International Commission of Jurists

Proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest

Briefing Paper

October 2011

1. Introduction

This briefing paper addresses the proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and the Right to Communicate Upon Arrest, issued by the Commission as part of its roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.[1] The paper does not present a comprehensive analysis of the proposal, but makes recommendations for strengthening the protection offered by the Directive on several points, and responds to comments of the Presidency, and of certain Member States, on the Commission's draft.[2]

The International Commission of Jurists (ICJ), as an organisation dedicated to advancing the understanding and observance of the rule of law and the legal protection of human rights, has worked worldwide, since its foundation in 1952, to ensure the protection of human rights in the criminal justice process, and to advance the role of lawyers in defending human rights. It has played a central role in the elaboration of international law and standards on rights of access to a lawyer, in particular through the UN Basic Principles on the Role of Lawyers, and has worked to ensure the implementation of these rights at a national level.

The ICJ therefore warmly welcomes the draft Directive, as an important support for effective implementation, in EU Member States, of the right of access to a lawyer as recognised in

[1] European Commission, 2011/0154 (COD) 8 June 2011

[2] Presidency Note to CATS, 2 August 2011, 12897/11; Question by the Presidency on "scope", 21 September 2011, 14470/11; Note by Belgium, France, Ireland the Netherlands and the United Kingdom, 22 September 2011, 14495/11

international human rights law and standards. As the Directive affirms, effective legal advice for suspects is essential to protection of rights to liberty, fair trial, and freedom from torture and ill-treatment. These rights are already protected under the EU Charter, as well as under international human rights treaties binding on EU Member States, and international standards which they have supported and helped to advance.

In this regard, the ICJ wishes to emphasise that the protections afforded by the draft Directive do not impose new obligations on EU States, but reflect existing international law obligations, whether under the European Convention on Human Rights, or global human rights treaties to which they are party.[3] In some instances, the draft Directive elaborates practical steps necessary to ensure protection of these rights, which have also been identified by authoritative international human rights bodies as necessary or desirable for effective protection of the rights of criminal suspects. It is important that the standards in the Draft Directive be aligned to Member States' obligations, not only under the ECHR, but also under other international human rights treaties to which they are party, and international standards to which they are committed: together, these form the minimum standards to which States, through their differing legal systems, must adhere. International human rights treaties, and the international courts and tribunals that apply them, consistently emphasise the necessity of prompt, regular, confidential and effective legal assistance for detained persons, to protect the right to a fair trial,[4] as well as to prevent arbitrary detention and torture or ill-treatment in custody.[5] The relevant international treaties, jurisprudence and standards will be referred to in more detail in regard to specific provisions of the draft Directive below.

The ICJ therefore urges Member States, and the EU institutions, to support the draft Directive. They should do so because the Directive reflects international law obligations of Member States. Moreover, it will bring benefits to those Institutions, States and their constituencies, including the reduction of the need for recourse by suspects to the European Court of Human Rights to challenge violations of their rights of access to a lawyer, and in supporting the smooth working of EU mutual legal assistance in criminal matters.

This draft Directive does not, as had been envisaged by the Stockholm Programme, address the right to free legal aid. The ICJ looks forward to the publication of a further Commission draft Directive on Legal Aid, which is closely linked to the right of access to a lawyer. The ICJ trusts that the development of EU standards on legal aid – without which the right of access to a lawyer will in many cases be illusory - will remain a priority under the Stockholm

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[3] Including in particular the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and their Optional Protocols.

[4] *John Murray v UK*, ECtHR, Application no. 18731/91 para.62; *Salduz v Turkey*, EctHR, Application No.36391/02 Grand Chamber, Application no. 36391/02, para.54 See also Principle 7 of the UN Basic Principles on the Role of Lawyers; Human Rights Committee General Comment 32 on the Right to Equality before Courts and Tribunals, and to a Fair Trial, CCPR/C/GC/32 23 August 2007, para.38.

[5] *Ocalan v Turkey* ECtHR Application no.46221/99 para.72, endorsed by the judgement of the Grant Chamber, para.70; Human Rights Committee, General Comment 20; Committee against Torture, *General Comment no. 2: Implementation of Article 2 by State Parties*, 24 January 2008, UN Doc. CAT/C/GC/2, paragraph 13 (our emphasis). See also Article 17.2 (d) Convention on the Prevention of Enforced Disappearances; Working Group on Arbitrary Detention, Annual Report 1998, UN Doc E/CN4/1999/63, para.69, Guarantees 6 and 7.
CPT, 2nd General Report CPT/Inf (92) 3 para.37; CPT, 6th General Report CPT/Inf (96) 21 paras.15-16; CPT, 12th General Report CPT/Inf (2002) 15 para.40-41.

Programme.

2. Scope of application of the direction (Article 3)

The ICJ notes that questions have been raised by the Presidency,[6] as well as by other Member States[7] as to the scope of application of the Directive, and whether it should apply to persons who are not formally detained. It should be borne in mind that, in practice, suspects are often most at risk of ill-treatment or coercion in the early stages of the criminal justice process,[8] including in situations where they are not formally arrested or detained. Irrespective of whether national law considers an individual to be arrested or detained, the European Court of Human Rights applies its own tests to determine whether there is either detention, or a criminal charge that attracts the protection of the right to fair trial. It has consistently held that a person may be deprived of liberty (attracting the protection of Article 5 ECHR) in circumstances where he or she is not officially detained.[9] This may be the case even where the suspect is asked to appear "voluntarily" for questioning, if there is nevertheless substantial pressure to attend, or to remain once questioning has begun. The Court also recognises that the right to fair trial will apply from the moment when a person is under suspicion and has had his or her rights substantially affected by an investigation.[10] **The ICJ therefore considers that the scope of application of the Directive under Article 3 should extend, as it does in the current draft, not only to those who have been formally arrested or detained, but also to any deprivation of liberty and to those who have been invited to present themselves voluntarily for questioning by the authorities.**

3. Qualification and independence of lawyers: Article 3.1

While recognising the importance of the guarantees set out in the current draft of Article 3, the ICJ notes that, for legal advice to be effective in protecting the rights of the detainee, it must be provided by a lawyer who is fully qualified, and independent of the authorities. The UN Basic Principles on the Role of Lawyers state that adequate protection of human rights "requires that all persons have effective access to legal services provided by an independent profession".[11] They stipulate that detained persons should "be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance…"[12] The UN Committee Against Torture has emphasised the importance, for compliance with the Convention Against Torture, for all detainees, "promptly to receive independent legal assistance."[13] Standards of the Council of

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[6] Question by the Presidency on "scope", 21 September 2011, 14470/11

[7] Note by Belgium, France, Ireland, the Netherlands and the United Kingdom, 22 September 2011, 14495/11

[8] *Salduz v Turkey*, ECtHR Application no. 36391/02, para.54

[9] *Guzzardi v Italy*, ECtHR, Application no.7637/76

[10] *Foti v Italy*, ECtHR, Application no.7604/76; *Escoubet v Belgium*, ECtHR, Grand Chamber, Application no.26780/95. See also 12th General Report CPT/Inf (2002) 15, Para 41 "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".

[11] UN Basic Principles on the Role of Lawyers, preamble para.9;

[12] ibid, principle 6.

[13] Committee against Torture, General Comment no. 2: *Implementation of Article 2 by State Parties, 24 January 2008*, UN Doc. CAT/C/GC/2, paragraph 13. See also, *inter alia, Concluding Observations of the*

Europe Committee for the Prevention of Torture (CPT) also refer to the need for access to an "independent" lawyer.[14] In the view of the ICJ, the principle (stated in Article 3.2) that legal advice should be such as to protect the effective right to defence, would be best safeguarded by a clear stipulation in the Directive that lawyers must be formally qualified, competent to provide the advice required, and independent. **The ICJ recommends that the first sentence of Article 3.1 be amended to read "Member States shall ensure that suspects and accused persons are granted access to a qualified, competent and independent lawyer …."**

4. Choice of lawyer: Article 3

Article 6.3.c ECHR, as well as Article 14 ICCPR, and Principle 1 of the UN Basic Principles on the Role of Lawyers, recognise the right of a person charged with a criminal offence to engage in a defence through "legal assistance of his own choosing", a protection that applies at all stages of the criminal process, including at the early investigative stages.[15] While the accused person's choice of lawyer should be respected, in particular where failure to do so would affect the effectiveness of the defence,[16] international human rights law recognises that this choice may be constrained where there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[17]

The European Committee on the Prevention of Torture (CPT) has acknowledged that "in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice." But it has gone on to stress that "this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged."[18] The UN Human Rights Committee and the Committee against Torture have expressed concern at detention regimes in which detainees are not permitted to choose their own lawyer,[19] which, in sensitive situations relating to security or political crimes, may raise concerns at the potential lack of independence or effectiveness of the legal advice.

Committee against Torture: Hungary, UN Doc. CAT A/54/44 (1999), paragraph 84; and *Concluding Observations of the Committee against Torture: Cameroon,* 5 February 2004, UN Doc. CAT/C/CR/31/6, paragraph 9(a).

[14] 12th General Report [CPT/Inf (2002) 15] Para 41

[15] *Salduz v Turkey*, Grand Chamber, Application no. 36391/02, para.50-55; UN Basic Principles on the Role of Lawyers, Principle 1.

[16] *Goddi v Italy* Application no. 8966/80

[17] *Croissant v Germany*, Application no 13611/88, para.29. *Meftah and others v France*. Application nos. 32911/96, 35237/97 and 34595/97, para.45

[18] 12th General Report [CPT/Inf (2002) 15] Para 41

[19] See Human Rights Committee Concluding Observations on Spain, CCPR/C/ESP/CO/5 5 January 2009, para.14; *Concluding observations of the Human Rights Committee: Spain : Spain*. 03/04/96, CCPR/C/79/Add.61, paragraph 18; Committee Against Torture Concluding Observations on Spain, CA T/C/ESP/CO/5, 9 December 2009, para.3; *Report of the Committee against Torture : 16/09/98. A/53/44. (Sessional/Annual Report of Committee*) Fifty-third session, Supplement No. 44 (A/53/44), paragraph 135. See also *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his visit to Spain*, 16 December 2008, UN Doc. A/HRC/10/3/Add.2, paragraph 15.

In light of these standards, the ICJ recommends that Article 3 be amended by the addition of a new sub-paragraph which states "[t]he suspect or accused person shall have access to a lawyer of his own choosing, unless there are compelling reasons why such access cannot be provided."

5. Promptness of legal advice and visits by lawyers (Articles 3 and 4)

The ICJ would recommend an amendment to Article 4 to strengthen and clarify the promptness and frequency of access to lawyers. First, the present formulation does not seem sufficiently clear as to when exactly the right of a suspect to meet with a lawyer would vest (Article 4.1), and whether such a meeting must take place as soon as possible on the timescale specified in Article 3. It is important, to satisfy the principle of effectiveness of the right to legal advice, that detainees are able to meet personally with their lawyers immediately upon being taken into custody. This right is not satisfied by merely allowing a detainee to receive legal advice by phone or otherwise at a distance. The UN Basic Principles on the Role of Lawyers provide that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer …."[20] The UN Body of Principles for the Protection of Under Any Form of Detention or Imprisonment refer to "the right of a detained or imprisoned person to be visited by and to consult and communicate" with a lawyer.[21] **In order to clarify this important principle, the ICJ recommends that Article 4.1 should be amended to read: "The suspect or accused person shall have the right to meet with the lawyer representing him, including in the time and manner specified in Article 3.1."**

6. Lawyers' access to custody records (Article 4)

While the ICJ welcomes the safeguards set out in Article 4, CPT standards also recommend, as a further safeguard against ill-treatment in detention, that comprehensive custody records be kept, including records of all aspects of the individual's custody and relevant action taken by the authorities,[22] and that lawyers have access to the records of detainees they represent.[23] In line with this guidance, **the ICJ recommends that a new sub-clause be inserted in Article 4 stating that: "The lawyer shall have the right of access to all custody records of the detained person."**

7. **Lawyer-Client Confidentiality, possibility of limitations (Article 7)**

The ICJ welcomes the strong protection of the confidentiality of meetings and communications between lawyers and their clients contemplated by Article 7, which under the current draft would not be subject to any possibility of derogation under Article 8. It

[20] UN Basic Principles on the Role of Lawyers, para.8. Emphasis added.

[21] UN Body of Principles for the Protection of Under Any Form of Detention or Imprisonment, Principle 18.3

[22] see CPT standards, 2nd General Report CPT/InfC923 para.40

[23] ibid

notes, however, that the Presidency[24] has questioned whether the possibility of derogation under Article 8 should be extended to apply to rights of lawyer-client confidentiality under Article 7. The Presidency has refered to the need for derogation in certain clearly defined circumstances "including notably cases of terrorism." It has proposed inserting a specific derogation clause in Article 7, to allow for exceptional derogation from the confidentiality of correspondence, telephone conversations and other forms of communication "where this is justified by the urgent need to prevent a serious crime or a threat to public security".[25]

In the view of the ICJ, such a derogation clause would not comply with international human rights law standards on the right of confidential communication with a lawyer. Although the jurisprudence of the European Court has acknowledged that rights of lawyer-client confidentiality may be subject to restriction in certain exceptional circumstances, the Court has, in particular in recent decisions of the Grand Chamber in *Ocalan v Turkey*[26] and *Sakhnovskiy v Russia*[27] allowed for a very narrow scope for such limitations. The Court has emphasised that restrictions on confidentiality must not prevent the practical and effective right of access to legal advice, or extinguish the overall fairness of the trial. [28] If the absence of confidentiality is such as to prevent effective consultation with a lawyer in the preparation of the defence, it is unlikely to be justified. In *Sakhnovskiy v Russia*, the Grand Chamber emphasised that: "in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention … Nevertheless, any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances."[29]

These principles apply equally in sensitive cases, such as those of terrorism suspects, or in other cases where there is a threat to national security. It is notable, for example, that in *Ocalan v Turkey*,[30] concerning the trial of a high-profile suspect held on charges of terrorism, the Grand Chamber found restrictions on the confidentiality of lawyer-client communications unjustifiable, since they had significantly affected the applicant's defence, and could not be shown to be strictly necessary, in the particular circumstances of that case, for reasons of security. Reiterating the importance of the right to communicate with a legal representative, and the need to guarantee rights in ways that are practical and effective, the Grand Chamber noted that "If [the applicant's] defence to the serious charges he was required to answer was to be effective, it was essential that [his] statements be consistent. Accordingly, the Court considers that it was necessary for the applicant to be able to speak with his lawyers out of the hearing of third parties."[31]

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[24] Council of the European Union, Note of the Presidency to CATS, 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 – Orientation debate, 2 August 2011, 12897/11

[25] Presidency note to Working Party on Substantive Criminal Law, 14568/11, Brussels, 5 October 2011

[26] Application no. 46221/99

[27] Application no. 21272/03

[28] ibid para.97

[29] para.102. Emphasis added.

[30] op cit

[31] para.133

It should also be noted that the UN Basic Principles on the Role of Lawyers provide without exception that lawyer-detainee consultations may be "within sight, but not within the hearing, of law enforcement officials". Guidelines of the Council of Europe Committee for the Prevention of Torture (CPT)[32] also state without qualification the principle of the right to communicate with a lawyer in private. Principle 18.3 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment establishes the right of detained or imprisoned persons to communicate and consult with legal counsel in full confidentiality, and allows this right to be restricted only "in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order." Principle 18.4 does not envisage any qualification of the right to communicate or to hold consultations with a lawyer out of the hearing of law enforcement officials. It states that: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official."

Furthermore, the derogation clause proposed by the Presidency[33] is drafted in such open terms that it could be interpreted as permitting very wide restrictions on the confidentiality of correspondence with a lawyer. The terms "serious crime" and "threat to public security" are undefined and are susceptible to very broad interpretation. No test of necessity or proportionality is applied, nor is there any requirement that the restriction shall not prejudice the overall fairness of proceedings, or the right to a defence. The clause does not include the procedural protection of judicial authorisation.

The ICJ considers that, in light of the ECtHR jurisprudence and other international standards, the derogation clause proposed by the Presidency is drafted overly broad terms that would permit violation of fair trial rights. The ICJ considers that the permitted scope of derogation from rights of confidentiality under Article 6.3.c ECHR is so narrow and exceptional that the Directive could best ensure effective protection of this right by excluding derogation from this standard, as in the current draft.

8. Criteria for restrictions on the right of access to a lawyer (derogations in Article 8)

General Principles of Derogation

The ICJ considers that, if the Directive is to be effective in enhancing protection of the rights to legal advice guaranteed in international human rights law, it must carefully limit the circumstances under which its provisions can be curtailed. It should be borne in mind that, under international human rights law, the overall right to a fair trial is absolute and effectively non-derogable.[34] Permissibility of a restriction on the right of access to a lawyer depends on both the reasons justifying the restriction, and on the necessity and proportionality of the restriction in light of those reasons, including its scope and duration,[35] in the circumstances of the particular case. Crucially, as the European Court of Human

[32] 12th General Report [CPT/Inf (2002) 15] Para 41

[33] Note of 5 October 2011, op cit

[34] Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11, 31 August 2011, para.11

[35] *Magee v UK* ECtHR Application no. 28135/95; *Ocalan v Turkey* op cit para.133.

Rights has repeatedly emphasised, restrictions must not prejudice the overall fairness of the proceedings[36] or the right to defence.[37]

The ICJ understands that some Member States have proposed new language[38] which would simply permit derogation from the specified protections of the Directive where there are "compelling reasons", relying on the *Salduz* case.[39] However the judgment of the Court in that case makes clear that a stricter and more comprehensive assessment is required. The Court, drawing on principles developed by the CPT, noted that

> "the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies. … Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6." [40]

The ICJ further notes that the European Court of Human Rights has repeatedly found violations of the right of access to a lawyer in cases of suspects arrested on serious charges, in particular terrorism charges. In *Dayanan v Turkey*, the Court held that a systematic legislative bar on access to a lawyer for a category of detainees was in itself sufficient to violate Article 6 ECHR, even where the applicant had kept silence during that period of detention.[41]

The ICJ therefore considers that a test for restriction which relies only on the compelling nature of the reasons for restriction would not adequately meet the standard set by the European Court, or that in other international standards. Neither would a test which permits derogation solely on grounds of the nature or seriousness of the offence be compatible with international obligations. The ICJ strongly recommends that the strict criteria for derogation in Article 8 should not be modified.

Furthermore, the ICJ considers that the cumulative nature of the criteria listed under Article 8 would be better clarified if the test of necessity under Article 8 (c) were expressly linked to the reasons for derogation under Article 8 (a). **The ICJ therefore recommends that Article**

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[36] *Panovits v Cyprus* ECtHR Application no.4268/04 para.66, *Salduz v Turkey*, op cit para.55, *Ocalan v Turkey*, op cit para.131

[37] In *Magee v UK*, op cit, which concerned an applicant detained on suspicion of terrorism, the Court held that: " to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6." (para.44)

[38] Note from the Presidency to CATS op cit para… The Presidency did not support this proposal, preferring to recommend relatively minor amendments to Article 8

[39] op cit para.55

[40] paras.54-55. See also CPT, 6th General Report, CPT/Inf (96) 21, Para.15; 12th General Report CPT/Inf (2002) 15, Para 41.

[41] App No. 7377/03, para.32

8 (c) be amended to read "shall not go beyond what is necessary for the purposes set out in sub-paragraph (a)".

The ICJ is concerned at suggestions that the requirement of authorisation by a judicial authority could be replaced a requirement of ex-facto "judicial review" or by authorisation by a "competent authority". Prior authorisation by a judicial authority is an essential means of ensuring the proportionality of any restrictions on access to a lawyer. Judicial review of detention subsequent to a restriction on access to a lawyer being imposed, would not have the capacity to **prevent** derogations that are unnecessary or disproportionate or which undermine the fairness of the trial – it would provide review only at a point where such fairness may already have been fatally undermined. Neither would a clause which allowed Member States to designate an administrative authority – such as the police – to authorise derogations provide a real additional safeguard. Judicial authorisation, by contrast, would ensure that derogations are made only on a full assessment of the facts of the particular case, under proper judicial process, where strictly necessary and justified. **The ICJ strongly supports the provision in the current draft that derogations may only be authorised by a duly reasoned decision of a judicial authority.**

Derogation from particular provisions

The ICJ considers that, on the principle that the Directive should not permit any derogation from its standards that could prejudice the right to a defence, **it is particularly important that Article 3.2 of the Directive not be subject to derogation. Any departure from this principle by national authorities would violate the right to fair trial as protected by the ECHR and EU Charter. The ICJ recommends that Article 8 be amended accordingly. For similar reasons, the non-derogability of Article 4.5, established in the present draft, should be maintained.**

The ICJ also stresses that it is especially important that Article 4.4 be excluded from possibility of derogation, as in the current draft, since this article is necessary to protect against ill-treatment and to allow legal challenges against ill-treatment or poor conditions of detention, which may also impact on the right to fair trial. Neither should Article 7 be derogable (see above).

9. Statements by witnesses and the privilege against self-incrimination (Article 10)

The ICJ supports the current text of Article 10, which meets a need to protect against the circumvention of procedural protections for suspects, by their designation as witnesses in the early stages of criminal proceedings. This provision can help to establish mutual confidence between Member States by ensuring that suspects' rights do not vary according to differences in national practice on when someone is officially designated a suspect. It ensures that the Directive has a scope as wide as the protection afforded by Article 6 ECHR, which applies an autonomous Convention meaning to "charge" so that procedural protections, including access to a lawyer, may apply when someone is not formally charged under national law, but is in fact under suspicion and has had his or her situation substantially affected by a criminal

investigation.[42] The application of the right of access to a lawyer to witnesses subject to compulsory questioning by police has also been emphasised by the CPT.[43] In these situations, access to a lawyer is essential for protection of the privilege against self-incrimination, and for the fairness of the proceedings as a whole.[44]

The ICJ notes the concerns raised by the Presidency on the relevance of Article 10.2 to the central subject matter of the Directive.[45] The prohibition in the draft Article 10.2 on the admission of statements made by a person before he is made aware that he is a suspect, is closely linked to the right of access to legal advice, since it serves to protect against abuse of process that is designed to limit legal advice for suspects in the early stages of an investigation. It ensures that statements will not be used where they were made without rights to legal advice equivalent to those of a suspect. Article 10.2 is designed to encourage practices which will safeguard against abuse of formal designations as a witness or a suspect, to undermine rights of access to a lawyer.

The ICJ therefore considers it important that Article 10.2 be retained in the draft Directive. Greater clarity as to the connection of Article 10.2 with the central purpose of the Directive could be provided by making express the link between use of evidence and the availability of legal advice. **Article 10.2 could be amended to read "Member States shall ensure that any statement made by such person before he is made aware that he is a suspected or an accused person <u>and afforded legal advice on the same basis as a suspect or accused person</u>, may not be used against him."**

10. Prohibition on use of evidence obtained in violation of the right of access to a lawyer (Article 13.3)

The ICJ strongly supports the retention of Article 13.3, which supports the protection of the right to a lawyer in the Directive as a whole, discouraging violations of these rights and ensuring that evidence obtained in breach of the right to a lawyer is of no benefit to law enforcement or prosecuting authorities in securing a conviction. Article 13.3 excludes a category of evidence – that obtained in breach of the right of access to a lawyer - which is at relatively high risk of having been obtained under pressure or coercion, in violation of the freedom from self-incrimination and possibly in violation of the prohibition on torture or inhuman or degrading treatment. Where evidence is obtained in violation of these rights, then international human rights law will require its exclusion. In practical terms, exclusion of evidence obtained in such suspect circumstances strengthens the effective protection against violation of these rights.

The ICJ notes that the Presidency has questioned the scope of Article 13.3,[46] which extends both to statements by a suspect and to material evidence, and has suggested that excluding

[42] *Foti v Italy*, ECtHR, Application no.7604/76; *Escoubet v Belgium*, Grand Chamber, Application no.26780/95.

[43] 12th General Report CPT/Inf (2002) 15, Para 41 "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".

[44] *Salduz v Turkey* op cit para.54; *Jalloh v Germnay* Application no.54810/00para.101

[45] Note of the Presidency to CATS, 2 August 2011, 12897/11, para.22

[46] Note by the Presidency to CATS, op cit, para.24

material evidence obtained in violation of the right to a lawyer may undermine the efficacy of the criminal proceedings. The ICJ however considers it important that the protection against admissibility of such evidence extend both to statements and to material evidence. This is consistent with the jurisprudence of the European Court, which has held that, in some cases, the exclusion of self-incriminating material information, as well as statements, will be required by Article 6 ECHR, where such information is obtained by coercion in defiance of the will of the accused and extinguishes the essence of the freedom from self-incrimination.[47] **The ICJ therefore recommends that Article 13.3 be retained, and that its terms clearly exclude both statements and material evidence obtained in violation of the right of access to a lawyer.**

[47] *Jalloh v Germany*, Application no. 54810/00, para.111-116; *Funke v France,* Application no. 10828/84, para.44