



Observations by Amnesty International on the Commission's 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

September 2011

I. General comments

On 8 June 2011, the European Commission presented a 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 (the proposal). The proposal is part of the "Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings" (the Roadmap), adopted by the Council as part of the Stockholm Programme on 30 November 2009. In particular, it relates to measure C (legal advice and legal aid) and measure D (right to communication) of the Roadmap. However, it covers only one part of measure C - the other aspect of the right of access to a lawyer, i.e. legal aid, will be dealt with in a separate proposal, which the Commission is expected to present in 2013.

The proposal builds upon the European Court of Human Rights (ECtHR) case-law, which has gradually established a range of detailed criteria for the fairness of criminal proceedings and trials. Its stated aim is to establish common minimum standards across the EU, to enhance mutual trust between member states' legal systems and safeguard two essential components of people's fundamental right to a fair trial (i.e. the right of access to a lawyer and the right to communicate upon arrest).

Furthermore, while setting up safeguards to enhance the right to a fair trial, it should help provide protection for a number of other rights, such as the presumption of innocence and the right of defence (which is widely recognized as a basic element of a fair trial. See art. 48 Charter and 6 ECHR) the right to an effective remedy (art. 47 Charter and 6 and 13 ECHR), the right to liberty and security (art. 6 Charter and 5 ECHR), the right to protection from torture and other ill-treatment (art. 4 Charter and 3 ECHR) and the right to respect for private and family life (art. 7 Charter and 8 ECHR).

The proposal is an important step towards better protection of the rights of the persons who are suspected or accused of having committed a crime as it collects in a single binding legal text a series of principles recognised in:

- important treaties and conventions such as the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the (revised) Arab Charter on Human Rights, the International Convention for the Protection of All Persons from Enforced Disappearance;
- other important international instruments such as the Universal Declaration of Human Rights (UDHR), the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Declaration on the Protection of all Persons from Enforced Disappearance, the UN Basic Principles on the Role of Lawyers; and

- the jurisprudence and work of various courts and expert bodies charged with interpreting these treaties and instruments, including the most recent case-law of the European Court of Human Rights (ECtHR).

By doing so, it should reinforce the enforcement mechanisms within the Council of Europe, such as the European Court of Human Rights (ECtHR) and the European Committee for the Prevention of Torture (CPT), by ensuring the ECHR standards and norms are also directly incorporated into EU law binding on EU Member States. Amnesty International also believes the proposal represents an opportunity to further enhance protection of human rights in Europe, which can be achieved by ensuring that the proposal also incorporates progressive elements that may not necessarily have already been fully recognised within ECtHR jurisprudence, which by definition takes a case-by-case approach.

Amnesty International welcomes the proposal and considers it a good basis to start the discussion in the Council and in the European Parliament. The text could contribute to better ensuring that national systems are brought in line with international standards and in particular with the ECHR and CPT principles and recommendations as regards the right to legal representation, encouraging legislative reforms and developments in this area.

However, as presently drafted the Directive would generally only codify obligations already recognised to arise under the European Convention on Human Rights and European Court of Human Rights case-law. While this should result in better implementation and enforcement of standards to which EU member states are already legally bound under the European Convention and other international treaties, the Council and European Parliament should not miss this opportunity to ensure progressive development of international human rights standards. For instance, EU policy-makers could consider explicitly providing that no exception can be made to the right of the suspect to have his lawyer present, and laying down a mandatory prohibition on the use of evidence gathered in breach of this right. We also observe that some internationally recognised aspects of the rights contained in the Directive are absent from the proposal, while others could be clarified or elaborated further.

Furthermore, we note that the provisions on the right of access to a lawyer should be considered in close relation with the other rights referred to in the roadmap, in particular the right to information (as information on rights and information about the charges, and also as right of access to the case-file, which is an important part of the right to legal representation); the right to legal aid (which, in certain circumstances, is essential for the right of access to a lawyer to be effective); and the right to special safeguards for vulnerable persons. Amnesty International therefore reiterates that there should be more coherence between the measures envisaged by the Roadmap, and strongly supports the Commission's intention to launch in the coming years a Green Paper to look at the gaps inherent to this "step-by-step" approach, and to eventually come up with a consolidated text on the rights of the suspected and accused persons in criminal proceedings.

In the passages below, you will find our proposed amendments to the Directive text and some comments, which are meant to provide some benchmarks for the ongoing discussion within the Council and the European Parliament. *Note that the proposed amendments are indicated in boldface, strikethrough for deletions, underlining for additions. Where Amnesty International has proposed text, it has reflected the fact that the suspect or accused person as well as the lawyer may be a man or a woman. The final Directive should include all the necessary changes in this respect.*

II. Article-by-Article Comment

Article 1 - Objective

The Directive lays down rules concerning the right of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA to have access to a lawyer and to communicate upon arrest with a third party.



- While the stated purpose of the Roadmap is to focus on the rights of persons facing criminal proceedings, it should be recognised that persons deprived of liberty in other circumstances also have right to have access to a lawyer and to communicate with a third party. These have been recognized to be fundamental safeguards for *anyone* deprived of liberty by, among others, the UN Committee against Torture;¹ the UN Human Rights Committee;² the UN General Assembly;³ UN Human Rights Council;⁴ the European Court of Human Rights;⁵ the Inter-American Commission on Human Rights;⁶ and the European Committee for Prevention of Torture.⁷ (See also the International Convention for the Protection of All Persons from Enforced Disappearance, article 17(2)(d)).
- At minimum, the Directive should make clear that its provisions are without prejudice to the obligations of states to ensure the same or similar protections to persons deprived of their liberty in other circumstances (see the suggested addition to article 2 below). Amnesty International encourages the European Commission to launch a formal process for extending recognition of the rights in the Directive to other situations of deprivation of liberty, in accordance with international standards.

Article 2 - Scope

1. This Directive applies from the *earliest of the following times in relation to a given person: when the person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence; when the person is formally charged with having committed a criminal offence; when a person is deprived of his/her liberty in connection with the investigation of a criminal offence; when a person is questioned in connection with a criminal offence at a time when the authorities in fact suspect him or her of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal or constitutional or administrative law challenge.*

2. The fact that a particular offence or proceedings in question is not classified as "criminal" as a matter of national law is not, for purposes of this Directive, conclusive: an offence or proceeding may nevertheless be "criminal" for purposes of this Directive if the very nature of the offence is criminal, or if it will make the person liable to a sanction which, by its nature and degree of severity, belongs in

¹ See General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), para 13.

² See General Comment no 20 (1992), UN Doc HRI/GEN/1/Rev.9, para 11.

³ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988), Principles 17 and 18.

⁴ Human Rights Council Resolution 13/19 (26 March 2010), Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers, para 5.

⁵ See e.g. *Aksoy v Turkey*, no. 21987/93 (18 December 1996), paras 79-83; *Salduz v Turkey*, no. 36391/02 (27 November 2008), para 54.

⁶ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, Principle V, fourth paragraph.

⁷ See e.g. CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, p. 6. CPT "Standards".



general to the “criminal” sphere, or where these factors considered cumulatively lead to the conclusion that the offence or proceeding is criminal.

23. This Directive applies to persons subject to proceedings pursuant to Framework Decision 2002/584/JHA, from the time they are arrested in the executing State.

4. This article is without prejudice to the right of an individual to have access to a lawyer or communicate with third parties prior to the application of the Directive or subsequent to the conclusion of the proceedings, or in other circumstances not addressed by the Directive.

- The current language defining the situations in which the Directive has application, by referring only to the person in question being “made aware” he or she is under suspicion, is both too limited and creates inconsistencies with the substantive provisions that follow. For instance, article 3 provides that persons suspected of crimes should be given access to a lawyer before questioning, but if they have come voluntarily to a police station they may not in practice have been notified of the police suspicions; the same may be true in cases of deprivation of liberty. Further, if it is based on ECtHR jurisprudence relating to the requirement in article 6(1) of the European Convention of trial “within a reasonable time” [e.g. Deweer v. Belgium, 17 Feb. 1980 and subsequent cases], then it is not clear that it is appropriate simply to transpose a “made aware” test to the separate issue of the timing upon which a right of access to legal counsel arises for a person, because it may preclude application of the proposed Directive in the very situations where it is most needed.
- Article 2, as presently drafted, makes the entire application of the Directive contingent on authorities informing the person of their suspicions prior to arrest (art. 3), prior to commencing questioning (art. 3), prior to continuing questioning where the suspicion arises in the course of questioning (art. 10), and so on. If, for instance, the authorities fail to inform a person of the reason for his or her arrest, this could, ironically, deprive him or her of the protection of the Directive. If the Directive is to contain a scope provision that combines temporal and content criteria in this way, it should instead refer directly to a broader range of circumstances in which the right to access a lawyer will arise. I.e. the right should arise not only where the person is “made aware” through formal charges or otherwise, but from the earliest of events such as deprivation of liberty, being publicly named or given official notification by the competent authority of an allegation that s/he has committed an offence, or being questioned at a time when the authorities suspect the person of having committed an offence (whether or not they have actually made the person aware of their suspicions).
- A number of other provisions of the proposed Directive that should apply to persons described in Article 10 presently refer only to “persons described in article 2” or to “suspected or accused persons”. The scope provision in article 2 should make clear that persons referred to in Article 10 are also within the scope of the Directive, by making clear that it applies to anyone who is “questioned in connection with a criminal offence at a time when the authorities in fact suspect him or her of having committed a criminal offence.”⁸
- Considering the diversity of member states’ legal systems with regard to the scope of the definition of “criminal offence”, we also believe that, consistent with the approach under the European Convention on Human Rights and with the ECtHR case-law, the rights provided for in the Directive should apply to all cases which are considered “criminal” under international law, rather than relying solely on national law classifications of offences. The proposal should therefore incorporate

⁸ See e.g. CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, p. 11.: “The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend - and stay at - a police establishment, e.g. as a “witness”.



the internationally recognized criteria for determining whether a matter is “criminal” (i.e. nature of the act, nature and severity of possible penalties).⁹

Article 3 - The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons are granted access to a lawyer of the person's own choosing as soon as possible and in any event at the earliest of any of the following events:

(a) before the start of any questioning by the police or other law enforcement authorities;

(b) upon carrying out any other procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, ~~unless this would prejudice the acquisition of evidence, except where and only for so long as the person responsible for the act reasonably believes that the evidence to be gathered will be altered, removed or destroyed as a result of the passage of time needed for the lawyer to arrive;~~

(c) immediately from the outset of deprivation of liberty.

2. Access to a lawyer shall be granted in and for such a time, ~~and in such a manner,~~ and with adequate facilities, so as to allow the suspect or accused person to exercise his rights of defence effectively and should be provided without interception, censorship, intimidation or any other form of improper interference.

3. The right of access to a lawyer applies with equal force where an individual chooses not to appear at any given proceeding.

- The provision encompasses - **in letter a)** - an important aspect of the ECtHR case law, which has stressed the importance of the investigation stage for the preparation of the criminal proceeding, following the recommendations of the CPT. In particular, in the case *Salduz v. Turkey* (Grand Chamber, 27 November 2008) the Court has stated that “for the right to a fair trial to remain sufficiently practical and effective, art. 6 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police”. This interpretation of Art. 6 (3), also referred to as the “Salduz Doctrine”, has been confirmed and consolidated by the ECtHR.¹⁰ The importance of having the right to legal representation during the investigation has been acknowledged also by the CPT, the ICTY (see art. 18 (3) and art. 21 (4) (d) of the Statute), Art. 20 (4) (d) of the ICTR Statute, Art. 55 (2) (c) of the ICC Statute. See also principle 1 of the Basic principles on the role of lawyers (establishing the right to assistance at all stages of criminal proceedings, including interrogations); principle 17 of the Body of Principles; Rule 93 of the European Prison Rules.
- According to the explanatory memorandum, access must be granted “at the latest upon deprivation of liberty” and “irrespective of any deprivation of liberty [...] upon questioning”. This suggests, in line with ECtHR jurisprudence, that access must be provided at the *earliest* of the three events listed in article 3 (1). However the article does not expressly state this. It should be amended to do so. On the other hand, the explanatory memorandum itself should be amended to make it clearer that the access should be provided “before” (in the language of article 3) i.e. in advance of the start

⁹ See, e.g., European Court of Human Rights (Grand Chamber), *Ezeh and Connors v the United Kingdom* (Apps nos. 39665/98 and 40086/98), 9 October 2003, paras 82-86.

¹⁰ See, e.g. *Boke and Kandemir v. Turkey*, 10 March 2009; *Aba v. Turkey*, 3 March 2009; *Aslan and Demir v. Turkey*, 17 February 2009; *Ozturk v. Turkey*, 17 February 2009; *Shabelnik v. Ukraine*, 19 February 2009.



of questioning – and not “upon” (in the language of the explanatory memorandum) i.e. at the same moment as.

- **Letter b)** includes an exception but fails to specify who has authority to decide when/in which situations the presence of the lawyer during a procedural or evidence-gathering act involving the presence of the person would “*prejudice the acquisition of evidence*”. The explanatory memorandum states that the exception applies only where “*the evidence to be gathered could be altered, removed or destroyed as a result of the passage of time needed for the lawyer to arrive.*” The text of the Directive is far less precise and potentially open to abuse than is the language in the explanatory memorandum. Even the text of the explanatory memorandum is itself unnecessarily wide by imposing the very low standard of “*could*” for the exception to apply. A standard of at least “*reasonable belief*” by authorities would be more appropriate.
- With regard to **letter c)**, the Human Rights Committee has stated that detainees should have access to legal counsel within the “first few hours” after arrest or otherwise being taken into police custody.¹¹ We therefore suggest that ‘immediately’ is added to that point.¹²
- **Par. 2** reflects Art. 6 (3) letter b) ECHR and art 14(3) (b) ICCPR, stating that everyone charged with a criminal offence shall have the right “*to have adequate time and the facilities for the preparation of his defence*”. However, the wording in the Directive should include more explicitly the idea of an adequate duration of time, and the broader notion of facilities included in the original texts.
- There is no mention in the proposal of the right of the suspected/accused person to be assisted by a lawyer **of his or her own choosing**.¹³ This is a core aspect of the right to a lawyer, recognized in the relevant treaties, which must be incorporated in the Directive if it is to set out accurately the common minimum standards for EU member states.
- The provision should mention that the right to legal representation/counsel applies also to cases when the suspect or accused person chooses not to appear at the proceedings.¹⁴

Article 4 - Content of the right of access to a lawyer

- 1. The suspect or accused person shall have the right to be represented by the lawyer of his or her own choosing.**
- ~~**2. The suspect or accused person shall have the right to meet with the lawyer representing him.**~~
- 3. The suspect or accused person and the lawyer shall have the right to communicate with one another by correspondence, telephone conversations and other forms of communication.**

¹¹ See Concluding Observations on Belgium, UN Doc CCPR/C/BEL/CO/5 (Oct 2010), para 17 and similarly Kenya CCPR/CO/83/KEN, (March 2005), para 17, “initial hours of detention”.

¹² The Human Rights Committee has also used this language (“immediately”), for instance, in 2008 concluding observations on UK CCPR/C/GBR/CO/6 (July 2008), para 19, rejecting a 48 hour delay; and Netherlands, CCPR/C/NLD/CO/4 (July 2009), para 11. See also Japan, CCPR/C/JPN/CO/5 (Oct 2008), para 18; and Tajikistan, CCPR/CO/84/TJK, para 11, referring to “from the actual moment of arrest”; and Italy, CCPR/C/ITA/CO/5 (Nov 2005) “as soon as” arrested.

¹³ See e.g. art. 6 (3)(c) ECHR; art 14(3)(b) and (d) ICCPR; Principles 1 and 5 Basic Principles on the Role of Lawyers; Art. 7 (1) (c) of the African Charter; Art. 8 (2) (d) of the American Convention; Art. 21 (4) (d) of the ICTY Statute; Art. 20 (4) (d) of the ICTR Statute; Rule 93 of the European Prison Rules; Art. 55 (2)(c) and 67 (1) (d) of the ICC Statute. See also Human Rights Committee: *Miguel Angel Estrella v. Uruguay*, No 74/80, UN Doc CCPR/C/18/D/74/1980 (29 March 1983), paras 8.6 and 10; *Kelly v Jamaica*, UN Doc CCPR/C/57/D/537/1993 (July 1996), para 9.2; *Lyashkevich v Uzbekistan*, UN Doc CCPR/C/98/D/1552/2007 (March 2010), para 9.4; Concluding Observations, Spain, UN Doc CCPR/C/ESP/CO/5 (Oct 2008), para 14).

¹⁴ See, e.g., ECtHR, *Poitrimol v. France*, 13 Nov. 1993.



24. *The lawyer shall have the right to be present at any questioning and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.*

35. *The lawyer shall have the right to be present at any other investigative or evidence gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, **except where and only for so long as the person responsible for the act reasonably believes that the evidence to be gathered will be altered, removed or destroyed as a result of the passage of time needed for the lawyer to arrive unless this would prejudice the acquisition of evidence.***

46. *The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.*

57. *~~The~~ **Neither the** duration and frequency of meetings between the suspect or accused person and his lawyer, **nor communication between them,** shall ~~not~~ be limited in any way that may prejudice the exercise of his rights of defence.*

8. ***Lawyers shall be permitted to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; shall be able to travel and to consult with their clients freely both within their own country and abroad; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.***

- The provision gives effectiveness to the right provided for in Art. 3, listing some of the activities that lawyer needs to be able to carry out to discharge their duties to his/her client. The provision includes elements recognized in ECtHR case-law¹⁵ but should not necessarily be seen as exhaustive.
- It is also in line with ECtHR case-law stating that the obligations of a lawyer are not only to assist his client in the preparation of the trial, but also in the control of the legality of any measures taken in the course of the investigation proceedings.¹⁶ In particular, the lawyer has to ensure the respect of the right of the client not to incriminate him/herself.
- As mentioned above (see comment under art. 3), the relevant international treaties recognise the right of a suspected or accused person to the lawyer **of his or her own choosing**, and this must be recognised in the Directive as an essential element of the right to access to legal counsel (ECHR art 6 (3)(c); ICCPR art 14(3)(b) and (d), etc.).
- Persons subject to criminal procedures also have a **right “to communicate”** with legal counsel, which is not restricted to in-person visits (see e.g. ICCPR art 14(3) (b); art. 18 of the UN Body of Principles). To the extent the Directive as presently drafted fails to include this in article 4, instead apparently treating this as a matter for national law (see article 7), it is inconsistent with the existing obligations of EU member states and should be revised.¹⁷
- There is no mention of the right of access to the case-file, as this is part of Measure B - Right to Information (see Art. 3 (2) of the Commission's proposal). The two rights are however interlinked and overlapping and should be recognised as such.
- According to international standards, the right to legal counsel includes the right to effective assistance of a competent counsel: *“lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms*

¹⁵ See *Dayanan v. Turkey*, no 7377/03, 13 January 2010; *Brusco v. France*, no 1466/07, 14 October 2010)

¹⁶ See *Can v. Austria*, 12 July 1984; *Ocalan v. Turkey*, 4 March 2003)

¹⁷ See also Human Rights Committee, *Tomlin v Jamaica*, UN Doc CCPR/C/57/D/589/1994 (1996), par. 8 (3).



recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession” (see principle 14 of the Basic Principles). Lawyers also have a duty to help their clients in every appropriate way, taking such action as is necessary to protect their clients’ rights and interests and assist their clients before the courts (see principle 13 of the Basic Principles). Ensuring the respect of these principles is primarily the responsibility of an independent legal profession, and in no circumstances should government authorities be permitted to deprive a person of his or her choice of lawyer on the grounds that the authorities do not believe him/her to be competent or effective. However, the right of the individual to change lawyers when he or she does not have confidence in the lawyer to which he or she initially had access should be recognised.

- In the proposal there is also no mention of another important aspect of the right to legal counsel, i.e. the fact that lawyers should be free from intimidation, hindrance or improper interference in the exercise of their professional duties. This is a principle recognised under international law (see principle 8: “without delay, interception or censorship” and 16 of the Basic Principles on the Role of Lawyers: “Governments shall ensure that lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”; principle 18 (3) of the UN Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment; HRC General Comment 13, para. 9: “should be able to counsel and represent their clients [...] without any restriction, influences, pressures or undue interference from any quarter”; 8th Annual Activity Report of the African Commission on Human and Peoples’ Rights; UN Special Rapporteur on the independence of judges and lawyers, report on the mission of the UN Special Rapporteur to the UK, 1998). The proposal should therefore be amended to incorporate this principle.
- **Par. 3:** see comment on Art. 3 (1) (b).

Article 5 - The right to communicate upon arrest and to receive visits

1. In addition to the right to access to a lawyer, Member States shall ensure that a person to whom Article 2 refers and who is deprived of his liberty has the right to have at least one person named by him/her informed of the deprivation of liberty and to communicate with at least one person named by him/her as soon as possible promptly upon his or her arrest or detention.

2. Where efforts to contact the person named are not successful, the person may name another person. All reasonable efforts should be made to ensure the person is actually able to communicate with someone of their choosing.

3. Where the person is a child, Member States shall ensure that the child’s legal representative or another adult, depending on the interest of the child, is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed.

4. Member States shall ensure that anyone deprived of his liberty has the right to receive visits from family members or other persons of his or her choice.

- Access to the outside world is a not only a fundamental right to which anyone deprived of liberty is entitled but an essential safeguard against human rights violations such as torture, ill-treatment and “disappearances”, vital to the process of obtaining a fair trial. Furthermore, incommunicado



detention can in itself be a form of cruel, inhuman or degrading treatment.¹⁸ We therefore welcome the acknowledgment of this right at EU level through its insertion in a binding legal instrument.

- The provision however fails to refer to situations when communication/notification is not possible for various reasons. The explanatory memorandum states that in such cases the person deprived of his/her liberty is to be informed of the fact that the notification did not occur. This is also to give the person the possibility to select another person and to communicate with him/her. However, nothing is said about how to remedy for this failure. The provision should refer to such situations, thus giving concreteness to an important component of the right of communication, which is the right to feedback on notification of custody, and could perhaps provide for alternative solutions in cases when communicating with the person/persons named by the arrested is not possible.
- The wording “*as soon as possible*” in par. 1 is not sufficiently precise, leaving too much space to the discretion of the national legislator (or even of national authority). International standards refer instead to terms such as “immediately” or “promptly.”¹⁹
- In par. 2 the wording “unless it would be contrary to the best interests of the child” is also vague and could be clarified. First, and considering the proposal also covers the investigation (pre-trial) stage of the proceedings, the provision should clarify who is responsible for carrying out this evaluation. Furthermore, the provision should state that such a decision can always undergo some forms of judicial review. It is our understanding that other issues relating to children and other suspects or accused persons who are vulnerable will be addressed in the proposal for Measure E of the Roadmap (Special Safeguards for Suspected or Accused Persons who are Vulnerable).
- According to international standards and norms, persons deprived of their liberty not only have the right to communicate with family members or other persons of their choosing, they have the right to receive visits from them.²⁰ We believe the proposal should provide for this right.

Article 6 - The Right to Consular or Diplomatic Assistance

*Member States shall ensure that persons to whom Article 2 refers, who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention **promptly upon their arrest or detention** and to communicate with the consular or diplomatic authorities. **Such authorities have the right to visit such persons and to arrange for their legal representation, and to observe court proceedings in relation to the person.***

- The provision builds on the 1963 Vienna Convention on Consular Relations, recognising (in line with the case-law of the International Court of Justice and Inter-American Court of Human Rights)

¹⁸ See UN Commission on Human Rights, Resolution 1997/38, para. 20; UN Joint Study on Secret Detention, UN Doc A/HRC/13/42 (19 February 2010), paras 31-35.

¹⁹ See, e.g. the UN Standard Minimum Rules for the Treatment of Prisoners, 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 Ecosoc Res 663C(XXIV) (31 July 1957) and Res 2076(LXII) (13 May 1977), Rule 92, which says: “An 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...”)

²⁰ See, e.g. principle 19 of the UN Body of Principles; Rules 37 and 92 UN Standard Minimum Rules for the Treatment of Prisoners; article 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance; Rule 92 of the European Prison Rules. See also the Inter-American Commission’s case-law, which considers this right as essential to ensure also respect of the right to protection of family life.



what was a right of the State (i.e. only enforceable by the State) as a right of the individual (i.e. enforceable by the person him/herself).

- As with access to lawyers, the right is broader than simply “communication”: for instance, art. 36 (1) (a) of the Vienna Convention (*Communication and contact with nationals of the sending State*) refers to the right to have access to the national of the sending State as part of the right to communicate. Art. 36 (1) (c) states in particular that “*consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention*”. The right to visit the person deprived of his/her liberty, as an essential component of the right to communicate, is not mentioned in the proposal. This should be recognised and reflected in both the Article title and the text of the article.
- Art. 36 (1) (c) of the Vienna Convention gives more details with regard to the content of the right to communicate (“*to visit [...], converse and correspond with him and to arrange for his legal representation*”). On the contrary, Art. 6 of the proposal makes only a general reference to the right to communicate. Particularly regrettable is the choice not to refer to the right of the consular or diplomatic authorities to arrange for the legal representation of the person; in light of the choice to merge the proposal on the right to communicate with the one on the right to legal representation such reference would have been even more appropriate and reasonable, and would have provided the persons deprived of their liberty with stronger safeguards with regard to their right to a fair trial. The right of consular officials to observe trials and other court proceedings in relation to their nationals should also be recognised.

Article 7 - Confidentiality

Member States shall ensure that the confidentiality of all meetings between **a person to whom article 2**²¹ ~~refers the suspect or accused person~~ and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication ~~permitted under national law~~ between the ~~suspect or accused~~ person and his lawyer.

- The principle of confidentiality is identified by the ECHR as one of the key factors to a lawyer’s effective representation of a client’s interests and an important safeguard to one’s right to defence (see *Castravet v. Moldova*, 13 March 2007 et al.). The right “to communicate freely and privately with its counsel” is also mentioned in art. 8.2 of the American Convention on Human Rights, in Principle 22 and 8 of the Basic Principles on the Role of Lawyers; Principle 18 of the Body of Principles; Rule 93 of the European Prison Rules; par. 2 (E) (1) of the African Commission Resolution The Human Rights Committee has explained that Art. 14 (3) (b) of the ICCPR, which guarantees the right to communicate with counsel, requires “*counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications*” (HRC General Comment 32, para. 9). We therefore welcome the provision as well as the choice of the legislator not to allow for derogations to the principle.
- For the right to confidential communication with counsel to be effective, authorities must also provide adequate time and facilities for the persons suspected or accused to meet and have confidential communications with their lawyers, whether face to face, on the telephone or in writing. Furthermore, such meetings or telephone calls may take place within the sight, but not within the hearing, of others (see principle 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles, Rule 93 of the UN Standard Minimum Rules). A reference to such standards and conditions should be inserted in the proposal.

²¹ as in the amended version suggested above.



- To reinforce the principle of confidentiality of all forms of communication, we also believe that it would be wise to have a clause explicitly stating that communications between a detained person and his/her lawyer are inadmissible as evidence unless they are connected with a continuing or contemplated crime (see Art. 18 (5) of the Body of Principles).

Article 8 - Derogations

Amnesty International opposes the inclusion of any derogation provision in the Directive. If, however, a derogation provision is nevertheless included, as presently drafted it is insufficiently precise and narrow to properly reflect international legal standards. Track changes below indicate some of the changes that would be necessary to bring it in line with international legal standards.

Member States ~~shall may~~ not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6.

Any such derogation:

- (a) ~~shall may only~~ be justified **where it is more likely than not that it is urgently necessary by compelling reasons pertaining to the urgent need** to avert serious adverse consequences for the life or physical integrity of a person;
- (b) ~~shall must~~ not be based exclusively on the type or seriousness of the alleged offence;
- (c) ~~shall must~~ not go beyond what is necessary;
- (d) ~~shall must be strictly~~ limited in ~~time as much as possible~~ and in any event **shall not permit any person to be deprived of liberty for more than 48 hours without access to a lawyer of their choice not extend to the trial stage;**
- (e) ~~shall must~~ not prejudice the fairness of the proceedings **recognising that the 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;**
- (f) **must not be inconsistent with other obligations of the Member State under international law.**

The grounds and criteria for derogations listed above must be clearly set out in national law.

Derogations may only be authorised by a duly reasoned decision taken by a judicial authority, **in accordance with procedures prescribed in national law, and based on objective evidence considered on a case-by-case basis. They shall be subject to challenge as to their legal or factual basis by the person affected, or someone acting on his or her behalf, in a fair judicial procedure.**

- Given the crucial role that access to an independent lawyer plays not only in ensuring a fair trial, but as a fundamental safeguard against torture and other cruel, inhuman or degrading treatment or punishment while in police custody, Amnesty International takes the position that the proposal should not allow for any exceptions to be made to the right of the suspect or accused person to have his/her lawyer present from the outset of any deprivation of liberty.
- If, however, the Directive retains a derogation provision, certain additional criteria should be added to ensure that it meets the international standards indicated by the Human Rights Committee, European Court of Human Rights, and others.
- For instance, in *Salduz v. Turkey* (Grand Chamber, 27 November 2008), the ECtHR, recognising the link between access to a lawyer and the prevention of torture and other ill-treatment in violation of article 3 of the ECHR, stated that “any exception to the enjoyment of this right should be **clearly circumscribed** and its application **strictly limited in time.**” The proposed draft criteria fail to meet this standard in several ways. For instance, “strictly” connotes a more demanding standard than “as much as possible”. Further, the phrase “*compelling reasons pertaining to the urgent need to avert [...]*” is not sufficiently clearly circumscribed and would need to be replaced by a precise legal standard if it is to prevent interpretations which could indefinitely extend the scope of the



derogation (especially in sensitive cases such as terrorism cases or other serious situations where security concerns might prevail over individual rights concerns).

The Human Rights Committee has on several occasions indicated that postponing a detainee's access to a lawyer for more than 48 hours is not acceptable, including in the face of the challenges of countering terrorism and other serious situations that potentially would allow derogations of other rights.²² The ECtHR similarly has emphasised the right to access a lawyer within 48 hours as a "basic safeguard" in situations of emergency in which other derogations might in principle be justified.²³ The CPT, in rejecting legislation by France permitting a delay in access to a lawyer of 72 hours in terrorism cases, also recommended that France "*take appropriate legislative measures to guarantee immediate access to a lawyer during police custody, in accordance with article 11 of the Convention.*" [emphasis added]. Principle 7 of the Basic Principles on the Role of Lawyers also states that access to a lawyer cannot, in any case, be delayed for more than 48 hours from the time of arrest or detention. If the Directive is to allow derogations from the rights in question, Amnesty International strongly recommends that the proposal set a maximum time limit of no more than 48 hours, in line with international standards, for any such derogation.

- The ECtHR stated in *Salduz v Turkey* that: "The 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 principle should be recognised in the proposed Directive.
- Letter e) should also be more clearly circumscribed and contain at minimum a reference to Member States' obligations under international law.
- The proposal should state, consistent with international law, that any derogations to the rights enshrined in the proposal should be "*specified by the law or lawful regulations*" (see art. 18 (3) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Article 9 - Waiver

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:
(a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;
(b) he has the necessary capacity to understand these consequences and
(c) the waiver is given voluntarily and unequivocally.

2. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.

3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings.

- No comments.

²² See the Human Rights Committee's 2001 Concluding Observations on United Kingdom, UN Doc CCPR/CO/73/UK (6 December 2001), para 19 and repeated in 2008 re: UK CCPR/C/GBR/CO/6 (July 2008), para 19; and its 2003 Concluding Observations on Israel, UN Doc CCPR/CO/78/ISR (21 August 2003), paras 12-13.

²³ See *Brannigan and McBride v UK*, nos. 14553/89; 14554/89 (25 May 1993), paras 62-66; *Aksoy v Turkey*, no. 21987/93 (18 December 1996) para 82.



Article 10 - Persons other than suspects and accused persons

1. Member States shall ensure that any person other than a suspect or accused person who is heard by the police or other enforcement authority in the context of a criminal procedure is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.

2. Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.

- The scope provision in article 2 should make clear that persons referred to in Article 10 are also within the scope of the Directive, by making clear that it applies to anyone who is “questioned in connection with a criminal offence at a time when the authorities in fact suspect him or her of having committed a criminal offence.” See comment above on article 2.

Article 11 - The right of access to a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly upon arrest pursuant to the European Arrest Warrant in the executing Member State.

2. With regard to the content of the right of access to a lawyer, this person shall have the following rights in the executing Member State:

– **the right to be represented by the lawyer of his or her own choosing;**

– the right of access to a lawyer in **and for** such a time, **and in such a manner and with adequate facilities, so** as to allow him to exercise his rights effectively;

– the right to meet with the lawyer representing him;

– **the right to communicate confidentially with one another at meetings and otherwise, including by correspondence, telephone conversations and other forms of communication;**

– the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;

– **the right to be present at any other investigative or evidence gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, except where and only for so long as the person responsible for the act reasonably believes that the evidence to be gathered will be altered, removed or destroyed as a result of the passage of time needed for the lawyer to arrive unless this would prejudice the acquisition of evidence.**

– the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention

The duration and frequency of meetings between the person and his lawyer, **nor communication between them** shall **not** be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

Lawyers shall be permitted to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; shall be able to travel and to consult with their clients freely both within their own country and abroad; and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with § 4. This person shall be informed of that right.

4. The lawyer of this person in the issuing Member State shall have the right to carry out activities



limited to what is needed to assist with the proceedings on the European Arrest Warrant the lawyer in the executing Member State, and shall not be prevented from assisting with the defence in the issuing Member State, with a view to the effective exercise of the person's rights in the executing both Member States, including under that Council Framework Decision, in particular under its Articles 3 and 4.

5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.

- Par. 2 in spite of clearly following the structure of art. 4, fails to include among the rights of the person in the executing member state the right “to be present at any other investigative and evidence-gathering act at which the suspect or accused person's presence is required or permitted as a right” (art. 4 (3)). Furthermore, it fails to provide for other rights, whose absence from the proposal has already been criticized with regard to Art. 3-4. This lacuna should be filled as these elements are an essential component of the right to legal assistance. Para 2 should therefore be revised in order to put into line with art. 3 and 4 as amended.
- We welcome the mention made in par. 3 of the right of the person to be informed of his/her right of access to a lawyer in the issuing member States. The provision could serve as an example also for other provisions where a reference to the rights protected under measure B - Right to Information, to ensure more effectiveness and coherence, filling the gaps that a step-by-step approach is likely to leave in the overall structure.
- The Directive should not positively prohibit a lawyer from carrying out other functions, or purport to limit the recognition of the right of a lawyer to do so, as the original draft of paragraph 4 might be read to do.

Article 12 - Legal aid

1. This Directive is without prejudice to domestic provisions on legal aid, which shall apply in accordance with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

2. Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

- The provision provides some sort of provisional protection to the right to legal aid, which will become part of a separate proposal, that the Commission is expected to present in 2013. Art. 6 (3) letter c) ECHR looks at the right to legal aid as an essential part (together with the right to legal assistance) of the right to defence (“everyone charged with a criminal offence” shall have the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”). Furthermore, the Stockholm Programme itself states that “the right to legal aid should ensure effective access to the aforementioned right to legal advice”. We are concerned that separating the two rights - contrary to the original plan of the Roadmap - could delay addressing the concrete problems around the effective implementation of the right to a lawyer in EU member states. To avoid any negative impact of separating the two and to further pave the way for a strong directive on the right to legal aid, we believe that the principle of legal aid could be spelled out more robustly in the proposal.
- The provision takes a “negative” approach to the issue of legal aid (see the wording “without prejudice”, “shall not apply less favourable provisions”) instead of a proactive one, encouraging member state to support and promote this right at national level pending the entry into force of the new proposal.



- In spite of the provision calling on member states to comply, when implementing their national laws, with the Charter and the ECHR, pending the entry into force of the proposal on legal aid, there is a great risk that member states will not actually abide by those standards. At least there should be a mention in the current proposal of the **right** to legal aid and of the situations to which this should apply, also in connection with the right to a lawyer of one's own choosing (which is also absent in the proposal, see comment under art. 3 and 4) and with the right to self-representation.
- Furthermore, the proposal fails to look at situations in which compliance with the ECtHR standards (namely the "Salduz Doctrine") is not possible because of practical reasons such as the lack of resources (see for instance the case of Belgium). Since ensuring "the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons" is a duty incumbent upon Governments under international law (see principle 3 of the Basic Principles on the Role of Lawyers), we expect that the issue will be addressed by the proposal on legal aid, which is expected for 2013.

Article 13 - Remedies

1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer, **his/her rights to communicate upon arrest with others and to receive visits, or his/her right to consular or diplomatic assistance**, **has** been breached.
2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him; **unless the use of such evidence would not prejudice the rights of the defence.**

- We do not see the reason why the provision on legal remedies should be restricted only to the right of access to a lawyer and not to the right to communicate with someone of a person's own choice and to the right to consular assistance. The provision should certainly be expanded, in order to include these rights.
- However, the provision endorses the wide approach adopted by the ECHR in the Salduz judgment (see *Salduz v Turkey*, 27 November 2008).
- We welcome the choice, expressed in par. 2, to opt for the 'restitutio in integrum' principle, as the best possible form of redress.
- We also welcome the introduction of the prohibition to use the evidence gathered in breach of the right or in cases where derogation to the right was authorized in accordance with Art. 8. However, the provision is undermined by the proviso contained at the end of par. 3 ("*unless the use of such evidence would not prejudice the rights of the defence*"). The ECtHR Grand Chamber has stated, in the *Salduz* case, that: "*The 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.*" There should therefore be no scope for derogations to the general prohibition.

III. Other issues:

There are other items that are not currently included in the proposal, but which are closely interlinked with the matters addressed by the proposal that should be considered for inclusion.



- As the ECtHR and others have recognised, the right to legal counsel from the earliest stages of the investigation is also important to ensure the effectiveness of **the right to remain silent**, (which constitutes an important part of the **right to non self-incrimination**), especially given the fact that in practice a person's silence during questioning may in some countries be used as the basis for drawing adverse inferences against him/her in relation to charge and during trial. The risk of this happening increases if the person is not assisted by a competent counsel who can inform him/her of his/her right (in case the competent authorities did not), monitor compliance with the principle and take appropriate action if a violation occurs. Amnesty International would welcome more explicit recognition of these rights.
- There is no mention in the proposal of the **right** of persons who are deprived of their liberty **to be examined by a doctor of their own choice and**, when necessary, **to receive medical treatment**. This right, which is recognized by a number of international instruments as an essential safeguard against torture and ill-treatment,²⁴ is completely absent from the Commission's proposal. We believe this shortcoming should be remedied.

9 September 2011

²⁴ See principle 24 of the Body of Principles; Rule 24 of the UN Standard Minimum Rules; Rule 29 of the European Prison Rules. See also Human Rights Committee general comment 20, para. 11; Committee against Torture, General Comment no 2, para 13.