



Legal Safeguards to Prevent Torture

The Right of Access to Lawyers for Persons Deprived of Liberty

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Introduction

Torture and other cruel, inhuman or degrading treatment or punishment (“ill-treatment”), in almost all cases, happen in secret. Access to lawyers, as well as to doctors, and contact with friends or family members creates a more open detention environment which helps to prevent torture and other ill-treatment. Incommunicado and secret detention create an atmosphere of impunity for human rights violations, and can even constitute torture or ill-treatment in themselves. The right to be protected from torture and other ill-treatment is a fundamental one from which no derogation is permitted.¹

This briefing note is intended to outline the current state of the law in relation to access to legal counsel² promptly after deprivation of liberty as a safeguard against torture and other ill-treatment.

The function of the right of access to a lawyer for detainees³ is not only to prepare the defence in criminal cases, but also to provide an independent presence during detention and questioning (whether or not associated with criminal proceedings). The presence of a lawyer can help to ensure the detained person’s rights to safety and dignity are respected, and that the

¹ See International Covenant on Civil and Political Rights, articles 4 and 7, as well as UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment articles 2 and 16.

² For the purposes of this paper, no distinction is made between legal counsel, lawyers and legal representatives.

³ For the purposes of this paper, the term “detainee” should be understood to include any person deprived of personal liberty except as a result of conviction for an offence.

authorities do not exceed their legal powers. If a criminal process is set in train, the lawyer can also evaluate the police procedure for compliance with fair trial requirements (and intervene if necessary).

Articles 2 and 16 of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) require States Parties to take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. The experience of well established preventive monitoring bodies such as the European Committee for the Prevention of Torture (CPT) shows that legislating for safeguards, such as prompt access to a lawyer, is one of the best ways for States to fulfil their obligation to take such effective measures. The UN treaty bodies the Human Rights Committee (HRC) and Committee Against Torture (CAT) have also specifically recognised this safeguard as essential for the prevention of torture and other breaches of fundamental human rights.⁴

In short, a State has an obligation to establish safeguards for persons deprived of liberty – such as access to lawyers as described in this paper – if it is to meet the requirements of articles 2 and 16 of the UNCAT.

This paper is divided into sections examining various aspects of the right of access to lawyers. First, how does this safeguard actually protect those deprived of liberty? Secondly, what do we mean by “access” – is the mere presence of a lawyer in the police station sufficient? Thirdly, the timing – why does access need to be granted as soon as possible? Fourthly, can any restrictions legitimately be placed on this right, for example in relation to security concerns? Fifthly and finally, which countries already provide for access to lawyers in their legislation?

I. How does access to a lawyer safeguard human rights?

The presence of counsel serves multiple purposes, including the following:

- Redress of the power imbalance between the authorities and the detained (particularly in terms of knowledge of the law),
- deterrence of torture and other ill-treatment,
- capacity to address arbitrary or improperly justified detention, and
- ability to provide an alternative record of interviews to ensure the integrity of any evidence gathered.

Speaking from experience, the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment made the following recommendations for prevention in his report to the Commission on Human Rights of 17 December 2002:

⁴ See Human Rights Committee General Comment 20 of 10 March 1992, at § 11 and Committee Against Torture, General Comment 2 of 24 January 2008, at § 13. The International Convention for the Protection of All Persons from Enforced Disappearance, which is not yet in force at the time of writing, also provides for this safeguard in article 17(2)(d). See: <http://www2.ohchr.org/english/law/disappearance-convention.htm>

Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. [All relevant] information... should be scrupulously recorded... In accordance with the Basic Principles on the Role of Lawyers, all persons arrested or detained should be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer able to provide effective legal assistance... Security personnel who do not honour such provisions should be disciplined.⁵

The UN Committee Against Torture (CAT) has also issued numerous pertinent Concluding Observations, including for example those on China's 4th periodic report, in which the Committee noted with concern "the lack of legal safeguards for detainees, including... restricted access to lawyers".⁶ Similarly, in its Concluding observations on Indonesia's initial report in 2001, the CAT cited as a concern "the lack of adequate guarantees of the rights of persons deprived of liberty, including to notify a close relative or third party and to have access to medical assistance and *counsel of their choice*...".⁷ The CAT has also criticised (amongst others) the Netherlands,⁸ Spain,⁹ Azerbaijan,¹⁰ Georgia,¹¹ Estonia,¹² Latvia,¹³ Moldova,¹⁴ The Czech Republic,¹⁵ Slovakia,¹⁶ Turkey¹⁷ and Libya¹⁸ for failing to accord this right to all persons deprived of liberty. Examples of good practice are to be found in section V below.

The UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) has provided further explanation of the benefits of a right to access legal counsel:

From a preventive point of view, access to a lawyer is an important safeguard against ill-treatment which is a broader concept than providing legal assistance solely for conducting one's defence. The presence of a lawyer during police questioning may not only deter the police from resorting to ill-treatment or other abuses, but may also work as a protection for police officers in case they face unfounded allegations of ill-treatment. In addition, the lawyer is the key person in assisting the person deprived of liberty in exercising his or her rights, including access to complaints mechanisms.¹⁹

⁵ E/CN.4/2003/68, at § 26(g), available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360. In the remainder of this paragraph, the Special Rapporteur goes on to discuss other safeguards (including medical examinations and prompt appearance before a judicial authority).

⁶ See Concluding Observations on China of 12 December 2008, CAT/C/CHN/CO/4, at § 11.

⁷ CAT A/57/44 (2002) at § 44(e) (emphasis added)

⁸ CAT C/NET/CO/4 (2007) at § 6

⁹ CAT A/58/44 (2003) at § 62

¹⁰ CAT A/58/44 (2003) at § 88(g)

¹¹ CAT A/56/44 (2001) at § 81(e)

¹² CAT A/58/44 (2003) at § 49(d)

¹³ CAT C/CR/31/3 (2003) at § 6(h) – in Latvia's case the Committee observed that, even when legislation provided for a right of access to counsel, it was not guaranteed in practice.

¹⁴ CAT A/58/44 (2003) at § 138(b)

¹⁵ CAT C/CR/32/2 (2004) at §§ 5(b) and 6(d)

¹⁶ CAT A/56/44 (2001) at § 104(g)

¹⁷ CAT A/46/46 (1991) at § 121(c)

¹⁸ A/54/44 of (1999) at § 4(a)

¹⁹ *Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives*, (CAT/OP/MDV/1, 26 February 2009), at § 62.

Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR), which deals with fair trial rights, provides in relevant part that in the context of criminal proceedings the right to communicate with counsel of one's choice should be a minimum guarantee. In a line of authority developed over the last two decades²⁰, the European Court of Human Rights (ECtHR) has, explained that the presence of counsel during interrogation is indispensable to the notion of a fair trial. Testimony elicited in the absence of a lawyer is inevitably a less-than-satisfactory basis for conviction. The presence (or absence) of counsel may also be a decisive factor at other stages of the criminal process. In the case of *Lebedev v Russia*,²¹ the Court found a violation of article 5(3) of the European Convention on Human Rights, which provides for a right to be brought promptly before a judge to have the legality of one's detention determined. Even though there is no explicit mention of a right to legal assistance in article 5, the violation was based on the fact that exclusion of Mr Lebedev's lawyers from the initial detention hearing was unjust in the circumstances of the case.²² In the 2008 case of *Salduz v Turkey*,²³ the court found that the right to a fair trial under article 6 could not be considered practical and effective (as opposed to theoretical or illusory)²⁴ without access to a lawyer from the first interrogation.

Regional bodies have made similar findings. For example, the Inter-American Commission on Human Rights observed in a report on the situation of a minority in Nicaragua of 1983 that the presence of a lawyer was an important safeguard for the rights not to be compelled to incriminate oneself, and not to be tortured.²⁵ In conclusions on El Salvador of 1986, the Commission also said the right to counsel applies from the first time a person is interrogated.²⁶

Additionally, access to counsel is an important safeguard against unlawful and arbitrary detention, which are prohibited by article 9 of the ICCPR. Deprivation of liberty will be contrary to article 9 whenever the detaining authorities fail to act in accordance with domestic law or procedure, or when the detention is simply unreasonable, capricious or disproportionate to the alleged offence.²⁷ Detention which would otherwise be lawful can also become arbitrary if it can no longer be reasonably justified in the circumstances.²⁸ The chances of arbitrariness are higher when the detainee has no counsel to assess the legality and/or reasonableness of his or her detention. In the context of this and related civil and political rights, the Human Rights Committee has commented on the necessity of access to lawyers in

²⁰ See eg *Murray v UK* (Application 41/1994) and *Öcalan v Turkey* (Application 46221/99). This line of authority was followed in numerous cases in 2009 – see further section 4 below.

²¹ Application 4493/04

²² As above – see in particular the Chamber judgment of 25 October 2007, at §§ 84-91.

²³ Application 36391/02 of 8 August 2002 – see in particular § 55 of the Grand Chamber judgment of 27 November 2008. *Salduz* was followed in *Adalmış & Kiliç v Turkey* (Application 25301/04, Chamber judgment of 1 December 2009).

²⁴ This formulation derives from an earlier judgment: *Imbrioscia v Switzerland* (Application 13972/88, judgment of 24 November 1993, see § 38).

²⁵ From Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/II.62, doc.10, rev. 3, 1983, at 100, as cited in Foley, *Combating Torture: A Manual for Judges & Prosecutors*, available at: http://www.essex.ac.uk/combatingtorturehandbook/manual/2_content.htm, at § 2.30.

²⁶ Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador, as also cited in Foley (above), at § 2.30.

²⁷ See Nowak, *CCPR Commentary*, Engel 2005 (2nd Ed), at pp 223-5.

²⁸ As above, at p 226

Concluding Observations on countries including: Kuwait,²⁹ The Syrian Arab Republic,³⁰ Vietnam,³¹ Morocco³² and Belgium.³³

In short, access to a lawyer helps to ensure the protection of the law (national and international) extends to those at the mercy of the State.

II. When does this right come into play?

From the moment of deprivation of liberty, a person's autonomy is restricted and made subject to the will of the authorities. The resulting power imbalance creates a real risk that the person's rights will not be respected.³⁴ This is especially true where the detained person is suspected of criminality and the authorities believe they are in a position of moral superiority. However, under international law every person has the right to be protected from torture and other ill-treatment.³⁵

Access to counsel is no less important when a person is asked to accompany authorities, even if he or she is not under arrest and refusal is an option. In such circumstances there is still a risk he or she may be mistreated and/or compelled to incriminate him- or herself or others.

Since it can never be guaranteed that the detaining authorities (including e.g. police, intelligence officers and security guards contracted to the State) will respect this right in all cases, appropriate safeguards – including access to legal counsel – are necessary.

In practical terms, the effective implementation of the right of access to a lawyer entails permitting a detainee to see a legal representative of his or her choice as soon as possible after deprivation of liberty. The HRC, in its General Comment 32, states that the right to communicate with counsel in article 14 of the ICCPR “requires that the accused is granted prompt access to counsel”.³⁶

The relevant regional bodies also concur on the need for prompt access. For example, the ECtHR in *Salduz v Turkey*³⁷ emphasised that a trial can be rendered unfair as early as the time of the first interrogation, if safeguards such as access to a lawyer are not respected.

²⁹ CCPR A/55/40 (2000) at § 472

³⁰ CCPR A/56/40 (2001) at § 81(14)

³¹ CCPR A/57/40 vol. I (2002) at § 82(13)

³² CCPR A/55/40 (2000) at § 108

³³ CCPR A/54/40 (1999) at § 83. These lists do not purport to be exhaustive; merely to show the widespread incidence of the problem, even in places which do (or might be expected to) have a right of access to counsel enshrined in legislation or procedural guidelines.

³⁴ See Report of UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to Commission of Human Rights of 23 December 2005 (E/CN.4/2006/6, available at: <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/6>).

³⁵ UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 2.

³⁶ See: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/GC/32&Lang=E> at § 34

³⁷ See above, n 23

The European Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CPT) promulgated the following standard in 1992:

The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination... They are, in the CPT's opinion, three fundamental safeguards against the ill-treatment of detained persons *which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).*³⁸

In 1996, the CPT further developed its views on this subject:

The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.³⁹

Finally, in 2002, the CPT gave an update on the status of this safeguard in Europe:

... the right of access to a lawyer during police custody is now widely recognised in countries visited by the CPT; in those few countries where the right does not yet exist, plans are afoot to introduce it.⁴⁰

In its observations on the Russian Federation's third periodic report, the CAT decried the "... lack of adequate access for persons deprived of liberty, *immediately after they are apprehended*, to counsel, doctor and family members..."⁴¹ In its Concluding Observations on Kazakhstan of 12 December 2008, the Committee specifically recommended:

The State party should promptly implement effective measures to ensure that a person is not subject to de facto unacknowledged detention and that all detained suspects are afforded, in practice, all fundamental legal safeguards during their detention. These include, in particular, *from the actual moment of deprivation of liberty, the right to access a lawyer...* and to be informed of their rights, including as to the charges laid against them, as well as being promptly presented to a judge.⁴²

Guideline 20 of the Robben Island Guidelines for the prohibition and prevention of torture and ill-treatment in Africa, which were adopted by the African Commission on

³⁸ CPT Standards Document – extracts of “substantive” sections of CPT reports, available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf> [Rev 2009] - extract from p 6 (emphasis added).

³⁹ As above, at p 8

⁴⁰ As above, at p 10

⁴¹ See Concluding Observations on Russia of 6 June 2002, CAT/C/CR/28/4, at § 6(c) (emphasis added).

⁴² CAT C/KAZ/CO/2 (2008) at § 9 (Emphasis added)

Human and People's Rights in 2002, also specifically provides for a right of access to a lawyer "from the moment when [persons are] first deprived of their liberty".⁴³

In March 2008 the Inter-American Commission on Human Rights adopted a set of guidelines entitled Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. The following paragraph appears under Principle V on Due Process of Law:

All persons deprived of liberty shall have the right to a defence and to legal counsel, named by themselves, their family, or provided by the State; they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.⁴⁴

Principle 7 of the UN Basic Principles on the Role of Lawyers⁴⁵ proposes a specific time limit:

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

This is reinforced by Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to UN General Assembly resolution 43/173 of 9 December 1988:

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.⁴⁶

Since 1990, when these Rules were promulgated, the expert consensus on this timeframe has evolved. It is now generally agreed that that even 48 hours will often be too long. For example, the UN Special Rapporteur on Torture, in his report to the Commission on Human Rights of 27 February 2003, recommended a limit of 24 hours.⁴⁷

In section V below, you will find specific examples of national laws which provide for access to a lawyer from the outset of deprivation of liberty. In countries with ambiguous formulations (such as Canada), national Courts have held that "without delay" means from the moment a person is detained – even in cases involving detention without charge.

⁴³ The Guidelines were annexed to the Resolution of the African Commission on Human and Peoples' Rights on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa of 23 October 2002 – see: http://www.achpr.org/english/resolutions/resolution66_en.html

⁴⁴ The text of the Principles is available on the Commission's website at:

[http://www.cidh.org/Basicos/English/Basic21.a.Principles and Best Practices PDL.htm](http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices.PDL.htm) (emphasis added).

⁴⁵ See: <http://www2.ohchr.org/english/law/lawyers.htm>

⁴⁶ See: <http://www.un.org/documents/ga/res/43/a43r173.htm>. The exceptions mentioned relate to the "needs of the investigation" and the maintenance of "safety and good order".

⁴⁷ E/CN.4/2003/68, at § 26(g), available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360

III. What does “access” mean in practice?

It is necessary for the detainee to be permitted to meet his/her lawyer before being questioned by the authorities. The meeting must be private to ensure the maintenance of lawyer-client confidentiality, which is a cornerstone of many legal systems – particularly in criminal matters.

As the HRC states in its General Comment 32 on the Right to equality before courts and tribunals and to a fair trial:

The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.⁴⁸

The UN Basic Principles on the Role of Lawyers provide for “special safeguards in criminal justice matters,” of which principles 5 and 8 give more detail on the requirements in regard to access:

Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

The lawyer should also be present during questioning, in particular to ward against involuntary confessions. The UN Special Rapporteur on the Independence of Judges and Lawyers stated in a 1998 report after a visit to IRA holding facilities in Northern Ireland:

In the view of the Special Rapporteur, it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved.⁴⁹

International criminal law recognises the need for questioning to be independently observed. For example, article 55(2)(d) of the Rome Statute of the International Criminal Court provides that a person suspected of a crime within the Court’s jurisdiction shall have the right to be questioned in the presence of counsel (unless

⁴⁸ See: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/GC/32&Lang=E> at § 34.

⁴⁹ E/CN.4/1998/39/Add.4, at § 47, available at: <http://www.unhcr.org/refworld/category,REFERENCE,,,GBR,3ae6b0ea8,0.html>

the person voluntarily waives this right).⁵⁰ There are similar, albeit less specific, guarantees in the Statute of the International Criminal Tribunals for Rwanda⁵¹ and the former Yugoslavia.⁵² For further discussion of the relationship of access to lawyers and fair trial rights, please refer to section VI below.

It is not enough for the authorities merely to allow lawyers access to places of detention. If the detainee does not know a lawyer, or cannot afford one, the State should pay for an independent duty lawyer. Ideally such a lawyer would be chosen from a roster of volunteers maintained by the local bar association (or equivalent). Principle 6 of the Basic Principles on the Role of Lawyers is pertinent in this regard:

Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

The UN Standard Minimum Rules for the Treatment of Prisoners⁵³ also address this issue. Rule 93 provides:

For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

Rule 95 extends the same protection to those arrested or detained without charge.

Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁵⁴ (Body of Principles) provides:

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

⁵⁰ Rome Statute of the International Criminal Court, A/CONF.183/9, available at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>

⁵¹ See <http://www.icty.org/ENGLISH/basicdocs/statute.html> at article 20(4).

⁵² See http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf at article 21(4).

⁵³ See <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>. The Rules were Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Please note that, despite their name, these rules apply not only to prisoners but also to those on remand and other untried detainees (rule 95).

⁵⁴ See: <http://www2.ohchr.org/english/law/bodyprinciples.htm>

In summary, access in this context means private consultation with a view to ensuring strict adherence to procedure and respect for the detainee's rights. The authorities are obliged to facilitate such a consultation to the extent necessary to make it a meaningful exercise.

IV. Is this an absolute or a qualified right?

This section attempts to explore whether there are any justifiable restrictions on the right of access to lawyers. Can it be restricted on, for example, national security grounds? Does it make any difference whether the detainee is to be interrogated or merely questioned informally?

Many domestic legal regimes make provision for incommunicado detention, for example where an ongoing investigation may be jeopardised or where public safety is at risk. However, such regimes increase the risk of ill-treatment and other rights violations, and for this reason should be avoided, or at least strictly circumscribed.

One of the earliest international expressions of the safeguard of legal representation is contained in the Body of Principles. Principle 18 states (at paragraph 3):

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

This provision is, however, limited by principle 15 as outlined in Section II of this paper.

The Body of Principles was reaffirmed in December 2009 in paragraphs 19-20 of General Assembly resolution 64/153.⁵⁵ In this resolution, the Assembly:

Recalls its resolution 43/173 of 9 December 1988 on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and in this context stresses that ensuring that any individual arrested or detained is promptly brought before a judge or other independent judicial officer in person and permitting prompt and regular medical care and legal counsel as well as visits by family members and independent monitoring mechanisms are effective measures for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, [and]

Reminds all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards

⁵⁵ See: <http://www.un.org/ga/64/resolutions.shtml>

concerning the liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished;

This resolution, which was adopted by consensus, demonstrates that the international community has concluded prolonged incommunicado detention and secret detention must not be employed, even in exceptional circumstances.⁵⁶

The ECtHR, in *Öcalan v Turkey*,⁵⁷ held that a person should have a right of access to legal counsel to challenge his or her detention, and that article 6 of the European Convention on Human Rights – containing fair trial guarantees – “will normally require that the accused be allowed to benefit from the assistance of a lawyer from the initial stages of police interrogation”.⁵⁸ “However,” the ECtHR went on to say, “this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in light of the entirety of the proceedings, has deprived the accused of a fair hearing”.⁵⁹

The ECtHR reaffirmed and elaborated on its stance in *Öcalan* in the 2008 case of *Salduz v Turkey*.⁶⁰ The Court found that the right to a fair trial requires access to a lawyer from the first interrogation, and said further that, even where there are compelling reasons to curtail such access, “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”. This means that not even waiver of the right to counsel or other valid exceptions in domestic law will necessarily excuse the authorities from providing access to a lawyer, if subsequent reliance on the relevant oral evidence would be unfair in light of all the circumstances.⁶¹

As regards exceptional circumstances in which the right to access counsel may be restricted, it should be noted that the Human Rights Committee has said:

It is inherent in the protection of rights explicitly recognised as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights...⁶²

⁵⁶ The International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force but also adopted by consensus by the UNGA on 20/12/2006) also prohibits secret detention in article 17(1).

⁵⁷ Application 46221/99. See also *Murray v UK* (Application 41/1994).

⁵⁸ *Öcalan v Turkey*, as above, judgment of the First Section (Chamber) of the ECtHR, 12 March 2003, at § 140. This passage was approved by the Grand Chamber on appeal, at § 131 of the Grand Chamber judgment of 12 May 2005.

⁵⁹ As above

⁶⁰ See above, n 23

⁶¹ See also *Pishchalnikov v Russia* (Application 7025/04, Chamber judgment of 24 September 2009, in particular §§ 72-91), *Oleg Kolesnik v Ukraine* (Application 17551/02, Chamber judgment of 19 November 2009 § 35), and *Savaş v Turkey* Application 9672/03 of 13 March 2006; Chamber judgment of 8 December 2009, in particular §§ 53-70).

⁶² See Human Rights Committee General Comment 29, § 15. The remainder of the paragraph gives an illustrative example related to the right to life (article 6).

Following this reasoning, safeguards such as the right to access a lawyer must never be restricted to such an extent that a breach of article 7 ICCPR (which is non-derogable) is thereby facilitated.

The Special Rapporteur on Torture has also addressed the issue of restrictions in the name of security, and proposed a solution to address at least one recurrent State concern:

In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association...⁶³

The common thread here is that access to a lawyer is an important means to ensure compliance with a State's other human rights obligations in relation to a detainee, including the obligation to accord him or her a fair trial and protection from all forms of ill-treatment. Where access to a lawyer is denied or unduly delayed, the risk of breaching these obligations is heightened.

V. Which national laws already enshrine this right?

Europe

The right of access to counsel is particularly well-established in Europe. The European Prison Rules provide that "[u]ntried prisoners shall be informed explicitly of their right to legal advice".⁶⁴

One prominent example of the recognition of this right in Europe is article 63(4) of the French *Code de Procédure Pénale*, which provides that, from the moment a person is taken into custody, he or she may request to speak to a lawyer.⁶⁵ This provision, read in light of the jurisprudence of the ECtHR above (the *Salduz* case in particular), was put into practice in July and November 2009, when supervising judges at the Tribunal de Grande Instance de Bobigny (Paris-St-Denis) refused to authorise further police custody (*garde à vue*) of persons suspected of serious crimes who had not seen lawyers.⁶⁶ At the time of writing, this is an emerging issue of constitutional controversy in France.⁶⁷

⁶³ 2003 Report to the Human Rights Commission – see above n 5.

⁶⁴ See Recommendation Rec(2006)2 of the Committee of Ministers, available at: <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

⁶⁵ Unofficial translation – in the original, it is: *Dès le début de la garde à vue, la personne peut demander à s'entretenir avec un avocat.*

⁶⁶ The Tribunal decisions are not published, but a copy of the decision of 30 November 2009 is available on the LeMonde.fr website: <http://combatsdroitshomme.blog.lemonde.fr/files/2009/12/decision-jld-bobigny-cedh.1259856473.pdf>. See further <http://www.abolir-gardeavue.fr> – the website of a campaign by Parisien barristers to reform the French system of "*garde à vue*" to include timely access to lawyers. Please note that this legal development is not without controversy – *Le Syndicat des Commissaires de la Police Nationale* (www.le-scpn.fr) issued a press release on 3 December 2009 deploring the prioritisation of European Human Rights law over French domestic law.

⁶⁷ See eg: <http://info.france2.fr/france/la-garde-a-vue-conforme-a-la-constitution--61451481.html>

Under section 10 of chapter 23 of the Code of Judicial Procedure in Sweden, every person detained has the right to have counsel present when giving a statement to police, even during a preliminary investigation, as long as this would not be to the detriment of the inquiry.⁶⁸ The SPT praised this provision after its mission to Sweden in 2008:

The SPT welcomes this new provision as it now allows the presence of counsel from the very beginning of the deprivation of liberty and for all persons obliged to remain with the police. It also reflects the fact that the person giving statement to the police is not necessarily a suspect but may later become one. The SPT recommends that the Swedish authorities take the necessary steps to ensure that this new provision is effectively applied in practice and that the persons obliged to stay with the police are systematically informed about this right.⁶⁹

Article 53, paragraph 2 of the Greek Penitentiaries Code guarantees access to a lawyer for those detained in prisons.⁷⁰ Article 96 of the Criminal Procedures Code also guarantees a right of communication between those charged with criminal offences and their lawyers.⁷¹ In 2003, the Greek Chief of Police also issued a Protocol (directive) stating that all Greek police should also comply with article 6 of the European Convention on Human Rights and allow a lawyer free access to all detainees (whether criminal or administrative).⁷²

In the UK, there are codes of practice under the *Police and Criminal Evidence Act 1984* (PACE Act),⁷³ including Code C which “sets out the requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody by police officers”.⁷⁴ The code provides that the “right to consult privately with a solicitor and [to]... free independent legal advice...” is available “at any stage during the period in custody”.⁷⁵ Note 1A to the Code specifies that people who are in a police station voluntarily (witnesses, for example) are also to be accorded an absolute right to obtain legal advice.⁷⁶ However, under s 67(10) of the PACE Act,⁷⁷ no liability – be it civil or criminal – arises out of a breach of the Codes.

Articles 255(1) and 256 of the Albanian Criminal Procedure Code provide:

The officers and the agents of the judicial police that have made an arrest or a detention or have held the arrested on delivery, shall immediately inform the prosecutor of the place where the arrest or the detention has taken place. They shall explain to the arrested or the detained that they are not obliged to declare anything and that they have the right to select a

⁶⁸ An (official) English translation of the Code is available at:

<http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf>

⁶⁹ See *Report on the Visit of the UNSPT to Sweden*, (CAT/OP/SWE/1, 10 September 2008), at § 56.

⁷⁰ In the absence of a readily available translation of the code, see communique from Chief of Police Fotios Nasiakos of 4/7/03 on the treatment and rights of persons detained by Greek Police, available at: <http://www.unhcr.org/refworld/pdfid/426fa1f14.pdf>, at § 3(f).

⁷¹ As above at § 3(e).

⁷² As above.

⁷³ Available at: http://www.opsi.gov.uk/acts/acts1984/pdf/ukpga_19840060_en.pdf

⁷⁴ <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>

⁷⁵ As above, at p 9.

⁷⁶ As above, at p 5.

⁷⁷ See above, n 73.

defence lawyer and immediately shall notify the selected defence lawyer or the one appointed ex officio by the prosecutor.

The prosecutor interrogates the arrested or the detained in the presence of the selected or appointed ex-officio defence lawyer. He shall notify the arrested or the detained the fact for which he is being proceeded and the reasons of the interrogation, making known the information on his charge and, when the investigation are not impaired, even the sources.⁷⁸

The Criminal Procedure Code of the Russian Federation contains the following guarantee:

“The suspect shall have the right... to avail himself of the advice of the counsel for the defence from the moment stipulated by Items 2 and 3 of the third part of Article 49 of the present Code, and to have a private and confidential visit from him before the suspect's first interrogation...”⁷⁹

Many other European criminal codes and constitutions contain similar guarantees.⁸⁰

The Americas

The sixth and fourteenth amendments to the United States Constitution⁸¹ have been held to guarantee a right to counsel at or after the time that judicial proceedings have been initiated against a person. The Supreme Court has interpreted this to include arrest under a warrant and interrogation.⁸²

Canada has a right to counsel “without delay” in its Charter of Rights and Freedoms.⁸³ The Canadian Supreme Court considered whether this had a different meaning in the context of detention without charge in the 2009 case of *Suberu v The Queen*⁸⁴ and concluded that the right is engaged the moment a person is detained,

⁷⁸ See:

<http://www.legislationline.org/download/action/download/id/1654/file/3e7ef0be7ad60ee6e16cbd8b63db.htm/preview> (English translation)

⁷⁹ Available at:

<http://www.legislationline.org/download/action/download/id/1698/file/3a4a5e98a67c25d4fe5eb5170513.htm/preview> - see also articles 49(3)(3) and 92(4)

⁸⁰ Unofficial translations of these laws are available at: <http://www.legislationline.org/documents/section/criminal-codes>. The other Codes containing pertinent protections include: Code of Criminal Procedure of the Azerbaijan Republic (article 85.2.3); Republika Srpska Criminal Procedure Code (articles 47(1) and 201(5)); Criminal Procedure Code of Bulgaria (article 97); Code of Criminal Procedure of Estonia (article 45); Criminal Procedure Code of the Former Yugoslav Republic of Macedonia (article 3); Criminal Procedure Code of the Republic of Moldova (article 17); Criminal Procedure Code of Montenegro (articles 5 and 13); Criminal Procedure Code of Norway (articles 96-8 and 107); Federal Criminal Procedure Code of Switzerland (article 35 – NB this grants a right to counsel only from the first detention hearing, which must be within 24 hours of initial detention); Criminal Procedure Code of Uzbekistan (article 49, as amended in 1999). Please note this list does not purport to be exhaustive – it includes only codes of which the author was able to find suitable translations.

⁸¹ That is, the guarantees of legal assistance for defence of a criminal charge and due process on deprivation of liberty – see <http://www.archives.gov/exhibits/charters/constitution.html>.

⁸² See *Brewer v Williams* 430 US 387 (1977), unofficially available at:

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0430_0387_ZO.html, at pp 398-9.

⁸³ At section 10(b) – see: <http://laws.justice.gc.ca/en/charter/> under (“Legal Rights”).

⁸⁴ 2009 SCC 33, unofficial full text available at: <http://scc.lexum.umontreal.ca/en/2009/2009scc33/2009scc33.html> (official summary also available at: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=31912>).

subject to restrictions only in relation to personal safety or prescribed by law and consistent with the purpose of the Charter.⁸⁵

Mexico's Constitution of 1917, as amended, provides that a person is entitled to an adequate defence by counsel, and may choose such counsel at any time from the moment of arrest/detention.⁸⁶ The actual right of access is provided for later in the same paragraph "at all stages of the process/proceedings".⁸⁷ As in the United States, there is some controversy as to whether this means from the moment of deprivation of liberty or some later point.⁸⁸

Oceania

New Zealand's Bill of Rights Act 1990 provides that:

[e]veryone who is arrested or who is detained under any enactment...
[s]hall have the right to consult and instruct a lawyer without delay and to be informed of that right...⁸⁹

Similarly, Section 65(c)(ii) of the Constitution of the Cook Islands states:

No enactment shall be construed or applied so as to deprive any person who is arrested and detained of the right, wherever practicable, to retain and instruct a barrister or solicitor without delay.⁹⁰

Africa

In Madagascar, article 4 of the Law against Torture of 2008⁹¹ provides for the application of several fundamental guarantees "from the instant of deprivation of liberty",⁹² including the right to "a lawyer or assistance of a person of [the detainee's] choice".

Section 35(2)(b) of the Constitution of South Africa provides that "Everyone who is detained, including every sentenced prisoner, has the right... to choose, and to consult with, a legal practitioner, and to be informed of this right promptly".⁹³

In a similar vein, section 14(2) of the Constitution of the Republic of Ghana provides: "A person who is arrested, restricted or detained shall be informed immediately; in a

⁸⁵ As above – see in particular § 2 of the majority judgment

⁸⁶ Unofficial translation – original reads: *Tendrá derecho a una defensa adecuada por abogado, al cual elegirá libremente incluso desde el momento de su detención* - article 20(B), § VIII – see: <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>.

⁸⁷ Unofficial translation – in the original: "...en todos los actos del proceso".

⁸⁸ See Special Report entitled *Presumed Guilty: Criminal Justice and Human Rights in Mexico* – 24 Fordham Intl LJ (2000-01) 801 at 843.

⁸⁹ At section s23(1)(b) – see: <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁹⁰ The text of the Constitution is available at: http://www.paclii.org/ck/legis/num_act/cotci327. A failure to avert to this right before conducting an interrogation led to a ruling of inadmissibility in *Police v Ngametua Tutakiau* [2001] Cook Islands Crim.

⁹¹ Formally *Loi #2008-008 of 25 June 2008 contre la torture et autres peines out traitements cruels, inhumains ou dégradants* – available at: <http://www.apr.ch/tld/Madagascar.pdf>.

⁹² In the original: "...dès l'instant où intervient la privation de liberté d'une personne...".

⁹³ <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>

language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.”

Others

There are numerous other instances in domestic legislation of similar guarantees, the comprehensive coverage of which would go beyond the scope of this paper. However, the examples above amply demonstrate the widespread recognition of the right to access a lawyer on deprivation of liberty – even if various countries choose to characterise it differently.

Recommended Approach

One significant problem with most of the national legislation cited above is that it links the right of access to a lawyer to criminal proceedings, and thereby restricts it to suspects. However, to constitute a comprehensive safeguard against torture, ill-treatment and other human rights violations, access to a lawyer should be available to anyone effectively deprived of his or her liberty, including those kept in any form of administrative detention,⁹⁴ witnesses and other “persons of interest” to the authorities. For this reason, the ideal approach is to include the guarantee in a universally applicable Bill of Rights.

⁹⁴ Support for this proposition may be found in the Body of Principles (See above, n 54. The definition of “detainee” is not restricted to criminal cases, and in Resolution 1993/36 on the question of arbitrary detention, the former UN Commission on Human Rights specifically stated that the Body of Principles covers administrative detention [See:

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/fe59d64a20ec7117c1256a8400459c75?Opendocument> at PP6]). The Standard Minimum Rules (see above, n 53) also extend to persons arrested or detained without charge (see rule 95), and the CPT Standards refer to access to a lawyer for irregular migrants detained administratively [Rev 2009, at p 50 – see above, n 38].

VI. Related Rights

Apart from article 7 of the ICCPR and articles 2 and 16 of the UNCAT (and other well-established prohibitions on torture and ill-treatment⁹⁵), the safeguard of access to lawyers is related to international law prohibitions on arbitrary arrest and detention contained in article 9(1) of the ICCPR.⁹⁶ Articles 9(3) and 9(4) are also pertinent. The right to be brought promptly before a court for a pre-trial hearing⁹⁷ and the right to challenge the legality of one's detention (*habeas corpus*), are other critical safeguards against torture and other ill-treatment. In its resolution 34/178, the UN General Assembly:

Considers that the use of those remedies may also forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment...⁹⁸

Although they are well established in international law, respect for these rights is far from universal, and this situation will not improve unless detainees have access to competent legal representation.

In addition, as mentioned previously, there is some crossover between this right and the right to adequate legal representation in criminal trials.⁹⁹ Although this paper focuses on the potential for the right to access counsel as a safeguard against ill-treatment, rather than as a fair trial guarantee, it is clear that damaging evidence obtained through interrogation without a lawyer may eventually result in an unfair conviction.¹⁰⁰

⁹⁵ See eg article 3 of the European Convention on Human Rights (available at: <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>), article 5 of the American Convention on Human Rights (available at: <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>), or article 5 of the African (Banjul) Charter on Human and Peoples' Rights (available at: <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>).

⁹⁶ See eg article 9 of the International Covenant on Civil and Political Rights; article 5 of the European Convention on Human Rights, article 7 of the American Convention on Human Rights, or article 6 of the African Charter on Human and Peoples' Rights.

⁹⁷ In General Comment 8, the HRC states: "Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorised by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days."

⁹⁸ See: <http://www.un.org/documents/ga/res/34/a34res178.pdf> at § 2. "Those remedies" refers to *amparo*, *habeas corpus* or other legal remedies to the same effect (see § 1).

⁹⁹ See eg article 14 of the International Covenant on Civil and Political Rights; article 6 of the European Convention on Human Rights, article 8 of the American Convention on Human Rights, or article 7 of the African Charter on Human and Peoples' Rights.

¹⁰⁰ See eg *Salduz v Turkey*, above n 23 – in particular § 55 of the Grand Chamber judgment of 27 November 2008.

Conclusion

A right to access legal counsel, backed up by cooperation on the part of the detaining authorities, is vital to a State's adequate implementation of articles 2 and 16 of the UNCAT (the duty to prevent), as well as to reduce the risk of other human rights violations. In countries where the judiciary has limited control over detention by the executive, the role of independent lawyers is even more critical.

It is therefore strongly recommended that any Government which has not already enshrined such a right in its national legislation do so, bearing in mind the following essential elements of the guarantee:

- It should apply from the outset of any deprivation of liberty, or in any case before any questioning takes place;
- it should apply in respect of anyone detained against their will, not just those suspected of involvement in crime;
- the access for the lawyer to the detainee must be unrestricted and private, and
- provision should be made in the relevant legislation for:
 - the discipline of authorities who refuse to allow access to/for lawyers, and
 - the inadmissibility of any evidence obtained without respecting this guarantee.

Provision for the actual presence of the lawyer during any questioning or interrogation, wherever possible, would further enhance protection and lessen the risk of violations.

Existing rights of access to lawyers in national legislation which lack any of these essential components should also be revised.

