Learning objectives II

- To illustrate how the various legal guarantees are enforced in practice in order to protect the rights of detained persons and their legal counsel
- To explain what legal measures, and/or actions, judges, prosecutors and lawyers must take in order to safeguard the rights of persons arrested or detained

Questions I

- On what basis can persons be detained on remand in your country, and what alternatives to such detention are available, pending trial?
- For how long can people be deprived of their liberty in your country before they must be brought before a judge in order to have the legality of their deprivation of liberty determined?

Questions II

- How does the law in the country where you work as judges, prosecutors and lawyers protect individuals against unlawful or arbitrary arrest and detention?
- Do illegal or arbitrary arrests and detentions occur in the country where you exercise your professional responsibilities?

Questions III

- If faced with an arrest and detention that appears to be unlawful or arbitrary, what would you do about it, and what could you do about it, given the present status of the law in the country where you work?
- What remedies exist in your country for persons who consider that they are or have been unlawfully or arbitrarily deprived of their liberty?

Questions IV

- If a person is found by a judge to have been unlawfully or arbitrarily deprived of his or her liberty, is there a right in your country for that person to receive compensation for unlawful or arbitrary imprisonment?
- Is it possible in the country where you work to rely on international human rights law in order to challenge the lawfulness of a deprivation of liberty?

Questions V

- On what grounds and under what conditions can persons be subjected to detention by the *administrative* authorities in your country, and what legal remedies do they have at their disposal to challenge the legality of the original and continued deprivation of liberty?
- From which moment after their arrest or detention do people deprived of their liberty have the right to access to a lawyer in your country?

Questions VI

- Does the law in your country authorize the resort to incommunicado detention? If so, for how long?
- Before joining this course, what did you know about the international legal standards applicable to arrest and detention?

The notion of the liberty and security of the person I

All human beings have the right to liberty and security.

Irrespective of their treaty obligations, all States are bound by international law to respect and ensure everybody's right to liberty and the security of the person (*universal legal responsibility*).

The notion of the liberty and security of the person II

The notion of security also covers threats to the personal security of non-detained persons. States cannot be passive in the face of such threats but are under a legal obligation to take reasonable and appropriate measures to protect the liberty and security of the person.

Lawful arrest and detention

Key legal texts I

International Covenant on Civil and Political Rights, article 9 (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.

Lawful arrest and detention

Key legal texts II

African Charter on Human and Peoples' Rights, article 6:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Lawful arrest and detention

Key legal texts III

American Convention on Human Rights, article 7:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

Lawful arrest and detention

Key legal texts IV

European Convention on Human Rights,
article 5 (1)(a)–(b):

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a 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[.]

Lawful arrest and detention

Key legal texts V

The European Convention on Human Rights, article 5 (1) (c):

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure 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[.]

Lawful arrest and detention

Key legal texts VI

European Convention on Human Rights, article 5 (1) (d):

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[. . .]
 - (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[.]

Lawful arrest and detention

Key legal texts VII

European Convention on Human Rights, article 5 (1) (e):

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[. . .]
 - (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants[.]

Lawful arrest and detention

Key legal texts VIII

European Convention on Human Rights, article 5 (1) (f):

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[. . .]
 - (f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Lawful arrest and detention

Key legal texts IX

Other legal instruments relevant to the deprivation of liberty are:

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, articles 16 and 17
- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (General Assembly, 1988)
- The Standard Minimum Rules for the Treatment of Prisoners, 1955
- The Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly, 1992)
- The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65)
- The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly, 1990)
- The Principles and guidelines on the right to a fair trial and legal assistance in Africa, 2003
- The Guidelines on human rights and the fight against terrorism (Committee of Ministers of the Council of Europe, 2002)

Lawful arrest and detention

What it means

To be lawful under international human rights law, arrests and detentions must:

- Be carried out in accordance with both formal and substantive rules of domestic and international law
- Be free from arbitrariness in that the laws and their application must be appropriate, just, foreseeable/predictable and comply with due process of law

Arbitrary detention

What it means I

According to the Human Rights Committee, “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must be not only lawful but reasonable in all the circumstances. Further, remand in custody must be for compelling reasons, for example, to prevent flight, interference with evidence or the recurrence of crime.

Arbitrary detention

What it means II

The United Nations Working Group on Arbitrary Detention regards deprivation of liberty as arbitrary in the following cases:

1. When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act)
2. When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights
3. When the complete or partial non-observance of international standards relating to the right to a fair trial, as set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character

Unacknowledged detentions, abductions and enforced or involuntary disappearances I

International law prohibits *at all times* unacknowledged arrests and detentions, abductions and enforced or involuntary disappearances. States are accountable for all persons in their custody. The date and time of the detention and the location of all detainees must in particular be available to families, lawyers and all competent judicial and other authorities at all times in official registers, the accuracy of which should not be open to doubt.

Enforced disappearance means the arrest, detention or abduction of persons or any other deprivation of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

Unacknowledged detentions, abductions and enforced or involuntary disappearances II

Enforced or involuntary disappearances, abductions and unacknowledged detentions constitute particularly serious violations of fundamental human rights, including the right to liberty and security.

Lawful grounds of arrest and detention I

As a general principle *liberty is the rule and detention the exception.*

A person's deprivation of liberty must at all times be objectively justified in that the reasonableness of the grounds of detention must be assessed from the point of view of an objective observer and based on facts and not just subjective suspicion.

Lawful grounds of arrest and detention II

The most common grounds for a lawful judicial deprivation of liberty are:

- After conviction by a competent, independent and impartial court of law
- On reasonable suspicion of having committed an offence or in order to prevent a person from doing so
- In order to prevent a person from fleeing after having committed a crime

Administrative detention I

The basic legal standards regulating arrest and detention are also applicable to *administrative detention*, that is, detention by the Executive for reasons unrelated to criminal activities, such as, for instance, detention for educational supervision, reasons of mental health, for the purpose of deportation and extradition, and in order to protect *ordre public*.

Administrative detention II

The international law of human rights provides important judicial guarantees also with respect to administrative detention. The domestic law must provide for the possibility of challenging the lawfulness of such detentions before an ordinary court of law applying due process guarantees.

The right to be informed of reasons for arrest and detention and of any charges against oneself

Key legal provisions I

International Covenant on Civil and Political Rights, article 9 (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.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 16 (5):

Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

The right to be informed of reasons for arrest and detention and of any charges against oneself

Key legal provisions II

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 16 (7):

When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

- (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
- (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
- (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

The right to be informed of reasons for arrest and detention and of any charges against oneself

Key legal provisions III

American Convention on Human Rights, article 7 (4):

Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

European Convention on Human Rights, article 5 (2):

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

The right to be informed of reasons for arrest and detention and of any charges against oneself

What it means

A person deprived of his or her liberty must be *promptly* informed of the reasons for this arrest and detention *in a language which he or she understands* and in *sufficient detail* so as to be enabled to request a prompt decision by a judicial authority on the lawfulness of the deprivation of liberty.

The right to be promptly brought before a judge or other judicial officer

Key legal texts I

International Covenant on Civil and Political Rights, article 9 (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.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 16 (6):

Migrant workers and members of their families who are 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 while awaiting trial they 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 the occasion arise, for the execution of the judgement.

The right to be promptly brought before a judge or other judicial officer

Key legal texts II

American Convention on Human Rights, article 7 (5):

Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

The right to be promptly brought before a judge or other judicial officer

Key legal texts III

European Convention on Human Rights, article 5 (3):

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article 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 pending trial. Release may be conditioned by guarantees to appear for trial.

The right to be promptly brought before a judge or other judicial officer

What it means

A person arrested or detained on a criminal charge must be promptly brought before a judge or other officer, who is independent and impartial and who has the power to make a binding order for release.

The term “promptly” must be interpreted strictly and cannot be deprived of its essence even in a crisis.

The right to trial within a reasonable time or to release pending trial

What it means I

A person detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. The pretrial detention must not only be lawful, but also reasonable and necessary in all the circumstances.

The *reasonableness of pretrial detention* is assessed in the light of all the circumstances of the particular case, such as:

- The gravity of the offences
- The risk of fleeing the jurisdiction
- The risk of the destruction of evidence
- The risk of influencing witnesses, and of collusion with co-defendants
- The complexity of the investigation
- The person's behaviour
- The conduct of the domestic authorities

The right to trial within a reasonable time or to release pending trial

What it means II

Whenever feasible, release should be granted pending trial, if necessary by jointly ordering guarantees that the accused person will appear at his or her trial.

Throughout detention *the right to the presumption of innocence* must be guaranteed.

The right to have the lawfulness of the detention decided speedily or without delay by a court

Key legal texts I

International Covenant on Civil and Political Rights, article 9 (4):

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The right to have the lawfulness of the detention decided speedily or without delay by a court

Key legal texts II

American Convention on Human Rights, article 7 (6):

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

The Inter-American Court of Human Rights has ruled, based article 27 (2) of the American Convention on Human Rights, that in order to protect non-derogable rights, the right to judicial review, such as habeas corpus, is itself non-derogable.

The right to have the lawfulness of the detention decided speedily or without delay by a court

Key legal texts III

European Convention on Human Rights, article 5 (4):

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means I

- Everyone deprived of his or her liberty has the right to challenge the lawfulness of his or her arrest or detention before a court so that the court may decide without delay/ speedily on the lawfulness of the detention or order the person's release if the detention is not lawful
- This right applies to all forms of deprivation of liberty, including administrative detention

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means II

- The judicial remedy must be effectively available to the detainee. Incommunicado detention is not a valid ground for refusing a detainee the right to challenge the lawfulness of his or her detention before a court of law, or to communicate with his or her lawyer
- The legality of the detention must be determined by a court which is *independent* and *impartial*. A Government minister may not replace a court for the purpose of challenging the lawfulness of deprivations of liberty

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means III

- The court must have the power to review both the procedural and the substantive grounds for the deprivation of liberty and be empowered to make a binding order for the release of the detained person if his or her deprivation of liberty is unlawful

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means IV

- Every person deprived of his or her liberty is entitled to have the lawfulness of the continued detention subjected to periodic reviews for the purposes of testing whether the reasons for the deprivation of liberty remain valid; the exception to this rule is imprisonment pursuant to a criminal conviction by a competent court

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means V

- The detained person must be allowed access to a lawyer and to appear in court to argue his or her case on equal terms with the prosecuting or other authorities; this right also implies that the detained person must have access to all relevant information concerning his or her case (*equality of arms*)

The right to have the lawfulness of the detention decided speedily or without delay by a court

What it means VI

- The court must act *without delay/ speedily*, that is, as expeditiously as possible. What is considered to be without delay or speedily depends on the circumstances of each case. A delay must not be unreasonable and a lack of resources or holiday periods are not acceptable justifications for delay.

The right of access to and the assistance of a lawyer, and the right to compensation in the event of unlawful deprivation of liberty

- A detained person has the right to consult, and be assisted by, a lawyer in connection with the proceedings taken in order to test the legality of his or her deprivation of liberty
- Everyone has the right to compensation for unlawful deprivation of liberty by reason of violations of international and/or national law. Such compensation may depend on demonstration of damages

Incommunicado detention

The Human Rights Committee has urged Governments to take measures against incommunicado detention by ensuring that detainees are held only in officially recognized places of detention, and that official registers are maintained for all detainees, which are available and accessible to those concerned, including relatives and friends.

Incommunicado detention cannot be used in order to bar the detainee from exercising his or her rights as an arrested or detained person, including the right to communicate with his or her lawyer.