

**Preliminary Legal Advice to KICK: KAZAKHSTAN REPRESSION
(JAN. 2022): VIOLATIONS, CRIMES and LEGAL AVENUES:**

Excerpts from the report

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AVAILABLE FORA AND PROCESSES

4.1. HUMAN RIGHTS MECHANISMS ALLOWING FOR INDIVIDUAL COMPLAINTS

4.1.1. INDIVIDUAL COMPLAINTS BEFORE THE UN HUMAN RIGHTS COMMITTEE (or UN COMMITTEE V TORTURE)

Kazakhstan has accepted the competence of several UN mechanisms to hear individual complaints. It has done so for the UN Human Rights Committee (UNHRC) which notably has a broad mandate under the ICCPR, and is perhaps the most authoritative of the Committees at this time. It has also done so for the UN Committee against Torture (CAT) for alleged violations of the Convention against Torture. Several claims have in fact been brought before the UN Human Rights Committee (UNHRC) against Kazakhstan, including for alleged violations of the right to freedom of assembly and expression.¹⁹¹ Individual complaints have also been brought against Kazakhstan before the UNCAT.¹⁹²

Although there is some debate internationally as to the force of these committees decisions (they are not strictly speaking binding judgments), they are authoritative decisions that reach concrete findings against the state, in respect of its compliance with a binding treaty. As such they have a certain degree of weight. Moreover decisions can be taken relatively seriously by Kazakhstan it seems: unlike some states, Kazakhstan has a record of engaging in and responding to allegations, and indeed domestic courts have implemented UNCAT decisions and appear to have recognised the binding nature of the UN Committees' decisions.¹⁹³

While an attractive route, the relevant admissibility requirements would need to be met. As explained below, this includes: victim requirements and the exhaustion of domestic remedies.

.....PROCEDURE, OUTCOME AND IMPLEMENTATION

The procedure itself is not onerous, once victim(s) consent and evidence is gathered. The complaint does not need to be made in a specific format, though there are model complaint forms and guidelines detailing all the required information and documentation.²¹⁶

Once the Committee has received a complaint, it will be transmitted to the State party concerned to comment. After comments by the State, the complainant can also make observations. The Committee can decide whether to deal with admissibility and merits of the

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case together or separately; the government would urge them to do so separately here I am sure, in the hope it would be thrown out for lack of exhaustion for example.

Hearings are not common, but can be requested and granted. This is a new development, used rarely, but can be useful for advocacy purposes.

When comments are received from both parties the case is ready for a decision by the Committee. This can in my experience take years from application to final decision. But you may get interim decisions (on admissibility) or interim measures, along the way.

In its final decision, the Committee can:

- decide that the facts before it disclose a violation of the treaty, or not.
- makes recommendations to the State party as to reparation due to victims, which depends on the circumstances; sometimes the UNHRC does not specify, and at others times it can make clear the need for the state to make financial compensation, to modify national laws or to take other general measures to reform and prevent violations in the future.
- invite the state to supply information within a set time frame (normally 180 days) on the steps taken to give effect to the decision. This can be an important to engage with the state and ask for specific forms of remedy.

²¹⁵ Ibid; Guidance for Submitting and Individual Communication to the UN Treaty Bodies:

<https://www.ohchr.org/Documents/HRBodies/Guidance-note-for-complaints-form-E.docx>

²¹⁶ For a more detailed description of formal requirements see: "Human Rights Treaty Bodies – Individual Communications" (OHCHR):

<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#specialcircumstances>

- if there has been no violation of the treaty or the complaint is inadmissible, then the case is closed.

The human rights committees do not have enforcement mechanisms as such to ensure that the States abide their recommendations, but there are follow-up procedures which can be used to pressure for change.²¹⁷ The 'special rapporteur for follow-up' can, through written representation and through personal meetings with diplomatic representatives of the State, urge compliance with the Committee's Views and discuss factors that may be impeding their implementation.²¹⁸

Interestingly and unusually, decisions by UN Human Rights Committees may also be implemented through Kazakh courts. Following a CAT decision stating that the police had violated his rights not to be arbitrarily detained and not to be subjected to torture, A. Gerasimov filed a civil complaint before the Konstanai City Court for implementation of the CAT decision.²¹⁹ He won the case and the Court established that decisions of the UN Committees are binding in Kazakhstan, granting compensation. The decision was upheld by the Appeals Court and the Supreme Court. However, it is worthy of mention that Kazakhstan does not have a system of legal precedent, so subsequent decisions from the same courts could well be different, and the

political nature of cases will make a difference. For instance, in another case “the courts disputed the fact of torture, despite UNCAT finding otherwise, and refused to grant any reparations”.²²⁰

The importance of a case before the UNHRC very often lies in the process, and the advocacy opportunity they present at each stage, more than in the outcome which does not lead inevitably to a concrete result. A powerful legal case can however provide a strong advocacy document to agitate for particular ends.

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4.1.1.3. CONCLUSIONS

In conclusion, advantages of the UN Human Rights Committee (or possibly UNCAT) are:

- Kazakhstan has recognised the competence of the Committees to investigate into alleged violations committed on its territory.
- Mechanism allows for an international and authoritative assessment of how the January events and subsequent developments violate the obligations of Kazakhstan.
- The findings are published, raising public awareness of the situation among the international community.

²²¹ See e.g. Tshishimbi v. RDC (Comm no. 542/1993): <https://juris.ohchr.org/Search/Details/542>

²²² See e.g. Dzhakishev v. Kazakhstan (Comm no. 2304/2013), in which the Committee requested the State to provide the victim (who was in detention) with the necessary and appropriate medical care: <https://juris.ohchr.org/Search/Details/2033> ; Umorova v. Uzbekistan (Comm. No. 1449/2006): <https://juris.ohchr.org/Search/Details/1588>

²²³ “Human Rights Treaty Bodies – Individual Communications” (OHCHR): <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#specialcircumstances>

²²⁴ See Valetov v. Kazakhstan (Comm no. 2104/2011), regarding extradition: <https://juris.ohchr.org/Search/Details/1818>

²²⁵ It ratified in 2002: Optional Protocol to the CAT (2002): https://treaties.un.org/doc/Treaties/2002/12/20021218%2002-38%20AM/Ch_IV_9_bp.pdf List of States Parties: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=en

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-Committees can also request interim measures to the State, which could potentially help pressure for the release of those held in arbitrary detention, and elicit information.

-Kazakhstan Courts have recognised the binding nature of UN Committees' decisions before and implemented them in domestic proceedings, making it harder to disparage this process.

However, disadvantages or obstacles presented by this mechanism are:

-Complaints can only be submitted by victims or on behalf of them, not in the general interest by an NGO. A key determination is therefore access to victims, or their next of kin, their interest in pursuing action and of course their security and ability to do so;

-Before issuing a claim before any of the human rights committees, the victims must exhaust domestic remedies. This implies that a significant amount of time may pass by before this mechanism is available, unless we can promptly seek to exhaust, and make a solid case that there are no effective remedies;

-While the Committees have follow-up procedures, they do not have enforcement mechanisms. Consequently, States can sometimes refuse to abide the recommendations by the Committee. But then implementation is always uncertain in international legal proceedings. While Kazakhstan has implemented UN Committees' decisions before, and the courts have treated the decisions as weighty and indeed binding, as there is no legal precedent system, there is no guarantee that the same courts will rule the same way in future proceedings.

Human Rights *in Practice*

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