

Contemporary Issues—Arbitrary Detention

What is arbitrary detention?

- A deprivation of liberty that lack legal basis or a result from exercising rights and freedom guaranteed by certain articles of the UDHR and ICCPR
- Involves prolonged administrative custody
- Detention is discriminatory

Legal response

- International Bill of Rights
 - UDHR article 9
 - ICCPR article 9—explicitly defines arbitrary detention—one’s right to compensation if he/she found arbitrarily detained
 - State realised there are consequences when they violate human rights
- International Bodies
 - Working Group on Arbitrary Detention—IGO setup under UN Human Rights Council
 - Investigate arbitrary detention cases
 - Annual report on on-going cases and thematic issues
- International Case Law
 - No country or individual has been brought to any international court to trial for arbitrary detention
 - Andrew Wilkie ICC case to prosecute Tony Abott and 19 cabinet ministers over treatment of asylum seeker
 - Indefinite detention against *Rome Statute*
- Domestic response
 - Bill of Rights in UK and US (article 5)
 - Australia has no statute law protecting such rights—relies on Common law principles

- *Coco v The Queen (1994)*: “The Courts should not impute to the legislature an intention to interfere fundamental rights”
- *Teoh case*: the court should favour that construction accords with Australia’s obligations under a treaty or international convention to which Australia is a party...
- Legality of the detention can be challenged on the ground that the detention doesn’t comply with international law and interfere fundamental rights

Effectiveness and compliance

- Developed countries tend to **comply** with international law because they have a more comprehensive legal system and most cases would be heard in a fair trial. Some other reasons account for this may be tradition, for instance Magna Carta, pressure from international and local NGOs and the fact that citizens can punish a government by voting them out.

International law has no enforceability and doesn’t meet society’s needs results in non-compliance issues

- Mr Obaidullah case in Guantanamo bay- illustrates the effectiveness of international law is diminished by state sovereignty
- Captured in Afghanistan in 2002 detained over 10 years in Guantanamo and was not informed with the reason he was detained
- Violation of numerous articles in UDHR and ICCPR
- Human Rights experts at the UN objected to the continued indefinite detention, due to state sovereignty, it was not until February 2016 that President Obama announced to close this indefinite detention facility.

Low enforceability of international law

- Due to state sovereignty
- 14 years operation of an institution that violate various international law and UN Human Rights Council has condemned and criticised countless time
- US state sovereignty → Guantanamo Bay still operates

International law doesn't always meet society's need

- Gallup poll shows that Americans supported an offshore detention centre for suspect terrorist
- This drives US government to operate the Guantanamo Bay

Non-legal response

- NGOs have focus groups on arbitrary detention—Amnesty international and World Organisation Against Torture
- Media report the facts, but also programs such as QandA, Four Corners, provide a platform for members of society to debate over human rights issues

Effectiveness of non-legal response

- High responsiveness
Response to crisis really quickly, unlike Andrew Wilkie's ICC case and other legal response
- High Accessibility
People who have been arbitrarily detained can access media and NGOs easily while orthodox problems of legal responses are their low accessibility due to one's limited resources, language barrier and low education standard.