



# The role of lawyers in the prevention of torture

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## Introduction

The Association for the Prevention of Torture (APT) believes that the effective prevention of torture requires three integrated elements:

1. Transparency in institutions: All places where persons are deprived of their liberty should be accountable and subject to regular scrutiny through independent visiting and other monitoring mechanisms.
2. Effective legal frameworks: International, regional and national legal norms for the prevention of torture and other ill-treatment should be universally respected and implemented.
3. Capacity strengthening: National and international actors who work with persons deprived of their liberty should be trained to increase their knowledge of, and commitment to, prevention practices.

The role of the lawyer is most obvious in the establishment and operation of an effective legal framework to prevent torture and other forms of cruel, inhuman or degrading treatment or punishment (“ill-treatment”). However, lawyers at the national level, and their professional associations, also have a vital role to play in ensuring transparency in institutions and in strengthening the capacity of national, regional and even international actors. Furthermore, this role is not purely legal; it is to a large extent social and political, involving liaison between detainees and their families, cooperation with civil society actors, and lobbying of government officials.

## Effective legal frameworks

### - Legislation

To be effective, a legal framework for the prevention of torture must enshrine the procedural guarantees related to the right to a fair trial of every detainee, including the fundamental human right of every person in pre-trial detention to

consult with a lawyer of his or her choice,<sup>1</sup> the right to challenge detention before an independent court,<sup>2</sup> and the strict prohibition of all forms of secret detention.<sup>3</sup> But guaranteeing these rights is not enough; prevention also includes deterrence and the removal of incentives to torture. Torture must appear as a separate criminal offence, and any evidence obtained by torture, or in an unofficial place of detention, must be excluded from proceedings, regardless of whether it was obtained by another State, except where it is used as evidence against the suspected perpetrators of such acts.<sup>4</sup>

Where these rights are not guaranteed in national legislation, the role of a bar association will be primarily political; it can lobby for the ratification of the relevant international treaties, including the Convention against Torture and its Optional Protocol, comment on draft laws, point out lacunae in legislation, monitor application of legislation as well as reported cases of torture, and ensure that the law is the subject of public debate as well as professional scrutiny. Particularly in cases where lobbying at the national level is ineffective, the bar association may choose to submit comments or reports to the relevant international treaty body or regional mechanism. In all of these actions, bar associations can cooperate with and, where necessary, provide training to civil society organisations engaged in human rights monitoring or lobbying.

## **- Jurisprudence and the development of standards**

Where legislation is in place, lawyers have an important role to play in advancing and improving the protection of the law at the national, regional and even international level through jurisprudence. They can argue for judges to interpret international instruments dynamically, ensuring for example that States parties to the Convention against Torture fully implement their obligation to “keep under systematic review interrogation rules, instructions,

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<sup>1</sup> This right is guaranteed in a number of international instruments, including Article 14(3)(b) of the International Covenant on Civil and Political Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(2)(d) of the Inter-American Convention on Human Rights, and Article 7(1)(c) of the African Charter on Human and Peoples Rights.

<sup>2</sup> This is guaranteed under, among others, Article 9(4) of the International Covenant on Civil and Political Rights, Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(6) of the Inter-American Convention on Human Rights, and Article 6 of the African Charter on Human and Peoples Rights, interpreted in conformity with principle M(4) of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, and principle 32 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).

<sup>3</sup> See Human Rights Committee, General Comment 20 (1992), in UN Doc. HRI/GEN/1/Rev.7, paragraph 11; UN Special Rapporteur on Torture, Standing General Recommendations, UN Doc. E/CN.4/1995/34, 12 January 1995, paragraphs 923, 926(b) and (d). For more detailed discussion of this issue, see APT, *Incommunicado, unacknowledged, and secret detention under International Law*, March 2006.

<sup>4</sup> See UN Convention against Torture, Article 15; Human Rights Committee, General Comment 20 (1992), in UN Doc. HRI/GEN/1/Rev.7, paragraph 11; UN General Assembly Declaration against Torture (9 December 1975), GA Res. 3452(XXX), paragraph 12; UN General Assembly Resolution on Torture (2007), UN Doc. A/RES/61/153, paragraph 7.

methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”<sup>5</sup> These measures must in fact be effective in preventing torture, and must be replaced where they are not.<sup>6</sup> International standards in this area are continually improving. For example, the UN Committee against Torture now considers that every interrogation should be recorded.<sup>7</sup> By making reference to international and regional standards developed in *other* regions, or by treaty bodies, lawyers at the national level can make a valuable contribution to the construction of a coherent and comprehensive body of international law on the prevention of torture.

When a detainee, relative or lawyer lodges a complaint of torture or other forms of ill-treatment by public officials, or public officials have reasonable grounds to suspect that such abuses have occurred, international human rights law requires that there be a prompt, impartial and thorough investigation.<sup>8</sup> During such investigations, States must ensure that complainants, their families and witnesses are protected from reprisals. Moreover, to comply with their international legal obligation to ensure an effective remedy to anyone who is the victim of an act of torture or other form of ill-treatment, States must guarantee in law and practice the independence and freedom of action of individual lawyers and their professional associations to bring forward such claims without fear of retribution, whether or not the claims are ultimately upheld by the courts.<sup>9</sup>

### **- The early stages of detention**

International human rights law requires that all persons in police custody be informed of their rights without delay and in a language they understand.<sup>10</sup> The notification of rights must include the rights to be assisted by a lawyer of one’s choice, to be medically examined by a doctor of one’s choice and to notify a relative or a third party of one’s choice of the fact of detention. Furthermore, these rights apply regardless of the official designation of the detainee under the legal system concerned. Suspects, witnesses, and any other person who is under a legal obligation to attend and remain at a police

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<sup>5</sup> Article 11 Convention against Torture.

<sup>6</sup> Article 2(1) Convention against Torture; Committee against Torture, General Comment 2 (2007), UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paragraph 4.

<sup>7</sup> Committee against Torture, General Comment 2 (2007), UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paragraph 14.

<sup>8</sup> This is explicitly provided by Article 12 of the Convention against Torture. The UN Human Rights Committee stated that the obligation also exists under the International Covenant on Civil and Political Rights in its General Comment 20 (1992), in UN Doc. HRI/GEN/1/Rev.7, paragraph 14. This obligation has been confirmed by the European and Inter-American Courts, in Article 8 of the Inter-American Convention to Prevent and Punish Torture, and by the African Commission.

<sup>9</sup> Basic Principles on the Role of Lawyers, UN Doc. A/CONF.144/28/Rev.1, 7 September 1990, paragraph 17.

<sup>10</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 13 and 14; Committee against Torture, General Comment 2 (2007), UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paragraph 13

station or other place of detention all have the right to consult with a lawyer, and, in principle, to have a lawyer present during interrogation.<sup>11</sup>

Procedures should be put in place to ensure that every detainee is notified of his or her rights in practice. For example, detainees could be asked to sign a statement attesting that they have been informed of their rights. Lawyers have an important role to play in lobbying for the implementation of such procedures, and subsequently in ensuring that non-respect of procedural guarantees in relation to their clients is detected, highlighted in any proceedings, investigated, and, where appropriate, leads to disciplinary sanctions against the public officials responsible.

International experts agree that “it is in the period immediately following deprivation of liberty that the risk of intimidation and physical ill-treatment is the greatest.”<sup>12</sup> Lawyers have a crucial role to play in ensuring that all persons suspected of having committed or otherwise being connected with a criminal offence are treated in accordance with human rights standards at every stage of the investigation and proceedings. Every detainee’s fundamental human right of access to defence counsel must be ensured in law and in practice from the very outset of detention.<sup>13</sup> This access must be prompt, regular, direct and confidential, and if a person cannot afford to pay for the services of a lawyer, qualified and independent legal counsel must be provided free of charge. Most commonly, persons deprived of their liberty on suspicion of having committed a given criminal offence are subjected to acts of torture and other forms of ill-treatment, or threats thereof, during interrogation in the initial period of detention for the purpose of extracting a forced “confession” or related information. Such abuse almost inevitably occurs after the detainee has been denied prompt access to, or has not been informed about his or her right to, a lawyer.

Of course, in truly exceptional circumstances, and to protect specific interests in relation to a criminal investigation, it may be necessary to delay for a very short period a detainee’s access to a lawyer of his or her choice. However, only an extremely limited range of interests can provide grounds for any restriction on the right of access to a lawyer: to prevent completion of a specifically-suspected violent conspiracy; to prevent the suspect from alerting specifically-

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<sup>11</sup> This right may be restricted only for a very short period in exceptional circumstances where awaiting the arrival of a lawyer would jeopardise the investigation. See, for example, Committee against Torture, Conclusions and Recommendations on Austria (2005), UN Doc. CAT/C/AUT/CO/3, paragraph 11; Conclusions and Recommendations on the Netherlands (2007), UN Doc. CAT/C/NET/CO/4, paragraph 6; Conclusions and Recommendations on Japan (2007), UN Doc. CAT/C/JPN/CO/1, paragraph 15. See also European Committee for the Prevention of Torture, 12<sup>th</sup> General Report, paragraph 41.

<sup>12</sup> See the Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, paragraph 60.

<sup>13</sup> The right to legal counsel at all stages of detention, including at the very outset, is a key component of a fair trial and is enshrined in various international and regional human rights instruments and standards. See for example Principle 1 of the Basic Principles on the Role of Lawyers, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the European Prison Rules. The European Court of Human Rights and the Inter-American Commission have also recognised the right of access to a lawyer during the preliminary stages of detention.

known co-conspirators to ongoing investigations by the authorities; or to otherwise prevent specific threats to the life or physical security of other persons. Any exceptional restrictions on the right of prompt access to regular legal counsel should be specifically approved by an independent judge.<sup>14</sup>

However, in no circumstances should exceptional restrictions result in the right of access to a lawyer being denied altogether, as even a detainee in such a situation has the right to meet with an independent lawyer.<sup>15</sup> In this context, bar associations have an important role to play in appointing truly independent lawyers, as they are often the only bodies with the necessary qualifications and independence. Such lawyers must act independently in practice, which means that they must be able to communicate with the detainee in private and must *not* be bound to disclose to the government any communications with the detainee.

States that go beyond such exceptional limits on the right to legal counsel from the outset of detention are clearly in violation of international fair trial standards.<sup>16</sup> Moreover, such violations may be indicative of a wider pattern of abuses; international experts have long recognised that torture is most frequently practiced during incommunicado detention.<sup>17</sup> Lawyers defending the rights of their clients in such States often place themselves at risk. In these circumstances, bar associations can provide vital protection, condemning attacks on the independence of lawyers, and ensuring the collective right to freedom of expression of their members even where the exercise of such freedoms on an individual level can lead to reprisals.

## **- The rule of law**

An *effective* legal framework requires the support of civil society. To be legitimate in the eyes of the population, laws must be seen to reflect the values of the particular society. Conversely, the rule of law is at the very foundation of democratic societies. It is telling that governments which have sought to justify torture or other forms of ill-treatment, particularly as regards persons suspected of terrorism, have tried to hide behind the colour of law, inventing highly contrived and questionable interpretations of international

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<sup>14</sup> Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002, paragraph 26(g).

<sup>15</sup> *Ibid.*

<sup>16</sup> These standards are laid out Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 of the American Convention on Human Rights, and Article 7 of the African Charter on Human and Peoples' Rights. Several 'soft law' instruments give detail to these fair trial rights, including, at the international level, the Basic Principles on the Role of Lawyers, the Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Standard Minimum Rules for the Administration of Juvenile Justice, all of which can be accessed at [www.ohchr.org](http://www.ohchr.org).

<sup>17</sup> Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002, paragraph 26(g). See also APT, Incommunicado, unacknowledged, and secret detention under International Law, March 2006.

legal standards.<sup>18</sup> Such statements may serve to weaken the absolute nature of the prohibition of torture and ill-treatment, both in law and in the eyes of the general public. Bar associations have a unique credibility and expertise to respond to such challenges to the prohibition of torture, and to engage government authorities in a public debate.

However strong the legal prohibition on torture, reality has yet to conform to the strict letter of the law. Other mechanisms beyond the purely legal are required to ensure that agents of the State do not resort to or tolerate torture, that violations are detected, and that perpetrators are punished.

## **Transparency in Institutions**

Torture most often occurs behind closed doors. Where torturers believe that their actions will not be detected by outsiders, and feel secure in the knowledge that their superiors approve of - or will turn a blind eye to - abuses, they all too often act with impunity. For this reason, the APT has worked for 30 years towards greater transparency in institutions as a vital component of the prevention of torture.

### **- Detection and reporting of torture and ill-treatment**

It is imperative that *in practice* detainees have access to a lawyer of their choice from the very outset of detention as an important safeguard against acts of abuse, including during interrogation. For this safeguard to be effective, the authorities must respect the confidentiality of the communications and consultations between lawyers and their clients. Privacy of communication is essential for the effective representation of the client and is critical to ensuring that a detainee can freely disclose any torture or other forms of ill-treatment by public officials. Domestic legislation should be brought into line with international human rights standards to reflect these confidentiality rights, which should be respected by public officials in practice.

The lawyer will often be the first person the detainee can inform about any ill-treatment. Particularly where the lawyer and detainee do not have a pre-existing relationship, recording allegations can be a sensitive and delicate procedure that requires the establishment of a relationship of trust. It is crucial to ensure that the detainee is not put at risk at any time, which requires that he or she understands precisely what steps may be taken with regard to the alleged abuse. While such steps will in many cases be primarily legal, the lawyer may also have a more social role, acting as intermediary between the detainee and his or her loved ones, informing the detainee and/or his or her family about organisations working to record such abuse, or about the support and rehabilitation services available to victims of torture or ill-treatment. To

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<sup>18</sup> In response to such attempts, the UN Committee against Torture recently reiterated the absolute nature of the prohibition of torture and ill-treatment: Committee against Torture, General Comment 2 (2007), in UN Doc. CAT/C/GC/2/CRP.1/Rev.4, paragraphs 5-7.

prevent reprisals, any transmission of allegations to any authority, body or organisation, be it for nominative or for anonymous use, should only take place with the express consent of the detainee.

Particularly where monitoring bodies are under-resourced, lack independence, or do not exist, lawyers are often the only independent persons with access to detainees in police and pre-trial detention. In such contexts, and where authorities do not respond to confidential demarches, torture and ill-treatment will continue, and perpetrators will continue to act with impunity, if lawyers and bar associations do not act to draw public attention to abuses. However, awareness-raising must never jeopardise the safety and privacy of victims. Information should be made public only where cases are brought before a public tribunal, where the detainee has expressly consented to the use of information in this way, or where information is given in a general, aggregated form which in no way permits the identification of individuals or breaches lawyer-client confidentiality. Awareness-raising at the national level could involve, for example, issuing press releases or reports, cooperating with NGOs, or organising conferences or other events. To draw international attention to violations, bar associations can also transmit information to relevant UN or regional mechanisms.<sup>19</sup>

### **- Detention monitoring**

Many States do have some form of independent monitoring of at least some places of detention at the national level. Establishing national preventive mechanisms with access to all places of detention is one of the primary aims of the Optional Protocol to the Convention against Torture. However, even States which have not ratified that instrument are often under an obligation to set up such mechanisms.<sup>20</sup> Both the Committee against Torture, which monitors State compliance with the Convention against Torture and the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, have found that those instruments create an obligation to establish a systematic and independent mechanism to monitor the treatment of persons deprived of their liberty.<sup>21</sup> Bar associations

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<sup>19</sup> In addition to transmitting information to the UN Committee against Torture, Human Rights Committee or other relevant treaty body, the bar association could submit information under the Universal Periodic Review procedure of the UN Human Rights Council. With the express and informed consent of the victim, individual cases may be submitted to Special Procedures of the UN Human Rights Council, including the Special Rapporteur on Torture. A summary of communications between Special Procedures and State authorities regarding individual cases is included in the annual reports of Special Procedures to the UN Human Rights Council. At the regional level, lawyers and their professional associations may submit reports and information to, among others, the European Committee for the Prevention of torture, and the Special Rapporteur on Prisons and Conditions of Detention in Africa.

<sup>20</sup> This is made clear in the Preamble of the Optional Protocol to the Convention against Torture, which recalls the State obligation under the Convention against Torture to take effective measures to prevent acts of torture and other ill-treatment, and recognises that the protection of persons deprived of their liberty against torture and other ill-treatment can be strengthened by a system of regular visits to places of detention.

<sup>21</sup> See Committee against Torture, Concluding Observations on Brazil, UN Doc. A/56/44, 2001, paragraph 120(d); Concluding Observations on Moldova, UN Doc. CAT/C/CR/30/7,

can obviously lobby for such systems to be put in place, and lawyers can challenge any lack of independent monitoring in the courts.

Where an independent monitoring body does exist, lawyers and bar associations can provide it with vital information about problems and practices in particular places of detention on a confidential basis. Bar associations and lawyers can also, in a sense, monitor the monitors, commenting on the legislation setting up or designating monitoring bodies, as well as their working methods, functional independence, findings and reports. However, perhaps the most obvious and important contribution of lawyers to such a monitoring mechanism will be as members or associated experts. To be truly effective, preventive mechanisms need a mix of expertise, and it is crucial that this includes legal expertise, in particular a knowledge of international and regional laws, standards and norms on conditions of detention, codes of conduct for custodial staff, and more generally on the rights not to be subjected to torture or other ill-treatment, and to a fair trial. The importance of other types of expertise should not be forgotten, however; a preventive mechanism composed entirely of lawyers will often be unable to detect the full range of possible issues. For example, the presence of a medical doctor will be vital to evaluate the health care available to detainees, and to ensure that symptoms of detainees who allege torture can be documented.

## **Capacity strengthening**

Many bar associations already play an important role in strengthening the capacity of their members through continuing legal education, seminars, expert meetings, and more informal exchanges of expertise. They can also play a part in strengthening the capacity of both government and civil society actors. For example, where a State is preparing to ratify the Optional Protocol to the Convention against Torture, the bar association may be able to provide comments on the legislative reforms which would be required at the national level, and even advice or training to members of the relevant government department on the requirements of international law. Where this is not directly possible or desirable, the bar association may instead lobby for the government to organise such training by another independent body. As discussed above, the bar association can also train members of independent national preventive mechanisms, all of whom will need to have at least basic knowledge of the international law, standards and norms relevant to detention, as well as the international basis for their mandate where the State has ratified the Optional Protocol to the Convention against Torture.

Effective prevention of torture at the national level requires the active involvement of civil society, including NGOs, associations of relatives of detainees, lay visiting schemes, and providers of pastoral care in places of detention. Bar associations can play an important role in strengthening the

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2003, paragraph 6(l); Concluding Observations on Russia, UN Doc. A/52/44, 1996, paragraph 43(d) (and UN Doc. CAT/C/CR/28/4, 2002, paragraph 8(f)). See also Human Rights Committee, General Comment 21, in UN Doc. HRI/GEN/1/Rev.1, paragraph 6.



capacity of such groups, through the provision of advice or training on specific aspects of national or international law, and on the scope of the prohibition of torture and ill-treatment as regards high-security prisons, conditions of detention, and solitary confinement. Bar associations may also wish to be represented at conferences organised by NGOs on these issues.

## **Conclusion**

Lawyers and their professional associations have a central role to play in the effort to prevent torture and other forms of ill-treatment at the national, regional and international levels. They have unique expertise and ability to strengthen the legal framework to prevent torture by lobbying for changes in legislation, arguing for a dynamic interpretation of laws to strengthen effective protection, and ensuring that legal and procedural guarantees are in fact applied to every detainee. However, the role of lawyers in the prevention of torture goes much further than ensuring the implementation of a legal framework.

Lawyers and bar associations can play a vital part in opening places of detention to outside scrutiny. In many countries, lawyers are the only independent persons with access to places of detention, and the ability to meet with detainees in private. They are thus often the first external observers to detect, or receive reports of, torture or ill-treatment. Such abuses can in many cases be addressed through litigation, including public interest litigation, but depending on the national context, and in particular the risk of reprisals against detainees, bar associations may also take on a more political role, making abuses public, or submitting reports to relevant national, regional and international bodies.

The effective prevention of torture requires that lawyers not be alone in having access to places of detention. Rather, there must be regular, systematic and independent monitoring of all places of detention at the national level. With their detailed knowledge of international and regional laws, norms and standards, lawyers and bar associations can very effectively lobby for such independent monitoring, or provide assistance to other groups which are doing so. Where monitoring mechanisms are established, they will require a mix of expertise, but it is crucial that at least one legal expert is included to ensure that the body can both monitor compliance with legal standards and comment or advise on legislation. Bar associations can help to ensure the independence and effectiveness of the mechanisms as a whole by commenting on their legal mandate and powers, providing them with information, and acting as a watchdog against any attacks on their independence. In addition, bar and other professional associations can provide advice and training to detention monitors, government departments, and civil society organisations, thereby increasing the capacity of all actors in the effort to prevent torture or ill-treatment.

The role of lawyers in the prevention of torture thus goes far beyond litigation to include a direct role in monitoring places of detention, and a more indirect

role in strengthening the capacity of national actors. Effective prevention of torture requires, as a prerequisite, a truly independent legal profession. Bar and other professional associations can help to entrench this independence, provide a forum for lobbying and debate, act as a watchdog, and condemn any attempts to water down the absolute legal and moral prohibition of all forms of ill-treatment.