association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Position paper on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

16 October 2012

Summary of APT recommendations in response to the Council of the European Union proposal dated 11 April 2012. The APT recommends:

Scope

A. The directive should apply to any person, irrespective of their status, who is, in practice, not free to leave police custody, which may include witnesses.

The right of access to a lawyer

B. To be an effective safeguard, the right of access to a lawyer must be guaranteed from the very outset of the deprivation of liberty.
C. References to "official" interviews create a loophole in the protection and should be deleted.
D. Language in recital 20 permitting State authorities to initiate interrogations prior to the arrival of a lawyer creates a dangerous risk and should be deleted in its entirety.

The role of the lawyer

E. Proposals which place any restrictions on the role of lawyers should be rejected as unjustifiably limiting their actions.
F. Lawyers should be given the right to access places where detainees are held and to check their conditions of detention.

Confidentiality of communications

G. The importance of confidentiality in legal communications should be upheld without derogation.

The right to communicate upon arrest

H. The right to communicate with friends and family, and receive visits, rather than just for a person nominated by the detainee to be informed should be protected. Such a right should be subject to derogation only in exceptional circumstances in line with CPT recommendations.

Remedies

I. Any evidence obtained in the absence of an accused person's lawyer should be made inadmissible without exception.

Derogations

J. Derogations should be strictly limited in scope and time.

Introduction

The APT is a Geneva-based international NGO with over 35 years experience in the prevention of torture and other forms of ill-treatment to persons deprived of their liberty. In particular, the APT promotes the use of procedural and legal safeguards, among other preventive practices.[1]

It has often been observed that the most serious risk of torture and other forms of ill-treatment occurs during arrest and in the initial stages of detention.[2] It is here that an accused person feels most vulnerable and is likely to experience significant psychological stress and anxiety. Where a person is isolated from the outside world, the State authority maintains absolute control, which places the person at risk of torture and other ill-treatment.

The Sub-committee on Prevention of Torture has explained the some of the benefits of early access to legal assistance: "The presence of a lawyer during interrogations is not only a way to deter the police from resorting to ill-treatment during questioning, but it also serves to protect police officers in case they face unfounded allegations of ill-treatment."[3] The presence of a lawyer may also protect the integrity of the prosecution's case, since it prevents a defendant from withdrawing his statements at a later stage in the process with reference to allegations of ill-treatment or other forms of prohibited coercion.[4]

It is in this context that early access to a lawyer and the right to communicate with a third person are recognised as fundamental requirements of justice, which should be afforded strong protection in the final European Union directive.

The APT therefore welcomes the progressive approach of the EU roadmap on justice reform and procedural rights aimed at strengthening procedural rights of suspected and accused persons in criminal proceedings. We also endorse the commitment shown by the EU to achieving effective implementation of the right of access to a lawyer and to communicate upon arrest, as fundamental safeguards against ill-treatment in the initial stages of police detention.[5] However, we are seriously concerned by recent proposals which attempt to undermine these safeguards, reducing the protection to a level below that currently guaranteed by the EU Charter of Fundamental Rights, the European Convention on Human Rights, and other relevant provisions of international law.

The APT strongly encourages the EU and its Member States to reverse the downward revision of these fundamental rights, and to restore those provisions to the minimum standards included in the Commission proposal, dated 8 June 2011.[6] In particular, we draw

---

[1] In 2010, the APT published a Legal Briefing on the right of access to a lawyer for persons deprived of their liberty, which is available in Albanian, Armenian, English, French, Georgian, Portuguese & Spanish, see http://www.apt.ch/index.php?option=com_docman&task=cat_view&gid=283&Itemid=260&lang=en.

[2] For instance, see *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2010, §15: "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."

[3] SPT, *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, § 62.

[4] A. Kadar, *Presumption of Guilt* (Hungarian Helsinki Committee: Budapest, 2004), p.120.

[5] "The European Commission concluded that whilst all rights that make up the concept of 'fair trial rights' were important, some rights were so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights", in European Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, Green Paper from the Commission, Brussels 19 February 2003, COM (2003) 75 final, §2.5.

[6] European Commission, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, Brussels, 8.6.2011, COM(2011) 326 final, 2011/0154 (COD), hereafter "Commission proposal".

attention to the proposals of the Council of the European Union text dated 11 April 2012,[7] which, as currently drafted, fall below European and other related international human rights standards.

Each of the proposals which fall beneath current standards is addressed in detail below. Please note that references to proposals refer to either the Commission proposal, dated 8 June 2011, or the most recent Council proposal, dated 11 April 2012.

1. Reduced scope of the proposed directive creates the risk of torture and other ill-treatment

Though earlier proposals had considered the rights of other persons, recent drafts of the directive have focused only on the rights of criminal suspects and accused persons. However, standards proposed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Standards) emphasise that the right of access to a lawyer should be enjoyed by anyone who is under a legal obligation to attend a police station, but is not a suspect, such as a witness.[8] Such a pragmatic approach is followed in jurisprudence of the European Court of Human Rights (ECtHR), which has held that the formal qualification of the person is immaterial.[9]

It should therefore be recognised that access to a lawyer is no less important when a person is asked to accompany authorities, even if the person is not under arrest and refusal is an option. In such circumstances there is still a risk the person may be mistreated and/or compelled to incriminate himself or others.[10] There is also a risk that police may deliberately classify a person as a witness to avoid the range of rights which are traditionally reserved for suspects and other accused persons.[11]

It is critical that whatever the reason a person is detained or obliged to attend a police station, the right to access legal assistance should apply. To withhold this fundamental right creates a gap which could encourage police officers to coerce or otherwise ill-treat witnesses or any other persons subject to investigations in order to elicit information.

A wide scope for both rights described under the directive may be considered in line with existing practice in some Member States. Consider that in the UK, for instance, pursuant to codes of practice under the *Police and Criminal Evidence Act 1984*,[12] the "right to consult privately with a solicitor and [to] free independent legal advice is available" … "at any stage during the period in custody".[13] The code further explicitly specifies that persons present at police station voluntarily to assist with an investigation (such as witnesses, for example) should be treated with no less consideration, "and enjoy an absolute right to obtain legal advice or communicate with anyone outside the police station".[14] Sweden is another EU Member State which demonstrates law in compliance with the international standard. Under section 10 of Chapter 23 of the Code of Judicial Procedure, every person has the right to

[7] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, Brussels, 11 April 2012, 8032/12, DROIPEN 35, COPEN 66, CODEC 770, hereafter "Council proposal".
[8] *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2010, §41.
[9] ECtHR, *Busco v. France*, 14 October 2010, No.1466/07, §47.
[10] See, for instance, the Report of the Special Rapporteur on torture, Mission to Kyrgystan, 21 February 2012, A/HRC/19/61/Add.2, §45.
[11] Ed Cape *et al.* observe the distinction between accused persons and those who are otherwise the target of investigations, noting that in Germany and Poland the distinction leads to a reduction in rights for such persons. In both cases they recommend right to legal assistance be extended to all persons, whatever their formal designation. See E. Cape, Z. Namoradze et al., *Effective Criminal Defence in Europe* (Intersentia: Antwerp, 2010), at pp.619-620, and 623.
[12] Available at: http://www.opsi.gov.uk/acts/acts1984/pdf/ukpga_19840060_en.pdf
[13] UK, Police and Criminal Evidence Act (PACE) 1984, Code of Practice for the Detention, Treatment and questioning of persons by Police Officers (Code C), section 3.1.
[14] *Ibd*. at section 1A..

have counsel present when giving a statement to police, so long as this would not be to the detriment of the inquiry.[15] The provision was praised by the SPT 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 [emphasis added].[16]

Protection for such persons is partly found in the recitals,[17] but it is important that this text is returned to the directive text itself. By relying on the formal category of the person, the directive creates a risk that persons who are treated as witnesses, but are in fact suspected of committing a crime, will suffer unlawful coercion or other forms of ill-treatment.

- ***It is recommended that the directive should apply to any person, irrespective of their status, who is, in practice, not free to leave police custody, which may include witnesses.***

2. Creation of "official" interviews creates dangerous loophole in fundamental safeguards

While the Council proposal provides for access to legal assistance from *before* a person is interviewed by police, it limits such access only to "official interviews". This new language implies there are other 'unofficial' or 'informal' categories of interview for which legal assistance is not required.

Such language is extremely problematic and encourages abuse. Examples from several European States illustrate that where an opportunity exists to exclude from suspects guaranteed legal rights, it has been taken to the detriment of an accused.[18] Examples include deliberate questioning at the time of arrest or before a lawyer arrives, as illustrated in this example recorded by the Hungarian Helsinki Committee:

> Informal interviews are also used, which precede a formal one, during which detainees are bombarded with questions, or threatened with physical ill-treatment. Such cases highlight the important role of counsel. Reported examples describe case-officers summoning legal counsel to appear fifteen minutes after the interrogation begins. During these fifteen minutes alone, the interrogator tries to convince the defendant to confess.[19]

The Commission proposal recommends access as soon as possible, and in any event, before the start of questioning, upon carrying out of any procedural or evidence-gathering act at which the person's presence is required or permitted as a right (unless this would prejudice the acquisition of evidence). Yet this language is slightly different from standards which are found at international, regional and domestic levels, including in some EU Member States.

---

[15] An official English translation of the Code is available at: http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf
[16] See *Report on the Visit of the UNSPT to Sweden,* (CAT/OP/SWE/1, 10 September 2008), at § 56.
[17] See recital 13 of the EU Council proposal, dated 11 April 2012.
[18] E. Cape, Z. Namoradze *et al.*, *Supra*, p.585.
[19] A. Kadar, *Presumption of Guilt* (Hungarian Helsinki Committee: Budapest, 2004), p.77.

At the international level, the Committee against Torture consistently recommends "that access to a lawyer, as a fundamental legal safeguard, is guaranteed to persons in police custody from the very outset of their deprivation of liberty."[20] At the regional level, the CPT uses comparable language to direct that all persons deprived of their liberty by the law enforcement agencies should be granted as from the outset of their detention the right of access to a lawyer.[21] The illustration from the UK above provides a good example from national practice. But consider also, that in France, changes to the law (Law 2011-392 of April 14, 2011) followed a series of decisions of the *Cour de Cassation* to also require that persons should have access to a lawyer from the outset of their deprivation of liberty, and that a lawyer should be present during all interrogations.[22] Similar reforms have also recently taken place in Scotland, Belgium, and the Netherlands.[23]

- **It is recommended that to be an effective safeguard, the right of access to a lawyer must be guaranteed from the very outset of the deprivation of liberty, and all references to "official" interviews should be deleted.**

3. Allowing for a suspect to be interrogated prior to the arrival of a lawyer creates a dangerous loophole in the proposed protections

Recital 20 of the recent Council proposal proposes a dangerous arrangement where Member States are left to determine "whether, and if so, for how long, the competent authorities should wait until the lawyer arrives before starting an interview […]". Such a provision undermines proposed protective measures and effectively renders safeguards void, by creating a dangerous loophole and allowing police to begin interrogations before the arrival of a lawyer. To initiate interrogations before the arrival of a lawyer is to fail to give any effective meaning to the right of access to a lawyer.

In circumstances where it is really necessary to initiate an interrogation prior to the arrival of a lawyer, perhaps in urgent moments where there is a serious risk to human life, a strictly defined derogation anticipated by article 7 would adequately consider such circumstances.

As an important corollary to the right to access a lawyer before the start of the interrogation, once a person has requested legal assistance, all questioning must cease immediately until the person has consulted with a lawyer.[24]

- ***Language in recital 20 permitting State authorities to initiate interrogations prior to the arrival of a lawyer creates a dangerous risk of torture and ill-treatment, and should be deleted in its entirety.***

[20] CAT, Concluding Observations of the Committee against Torture for the Netherlands, CAT/C/NET/CO/4, 3 August 2007, §6. For an example of the consistency of the recommendation, see for instance the annual report of the Committee (2009-2010), CAT A/65/44, which repeats the same language in respect of various European States: Moldova (§53°10), Slovakia (§54°6), Austria (§57°9), France (§59°22), and Lichtenstein (§61°11).
[21] *CPT Standards*, *supra*, §15.
[22] Subject to notable exceptions for those suspected of organised crime or terrorism. For an analysis of the access to a lawyer in France prior to the changes, see E. Cape, Z. Namoradze, et al., *Effective Criminal Defence in Europe* (Insentia: Antwerp, 2010), pp.222-228.
[23] See Open Society Justice Initiative, 'Case Watch: Salduz Fever Sweeps Europe', Open Society Foundations, 26 April 2011, at http://www.soros.org/voices/case-watch-salduz-fever-sweeps-europe.
[24] *See* ECtHR, *Pishchalnikov v. Russia*, 24 September 2009, no. 7025/04, §79.

4. Reduction in assistance and services provided by lawyers

General practice from the ECtHR finds that rights should not be just theoretical or illusory, but practical and effective.[25] Building on this principle, in the case of *Dayanan*, the ECtHR describes the full range of legal services to which an accused person is entitled during police interrogation, in order to give effective meaning to the right of legal assistance. These services include (but are not necessarily limited to) discussion of the case, instructions by an accused, investigation of the facts, search for favourable evidence, preparations for interrogations, support for the suspect and control of the conditions under which the accused is held.[26]

The Standard Minimum Rules for the Treatment of Prisoners, adopted in 1957, also recommends full and effective assistance and access to a legal representative.[27]

Significantly, the Commission proposal includes the right "to meet" with a lawyer, but this language is dropped in the more recent Council proposal, which provides only the right "to communicate" with a lawyer, and reserves the right for the lawyer to be present only during an interrogation. This language implies that the requirement may be met through telephone communication or written correspondence. Yet such means of communication are poor substitutes for face to face communication, particularly for the first meeting when it is essential for the lawyer to build trust with the detainee, and for the detainee to be open and candid with the lawyer. A personal visit is also essential to ensure the fair treatment of the detainee. Clearly, it is impossible for a lawyer to observe signs of ill-treatment and torture or see the conditions of detention without being physically present.

Therefore, in order for the right to legal assistance to be effective in practice, a lawyer should be entitled to provide a full range of legal services to the detainee. Broadly, the lawyer should be entitled to meet the detainee *before* questioning by the authorities, to participate *during* the interrogation, to offer confidential advice as necessary, and to assist their clients in every appropriate way.[28] The lawyer should also be entitled to check the conditions in which the person is detained.

- ***Despite the range of responsibilities which lawyers may undertake on behalf of their clients, recent proposals by the Council appear to limit the scope of their role.[29] It is recommended that proposals which place any restrictions on the role of legal representatives should be rejected as unjustifiably limiting their actions.***

The Council proposal further provides an overbroad derogation to the provision of legal assistance, when "justified by compelling reasons."[30] The proposal does not define "compelling reasons" and as a result creates a potentially unlimited loophole in the right to legal assistance, making the right illusory in practice. Derogations are already adequately regulated under the separate derogations provision in all proposals.

- ***It is recommended this derogation from the general right of access to a lawyer should be deleted entirely.***

[25] See, for instance, ECtHR, *Daud v. Portugal*, 21 April 1998, No. 22600/93, paras.36-42.
[26] ECtHR, *Dayanan v. Turkey*, 13 January 2010, No.7377/03, §32.
[27] See particularly, SMR Rule 93, as interpreted with Rule 95.
[28] See Principle 13, UN Basic Principles on the Role of Lawyers.
[29] Particularly when read with reference to recital 21 in the recent Council proposal.
[30] Art.3(5) of the Council proposal, read in conjunction with recital 22.

5. Removal of the right for defence counsel to check the conditions of detention

The APT is particularly concerned that the recent Council draft does not include language proposed by the Commission, which provides for the explicit right for lawyers to check conditions of detention and have access to the place where a detainee is held.[31] Such a right provides a strong incentive to all police officers to treat those under their control humanely and hold detainees only in conditions which meet minimum standards. Additionally, after gaining access to the place of detention, lawyers may better look after their client's interests while in detention and argue on their behalf for accommodation which meets minimum standards.

- ***It is recommended that the text from the Commission proposal be adopted and that legal representatives be given the right to access places detainees are held and to check their conditions of detention.***

6. Reduction of confidentiality in communications between lawyer and client

The confidentiality of communications between a person and his or her lawyer is a critical condition of the functionality of legal assistance. Without guarantees of confidentiality, clients will not share information and lawyers can not provide advice. The ECtHR in the case of *Niemietz*, stated that "an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed under Art.6 of the Convention."[32]

In *S v. Switzerland*, the ECtHR ruled that the Convention should be interpreted to guarantee that all lawyer and client communications are confidential,[33] and the Court has repeated this finding in more recent rulings.[34] Only in exceptional circumstances may communications be intercepted and safeguards must be in place to ensure such interception is not used lightly.

In *S.*, the ECtHR further considered the impact of undermining guarantees of confidentiality between a lawyer and his client. The Court states: "If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.[35]

The Human Rights Committee (CCPR) has also stated in its General Comment on the Right to equality before courts and tribunals and to a fair trial, which restates the jurisprudence of the Committee on the issue, that "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." [36]

Though recent proposals by the Council would appear to guarantee the confidentiality of communications between lawyer and detainee, the provision is to be read in conjunction with recital 24, which provides wide scope for excuse. The recital provides for interception of confidential communications "which is incidental to lawful surveillance operation by

[31] See Art.4(4) of the Commission proposal.
[32] ECtHR, *Niemietz v. Germany*, 16 December 1992, No.13710/88, §37
[33] ECtHR, *S v. Switzerland*, 28 November 1991, No. 12629/87; 13965/88.
[34] See ECtHR, *Ocalan v. Turkey*, 12 May 2005, No.46221/99; and *Moiseyev v. Russia*, 9 October 2008, No. 62936/00, §210.
[35] ECtHR, *S v. Switzerland*, *Supra.,* at §48.
[36] CCPR, General Comment 32, at §34.

competent authorities […]". Such a deviation from the critical importance of confidentiality appears overbroad to achieve the stated objectives in Art.4(2) of the Council proposal and fails to effectively protect the fair trial rights of an accused person.

- ***It is recommended that the text from the Commission proposal be adopted, which fully appreciates the importance of confidentiality in legal communications, without broad derogations. The separate derogations provision (Art.7 of the Council proposal) would appear sufficient to cover the objectives for derogation and protect against overuse.***

7. Notification, rather than communication, of detention to a third person unduly limits exercise of the fundamental safeguard

The Commission proposal, dated 8 June 2011, provides that "[a] suspected or accused person deprived of his liberty should be entitled to communicate upon arrest with at least one person nominated by him as soon as possible."[37]

This proposal is a fair reflection of human rights standards. It is particularly welcome that the Commission proposal considers the significant anxiety of persons in the first few hours of detention, which could be reduced through personal communication with a friend or family member. The right to immediate personal communication by the person deprived of liberty respects Art.8 ECHR, and also eliminates the risk that the promise of notification could be used as a tool of coercion by police.

The Council proposal, however, uses much more restricted language. It states, "a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, *informed* of the deprivation of liberty without undue delay […]." The Council proposal also provides that a Member State may derogate from this principle "when this is justified by compelling reasons."[38]

The breadth of this derogation would appear unnecessary and prejudicial to the protection of the detainee from torture and other forms of ill-treatment. Furthermore, the distinction between a detained person being entitled to communicate his detention personally, and a police official informing a third person is significant and excessive for achieving the objective of safeguarding an ongoing investigation.

The right to have a person informed, rather than to communicate directly, falls beneath some (though not all) important international standards. For instance, rule 93 of the Standard Minimum Rules provides that "[a]n untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution." Rule 95 extends the same protection to those arrested or detained without charge.[39]

The CPT also recommends that communication with a third party should be guaranteed from the very outset of detention, but they acknowledge that this right might need to be made

[37] Art.5(1) of the Commission proposal.
[38] Art's.5(1) & 5(3) of the Council proposal [emphasis added].
[39] See Principle 16(1) of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, which provides for notification, and Principle 19 provides for a wider right to communicate with family members and receive visits. See also CAT, General Comment 2, at §13. But see also Art.57 of the European Code of Police Ethics 2001, which asserts detained persons should only have the right to have a third person of their choice notified of their detention.

subject to exceptions, in order to protect legitimate interests of police investigation. Nevertheless, such exceptions should be "clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards."[40]

- ***It is recommended that the directive should provide the right to communicate with friends and family, and receive visits, rather than just for a person nominated by the detainee be informed. Such a right should be subject to derogation only in exceptional circumstances in line with CPT recommendations.***

8. Inadequate remedies for breach violates European standards

European jurisprudence explicitly directs that any evidence obtained in violation of an accused person's right to a lawyer is inadmissible in court.[41] Only the exclusion of such evidence safeguards the rights of an accused person and provides an important disincentive for the collection of information in the absence of a lawyer.

Such a principle is explicitly included in the Commission's proposal,[42] which also provides for an exception whereby the use of such unlawfully obtained evidence may be used if it may be shown that the use would not prejudice the rights of the defendant.

The ECtHR has ruled that any failure to provide legal assistance during police interrogation will irretrievably affect the person's right to a fair trial.[43] Therefore, it is appropriate that any evidence obtained in the violation of a fundamental safeguard is excluded automatically as a matter of law, to guarantee the fairness of the judicial process.

- ***It is recommended that the inadmissibility of evidence obtained in violation of the right of an accused person to a lawyer is explicitly retained without exception in the final directive.***

9. Overbroad derogation clauses undermines directive's objective to uphold "the protection of human dignity"

To refuse a detained person access to a lawyer and to prevent communication of their arrest to a third person is equivalent to a regime of incommunicado detention, thus creating one of the greatest risks of torture and other ill-treatment.[44] Any derogation which permits periods of incommunicado detention, for instance, where an ongoing investigation may be jeopardised or where public safety is at risk, greatly increases the risk of torture and other ill-treatment, and for this reason should be avoided, or at least strictly circumscribed and its application strictly limited in time.

Yet the recent proposal provides for very wide derogations, by allowing Member States to derogate from its protections where, for instance, "it is extremely difficult to provide a lawyer

[40] CPT Standards, *supra*, p.12.
[41] ECtHR Grand Chamber, *Salduz v. Turkey*, 27 November 2008, No.36391/02. See also ECtHR, *John Murray v. UK*, 8 February 1996, No. 18731/91; ECtHR, *Zaichenko v. Russia*, 18 February 2010, No. 39660/02; and ECtHR, *Daynanan v. Turkey*, 27 November 2008, No. 7377/03.
[42] Art.13(3) of the Commission proposal.
[43] ECtHR, *Demirkaya v. Turkey*, 13 October 2009, No. 31721/02; and *Brusco v. France*, 14 October 2010, No. 1466/07.
[44] General Recommendations of the Special Rapporteur on torture, E/CN.4/2003/68, para.26(g).

due to the geographic remoteness of the suspect or accused person" (recital 22 in recent Council proposal). Such excuses give Member States wide scope to exclude detainees from fundamental safeguards. In this example, States might derogate from the protections by simply holding detainees in remote or inaccessible locations.

The ECtHR addresses derogations from fundamental safeguards in *Salduz v. Turkey*. The Court found that even where there are compelling reasons to curtail access to a lawyer from the first interrogation, "[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".[45] This means that not even waiver of the right to counsel or other valid exceptions in domestic law will necessarily excuse the authorities from their duty to provide access to a lawyer, if subsequent reliance on the relevant oral evidence would be unfair in light of all the circumstances.[46]

As any denial of legal assistance during the criminal proceedings would necessarily irretrievably prejudice the rights of the accused, there are no compelling reasons which might be permissible to justify such derogation whereby such statements are used to secure a conviction.

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...[47]

Given that the jurisprudence of the ECtHR has not found *any* exceptional circumstances which could justify derogation from the right of access to a lawyer, and that no information obtained could be used to secure a conviction without breaching the fair trial guarantees of the European Convention, *it is recommended that the proposal to derogate from these fundamental safeguards be revised.*

- ***It is recommended that the derogation provision be strictly limited in scope and time in the final directive. The associated recital 22 should be deleted entirely.***

Next Steps

During forthcoming negotiations, the APT would encourage the EU institutions and Member States to consider these areas of concern. We rely on you to ensure that the final provisions of this important directive are not reduced below the standards currently protected through ECtHR jurisprudence and other international standards, and remain at your disposal if you would like further advice.

Interested parties may contact Matthew Sands, APT Legal Adviser, for further information (msands@apt.ch, +41 22 919 2176).

---

[45] ECtHR, *Salduz*. *Supra.*, at §55. See also, ECtHR, *Panovits v. Cyprus*, 11 December 2008, No. 4268/04, §§73-76.

[46] See ECtHR, *Pishchalnikov v Russia*, 24 September 2009, No.7025/04, §§ 72-91, *Oleg Kolesnik v Ukraine*, 19 November 2009, No.17551/02, §35, *Yaremenko v. Ukraine*, 12 June 2008, 32092/02, §§86-91, and *Savaş v Turkey*, 13 March 2006, No.9672/03, §§ 53-70).

[47] SRT, Annual Report to the Human Rights Commission, E/CN.4/2003/68, 17 December 2002, §26(g), at: http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2003/68&Lang=E.