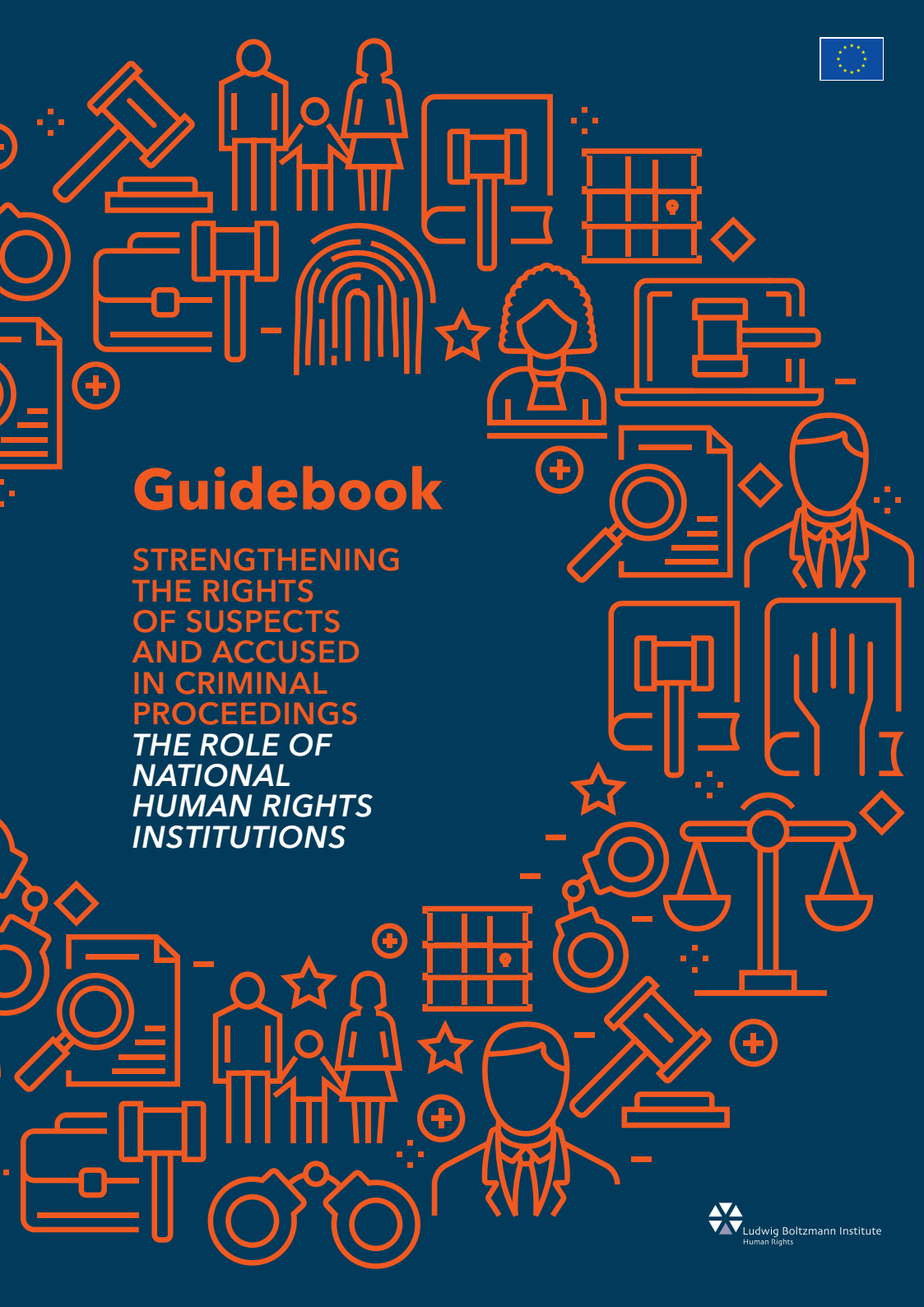

# Guidebook

## STRENGTHENING THE RIGHTS OF SUSPECTS AND ACCUSED IN CRIMINAL PROCEEDINGS

## *THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS*

Ludwig Boltzmann Institute
Human Rights

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# Strengthening the rights of suspects and accused in criminal proceedings – the role of National Human Rights Institutions

# Guidebook

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# ABBREVIATIONS

| | |
|---|---|
| AOB | Austrian Ombudsman Board |
| AP | Asia Pacific Forum |
| APT | Association for the Prevention of Torture |
| BIM | Ludwig Boltzmann Institute of Human Rights |
| CAT | Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| CAT | Committee – Convention Against Torture |
| CJEU | Court of Justice of the European Union |
| CNCDH | Commission Nationale Consultative des Droits de l'Homme |
| CoE | Council of Europe |
| CPT | European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment |
| CRPD | Convention on the Rights of Persons with Disabilities |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EEA | European Economic Area |
| ENNHRI | European Network of National Human Rights Institutions |
| EU | European Union |
| EU Charter | Charter of Fundamental Rights of the European Union |
| FRA | Fundamental Rights Agency of the European Union |
| GANHRI | Global Alliance of National Human Rights Institutions |
| GO | General Observations |
| ICCPR | International Covenant on Civil and Political Rights |
| IHRC | Irish Human Rights Commission |
| NHRI | National Human Rights Institution |
| NPM | National Preventive Mechanism |
| ODIHR | Office for Democratic Institutions and Human Rights |
| OHCHR | Office of the High Commissioner on Human Rights |
| OPCAT | Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| OSCE | Organisation for Security and Co-operation in Europe |
| SCA | Subcommittee on Accreditation |
| SPT | Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| SRT | Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNGA | United Nations General Assembly |

# CONTENT

# EXECUTIVE SUMMARY

**Procedural rights of suspects and accused in criminal procedures** play a crucial role in safeguarding numerous human rights, including the right to a fair trial, the prohibition of torture and ill-treatment, and the right to liberty and security. These safeguards are however not emphasized strongly enough in international instruments.

At the same time, recognising the crucial importance of procedural rights, the European Union (EU) has adopted a series of secondary law instruments, including the right to information, the right to interpretation and translation, the right of access to a lawyer and legal aid, the right to inform third parties, the right to presumption of innocence as well as the rights of persons in especially vulnerable situations, such as children and persons with psychosocial and/or intellectual disabilities.

Despite the growing literature on the importance of procedural safeguards, there is little information on the role and practice of EU National Human Rights Institutions (NHRIs) in this regard. For this reason, the present project explored how NHRIs can strengthen procedural safeguards and prevent torture and other forms of ill-treatment.

Although almost all NHRIs have worked on procedural safeguards in criminal proceedings in a way or another, our research showed that criminal procedural rights do not seem to be among the strategic priorities of NHRIs, and sometimes they are even perceived to fall outside their mandate. Moreover, some NHRIs are reluctant to work on procedural rights as they see it as an interference with the judiciary.

Our research also showed that **NHRIs can be important agents of change** to strengthen procedural safeguards. NHRIs, especially those with a mandate under the OPCAT and CRPD, dispose of a great number of tools that can be used to effectively strengthen procedural rights. One of the major strengths of NHRIs is that they have a broad and multi-functional mandate and can conduct a variety of activities to promote and protect the rights of suspects and accused, spanning from awareness raising, research, training and education to advising the State on the adoption of a new legal instrument and monitoring the practical application of such laws in the domestic context; from monitoring places of detention to complaint handlings and participation in courts proceedings.

Often the biggest challenge in the promotion and protection of procedural rights is that suspects and accused are seen only as subjects of 'ordinary criminal law' but not as human rights holders. In these cases, NHRIs can have a strong role in **promoting the universal applicability of human rights standards to all persons** and take part in the public debate and contribute to a necessary cultural change, through awareness raising, education activities and should make use of press organs and a broad range of media.

Another major challenges is that, even though procedural rights are comprehensively regulated, problems often arise in their practical application. With their powers and access, NHRIs, especially those with the mandate to monitor places of detention, can play a particularly important role in verifying that procedural rights are effectively implemented in practice and that information on rights is given and understood. If the **mandate to monitor places of detention** lies with another domestic human rights body (e.g. NPMs), NHRIs should ensure close cooperation and coordination, by e.g. exchanging information, conducting joint activities, and following up on respective recommendations.

Moreover, NHRIs with **complaints handling mandate** should have the power to receive complaints on criminal procedural rights concerning at a minimum the investigation phase, e.g. police proceedings, and can be key in **promoting the adherence and compliance of the judiciary to international human rights norms** and should support the judiciary to protect and promote human rights. To this aim, NHRIs could for example: refer cases to the attention of the judicial authority or participate as third parties in legal proceedings at the national, regional and international level.

Finally, in some countries NHRIs reported not to consider EU instruments on procedural rights of suspects and accused necessary or useful, but to prefer national law or other international standards. Yet EU law has become an important source of human rights standards and there is in certain cases an added value in the application of EU standards that can strengthen the procedural rights of suspects and accused in criminal proceedings. Hence, EU NHRIs should more strategically look into the opportunities

that EU laws and procedures offer to promote and protect human rights.

**NHRIs are not alone in this task but share the responsibility** with a number of other stakeholders active in the field of criminal justice, including inter alia other domestic human rights bodies, professional associations and practitioners and civil society organisations. Precisely the existence of other human rights bodies with specialised mandate (e.g. National Preventive Mechanisms (NPMs), Ombudsinstitutions for children or persons with disabilities) was mentioned as a reason by several NHRIs not to engage with procedural rights. Yet the intervention of NHRIs in the field of procedural rights of suspects and accused may bring an added value because NHRIs may have powers and expertise that could be particularly useful to reinforce and complement the work of other domestic human rights bodies and contribute to the strengthening of procedural rights. In this sense, our research showed that increased coordination, cooperation and exchange are necessary.

Although this will always depend on the national context, there are a number of areas where the work of NHRIs in the field of procedural rights of suspects and accused may bring a specific added value, including: promotional activities, activities promoting an adequate legal framework (e.g. giving opinions on proposals and existing laws, power to start proceedings before the Constitutional Court for an abstract constitutional review of the laws and other acts); monitoring places of detention, especially if no specialized monitoring body exists; but also order to conduct joint visits with other specialized departments if the NHRIs is entrusted with the NPM or CRPD mandate; participating before courts, e.g. third party interventions before national, regional and international courts.

Professional associations and lawyers have also been identified as a particularly strong partner in the promotion and protection of procedural rights, but many NHRIs mentioned that cooperation is often lacking or difficult. Similarly, several NHRIs found that there is not sufficient exchange on the topic of criminal procedural safeguards on an EU level and expressed interest in receiving information on good practices from other countries. Hence, initiatives facilitating exchange with professional associations as well as among EU NHRIs should be encouraged as they can further enhance the promotion and protection of those rights.





# INTRODUCTION

## Why a Guidebook on procedural rights for National Human Rights Institutions?

Procedural rights are 'gateway rights' or in other words crucial safeguards to ensure the respect of numerous human rights, including the prohibition of torture and ill-treatment, the right to a fair trial, and the right to liberty and security.

Access to procedural safeguards from the first hours of custody is the most effective measure to prevent torture, as recently confirmed by a global research study.[1] The study has reinforced the importance of procedural rights in criminal proceedings as not only components of the right to a fair trial *per se*, but also as a measure to prevent torture and other forms of ill-treatment. At the same time, it highlighted that these safeguards are not emphasized strongly enough in international instruments.[2]

On the other hand, procedural rights in criminal proceedings have been a key priority for the European Union (EU), which since 2009 has adopted a series of secondary law instruments, covering numerous procedural rights, including the right to information, the right to interpretation and translation, the right of access to a lawyer and legal aid, the right to presumption of innocence as well as the rights of persons in especially vulnerable situations, such as children and persons with psychosocial and/or intellectual disabilities (hereinafter the procedural rights of suspects and accused or procedural rights).[3]

Moreover, challenges often arise in the practical application. In this regard, a recent project analysing the suspects' rights at the investigative stage of the criminal proceedings in nine EU countries identified gaps and challenges in the practical application of all procedural rights mentioned above.[4]

Despite the growing literature on the importance of procedural safeguards, there is little information on the role and practice of National Human Rights Institutions (NHRIs) in the EU in this regard. For this reason, the present project explored how NHRIs position themselves as well as how they

might strengthen procedural safeguards and prevent torture and other forms of ill-treatment.

NHRIs can be important agents of change to strengthen procedural safeguards. The Paris Principles empower NHRIs to deal with all human rights in the widest sense, including the procedural rights of suspects and accused.[5] However, in practice, NHRIs may not have the resources to focus on each and every human right and may need to develop a strategy and prioritise certain rights. As noted by Murray/De Beco, 'the broader the mandate of the body, the more difficult its task becomes in defining a role and clear strategic direction for its work'.[6] Hence, in order to maximise their impact, NHRIs should adopt a strategic approach and reflect on what is the best strategy to improve procedural rights in their national context.[7]

As noted by UNDP-OHCHR, and given the importance of criminal procedural rights, NHRIs should be especially vigilant regarding their 'core protection mandate [which] deals with a narrower group of rights associated with civil and political rights of an urgent nature'.[8] Within the 'core protection issues', are activities relating to the prevention of torture and other forms of ill-treatment, but also more broadly procedural safeguards in criminal proceedings.[9]

NHRIs are not alone in this task – but share the responsibility with a number of other stakeholders active in the field of criminal justice, including inter alia other domestic human rights bodies, professional associations, practitioners, and civil society organisations. A special strength of NHRIs is that they have a multifunctional mandate that allows them to cover different aspects of the protection and promotion of human rights, spanning from research, training and education, to monitoring visits and complaint handling; from advising the State on the adoption of a new legal instrument to monitoring the practical application of such laws in the domestic context. If well-coordinated with other stakeholders, the mandate of NHRIs can be key to complement, reinforce and follow-up to the work of others.

When it comes to procedural rights, the change to be achieved may have various dimensions, including change in the law and policies, change in their practical application, as well as change in the public awareness and culture. NHRIs, especially those with a mandate under the OPCAT and





CRPD dispose of a great number of tools that they can use to effectively strengthen procedural rights in all these dimensions, including also their practical application, which is often reported as the main gap and challenge.

During the course of the project, some NHRIs, including those with an OPCAT or CRPD mandate, raised doubts as to whether focusing on criminal procedural safeguards would fall within their mandate.

*We do not think we have to work on this issue because it is already supervised by the prosecutor. We have received complaints a month ago regarding the right to information, but the problem is that we cannot be in the place of the prosecutor*

*(NHRI Representative, Consultation Workshop, Budapest)*

*NPMs cannot monitor prosecutors, but institutions only'; 'NPMs must be there on the spot when the violation happens in practice ... if no information is provided to us, we are limited on promoting human rights.*[10]

*(NPM Representative, Consultation Workshop, Budapest)*

However, the research and consultations within the course of this project highlighted that although criminal procedural rights are not among the strategic priorities of NHRIs, almost all NHRIs have worked on them in a way or another.

Moreover, while several NHRIs reported using the relevant EU instruments, in some countries NHRIs do not consider a reference to EU instruments on procedural rights of suspects and accused necessary or useful, and prefer to refer to national law or other international standards. Yet there is in certain cases an added value in the application of EU standards that can strengthen the procedural rights of suspects and accused in criminal proceedings (see below, Chapter 1).

This Guidebook attempts to offer practical guidance to NHRIs on how to strengthen procedural rights, to address the major issues and concerns according to the views shared by NHRIs and experts during the two-year project, as well as to disseminate good practices and examples from NHRIs in the EU area.

# TERMINOLOGY

## What do we mean by NHRIs?

As shown in Annex 2 there is a great diversity of NHRIs in the EU. This makes it difficult to categorise them, since depending on the model and the additional specialised mandates enjoyed, their powers, functions and aims may vary considerably.

As the main aim of this Guidebook is to give practical guidance on how to strengthen procedural rights, the Guidebook adopts a broad understanding of NHRIs. Hence, although looking primarily at NHRIs accredited by GANHRI through its Sub-Committee on Accreditation (SCA) and defined under the Paris Principles,[11] it also covers 'equivalent institutions' in countries where accredited NHRIs are lacking. Given that many NHRIs in the EU were designated as national mechanisms under the Optional Protocol to the UN Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD), the Guidebook also considered the work that NHRIs can conduct under these additional specialised mandates.

Taking into account the different rationales, perspectives and functions arising from the various models and specialised mandates, the Guidebook will inevitably contain some Guidelines that will be more relevant for certain institutions and less for others. On the other side, this Guidebook wants to show how the combination of these different mandates can give a broad array of tools to strengthen the rights of suspects and accused.

## What do we mean by procedural rights of suspects and accused?

*'More and more people are making the link between procedural rights in criminal proceedings and torture prevention. We call it differently, we call it "safeguards" in the initial phase of detention instead. But we also refer to the right to information, right to a lawyer, right to medical examination, right to inform a third person.'*

*(SPT Representative, 1.9.2019)*





The argument that criminal procedural rights are key components to prevent torture and ill-treatment is not new. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has been highlighting the importance of 'fundamental safeguards' from as early as 1992.[12] Similarly, also the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the CAT Committee have been continuously referring to 'legal safeguards' or 'fundamental legal safeguards'.[13] Even though torture prevention bodies refer to these rights as "safeguards", in practice they refer to the same list of rights regulated by the EU instruments.[14] The rationale is however partially different. While standards enshrined by the main torture prevention treaties prescribe these safeguards to prevent torture and ill-treatment, EU secondary law instruments aim primarily to safeguard the rights to fair trial, especially to overcome the divergences in the different EU Member States and create a functioning EU criminal justice area based on mutual recognition and mutual trust (see below, Chapter 1).

International standards provide that procedural safeguards should apply from the first hours of the detention, when the risk of torture and ill-treatment is highest. In other words, this means that safeguards should apply irrespective of the precise legal status of the persons concerned, for example, also to persons that are obliged to attend and stay at a law enforcement establishment as 'witnesses' or for 'informative talks'. Depending on the circumstances of the case concerned, safeguards may become operative at an even earlier stage.[15]

Also EU instruments explicitly make clear that procedural rights apply to persons who have been arrested and/or detained from the moment that a person is suspected or accused in a criminal proceeding. They may also apply to persons who are suspected of having committed an offence but have not (yet) been detained.16 In practice, their application should not be made strictly dependent on a formal act[17] and should not be circumvented by informal talks, or by the practice of witnesses becoming suspects in the course of questioning by the police or other law enforcement authorities (see below, Chapter 1.2). EU instruments apply until the final determination of the question whether the suspect or accused person has committed a criminal offence.[18]

### What do we mean by strengthening procedural rights?

According to the Paris Principles, NHRIs can conduct several activities to protect and promote human rights. The SCA interprets the term '**promotion**' to include those 'functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy'; and the term '**protection**' as those 'functions … that address and seek to prevent actual human rights violations. Such functions include monitoring, inquiring, investigating and reporting on human rights violations, and may include individual complaint handling.'[19] The mandate of NHRIs under the Paris Principles is further clarified by the SCA, which states that 'NHRI's mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights.'[20]

Under Article 19 OPCAT, NPMs are mandated to monitor places where persons are deprived of their liberty, to make recommendations to the relevant authorities and to submit proposals and observations concerning laws to prevent torture and other forms of ill-treatment. Similarly, under Article 22(2) CRPD independent mechanisms should promote, protect and monitor the implementation of the rights under the CRPD.

Although broadly overlapping, the wordings promotion and protection are used in different ways by the Paris Principles, the OPCAT[21] and the CPRD.[22]

Being targeted to all NHRIs, including those with specialised mandates, this Guidebook does not apply a strict categorisation of the wording promotion and protection. It rather starts with addressing general ways to promote change as these activities can be pursued by all NHRIs, and continues with examining the specific functions of monitoring places of detention as well as complaints handling and participation in court proceedings.





## METHODOLOGY

The project began in March 2018 with a desk research phase that involved the analysis of the relevant legal instruments, policies and practices on procedural rights of suspects and accused across the EU and their application by NHRIs. Specifically, at the outset all project partners conducted pilot interviews with stakeholders in their respective countries, namely Austria, Hungary, Poland and Slovenia. On this basis, the project team prepared a survey to which all EU NHRIs and equivalent bodies were invited to reply. The survey consisted of questions regarding the NHRIs' practice in the light of the procedural rights provided by the EU instruments. Out of the 26 institutions invited, 15 participated in the project survey (see Annex 6). 12 of them are NHRIs accredited by the SCA, 2 of them are equivalent bodies not yet accredited, and 1 is an NPM, which was chosen because no NHRI/equivalent bodies exist in the country. In addition, interviews were conducted with representatives of NHRIs, civil society organisations and international experts (see below, Annex 4). Within the framework of the project several consultations took place, namely an International Consultation Workshop in Budapest (February 2019); National Workshops in all project partners' countries, i.e., Austria, Hungary, Poland and Slovenia (May/June 2019); and a Final Conference in Vienna (24 October 2019) (see Annex 5).

The Guidebook is structured in two parts. The First Part gives an outline of the general principles. It includes an overview of selected procedural rights, especially in the light of EU law (Chapter 1) and a chapter on the mandate and role of NHRIs (Chapter 2). The Second Part deals with tools that NHRIs can use to strengthen the procedural rights of suspects and accused in criminal proceedings. This Part of the Guidebook aims to give practical guidance on how procedural rights could be strengthened by different Ways to promote change (Chapter 3), Monitoring places of detention (Chapter 4) and Complaints handling and Participation in court proceedings (Chapter 5). The Annexes include an overview of the existing EU instruments (Annex 1) and composition and mandates of the EU NHRIs (Annex 2 and 3).

# FIRST PART:
# GENERAL PRINCIPLES

# 1. STANDARDS

## 1.1. EU instruments on procedural safeguards

Since 2009 the EU has adopted a series of secondary law instruments, covering the right to information, the right to interpretation and translation, the right of access to a lawyer and legal aid, the right to presumption of innocence as well as the rights of persons in especially vulnerable situations, such as children and persons with psychosocial and/or intellectual disabilities.[23] These EU instruments build upon Articles 3, 5, 6 and 8 ECHR and the case law of the ECtHR as well as promote the application of the EU Charter, in particular Articles 4, 6, 7, 47 and 48.

The Area of Freedom, Security and Justice is rooted in Article 3 (2) Treaty on European Union (TEU) requiring EU Member States to establish an area without internal borders enabling free movement throughout the EU. To compensate for the abolition of internal borders and deal with cross-border criminality, a more effective judicial cooperation was deemed essential.[24] Mutual recognition of decisions and enforcement of judgments in criminal law seemed the most suitable option in order to enhance the cooperation, while safeguarding Member States' sovereignty.[25] To further intensify and ameliorate the cooperation, instruments in the form of Framework Decisions related to detention were adopted, the most significant being the European arrest warrant (EAW).[26]

Mutual recognition instruments are "based on the presumption that criminal justice systems within the EU, whilst not the same, are at least equivalent".[27] In other words, they demand a high level of mutual trust - trust in each other's (criminal) justice systems.[28] This also includes the presumption that the Member States share a commitment to general principles such as the respect for fundamental rights,[29] the ECHR and the EU Charter establishing the framework in this regard.[30] Although all Member States are bound by these instruments, experience has shown that this does not automatically guarantee compliance nor ensure mutual trust.[31] Thus, the EU emphasised the need to move towards stronger procedural rights for suspects and accused in numerous reports and policy papers over the years. A "Procedural Roadmap"[32] was adopted with the aim to counterbalance the simplified and speeded up cooperation instruments and to enhance human rights within criminal proceedings. In order to overcome the partly highly divergent standards in the Member States, common minimum regulations on an EU level were deemed essential, on the one hand, to strengthen the procedural rights, and on the other end, to enhance mutual trust and consequently mutual recognition.[33]

Due to the reasoning behind their adoption, EU instruments are not necessarily perceived as human rights instruments in the classical sense (e.g. Bill of Rights, ECHR, EU Charter). Nevertheless, EU instruments do address fundamental rights, especially the right to a fair trial, the right to liberty and security, and the prevention of torture and ill-treatment, and may bring several advantages vis-a-vis other international instruments (see below, Chapter 1.3).

## 1.2. Scope of the EU instruments

### Personal scope

Building upon the case law of the ECtHR, EU instruments (i.e., Directives and Recommendation) explicitly make clear that procedural rights are applicable for all phases of the criminal proceedings from the moment that a person is made aware of being suspected or accused of having committed a crime by a competent authority.[34] The ECtHR clarified the scope of application of Article 6 ECHR (right to fair trial) and more specifically the meaning of "criminal charges" in *Imbriosca v Switzerland*. There it is affirmed that the primary purpose of Article 6 is to ensure a fair trial by a tribunal competent to determine any criminal charge. However, this does not mean that the Article does not apply to pretrial proceedings.[35] This case-law was confirmed in numerous other decisions, e.g. concerning access to a lawyer[36] and right to translation and interpretation.[37] Yet, in some of its decisions the ECtHR also found no violation of Article 6 ECHR in a situation where procedural rights, i.e. access to a lawyer, are derogated, if the "[p]olice questioning was used only to determine the necessity of initiating criminal proceedings".[38] In contrast, EU Directives more concretely clarify the scope of application of procedural rights extending it explicitly to the pre-trial stage and leaving less leeway for interpretation.

In practice, the application of Directives should not be made strictly dependent on a formal act.[39] Accordingly, procedural rights enshrined in

the EU instruments should not be circumvented for example by **informal talks**. In this regard, however, worrying practices have been reported in some EU Member States. In particular, in certain countries, the rights enshrined in the Directive are not applied when persons are de facto arrested or detained. This is for example the case when the police have the power to take a person to the police station prior to an official arrest or in the initial 24 hours of police detention, which are seen as an administrative procedure to which the Directives do not apply.[40] Similar practices on informal questionings were reported from other countries too.[41]

While the first Directives[42] were silent about witnesses becoming suspects, the subsequent Directives, first in the Recital[43], then also in the text of the articles make clear that cases of witnesses becoming suspects are covered by the Directives.[44] The Directive on the right of access to lawyer further clarifies what are the consequences if a witness becomes a suspect, specifying that the person has the right:

- Not to incriminate him or herself
- To remain silent
- That the questioning is suspended immediately.

However, the questioning can be continued *where the person has been made aware that he or she has become a suspect or an accused person and is able to fully exercise the rights provided for in the Directives.*[45]

Even though the latest EU Directives envisage the situation of **witnesses becoming suspects** in criminal proceedings, issues may arise in practice since it is up to the law enforcement authorities when to interrupt or inform the persons who become suspected of having committed a crime. [46] Hence their practical implementation must be scrutinized as well. Further, the statements given as a witness often become part of the file and are used irrespectively of the fact that the witness became a suspect.[47] The Directives are silent about the use of these statements and possible remedies. The EU instruments apply until the final determination of the question whether the suspect or accused person has committed a criminal offence, including, where applicable, sentencing and the resolution of any appeal.[48]





### Minor offences

The application of Directives is limited in the context of minor offences. To assess whether EU Directives are applicable to minor offences one should look at what procedure is foreseen under national law (i.e. involvement of a court having criminal jurisdiction); at what sanction can be imposed in such national proceedings (i.e. deprivation of liberty as a sanction).[49]

As a general rule the EU Directives apply to all criminal offences if the court competent to deal with the offence has criminal jurisdiction. However, when an administrative authority can decide over a criminal offence but such decision can be appealed or referred to a court with criminal jurisdiction, the Directives only apply to the proceedings before the court (eg, minor traffic offences).[50]

The EU Directives do not apply where the police, other administrative authorities or courts having jurisdiction in non-criminal matters are competent to deal with the minor offence. However, the EU Directives apply in these cases if the competent authorities for the minor offences can impose deprivation of liberty as a sanction.[51] In this situation, the severity of the sanction envisaged requires the Member State to guarantee the same procedural rights standards, regardless from the fact that the national law defines the procedure as administrative.[52] Thus, if the authority can impose deprivation of libery as a sanction, the Directives apply throughout the proceedings.

## 1.3. The added value of EU law

Compared to other international instruments, especially soft law, the use of EU instruments may bring several advantages.[53]

At the outset, it is to be noted that procedural rights established by the EU Directives have an independent status. This means that violations of individual procedural rights are not linked to the question of the overall fairness of the proceedings like before the ECtHR.[54] In addition, EU law often provides a very detailed framework spelling out many important aspects of the rights of suspects and accused. This may provide NHRIs with more

guidance on how to interpret those rights.[55] Without being exhaustive, a number of examples in this direction may be found in the Directive on the right to interpretation regarding the quality of the interpretation as well as in the Directive on legal aid regarding the quality of legal assistance.

For example, Art. 6 (3)(e) ECHR simply states that "everyone charged with a criminal offence has the following minimum rights: (…) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. In the case *Kamasinski v Austria*,[56] the ECtHR did not find a violation when at one police interrogation a prisoner served as interpreter and at another the interpreter was not registered in the official register for interpreters.[57] In comparison, EU law provides a more comprehensive framework to ensure the quality of translations and interpretations. The EU Directive requires Member States to take concrete measures to ensure quality. Further, EU Member States should also endeavour to establish a register to facilitate access and promote adequacy of the translation.[58] Similarly, concerning the quality of legal aid lawyers, ECHR standards provide that everyone has the right to legal assistance and if necessary free legal aid.[59] In its case law the ECtHR established possible remedies for inadequate legal advice but does not demand States to implement concrete measures to ensure quality legal advice.[60] Although the Directive on legal aid falls short in giving concrete guidance, it explicitly requires States to guarantee effective legal aid systems as well as adequate quality of legal aid.[61]

Second, compared to most international law instruments, EU law is binding and provides concrete sanctions when a State fails to implement the Directives or a decision by the CJEU (e.g., infringement proceedings by the European Commission including financial penalties imposed by the CJEU[62]). Therefore, States have stronger incentives for the timely and correct transposition of EU law into national law and implementation of CJEU judgements.[63]

Finally, in comparison to ECHR standards, EU Directives allow for less leeway in their interpretation due to their detailed legal framework. For example, the ECtHR jurisprudence in the context of procedural rights was subject to change. While in the case *Salduz v Turkey* the ECHR recognised the right of access to a lawyer prior to or at least from the first interrogation of a suspect by the police unless there are compelling reasons to restrict this right,[64] its subsequent judgements were contradictory. Some strengthened the previous jurisprudence by stating that denying access to a lawyer without compelling reasons is not only a violation of Article 6 if there is a risk of selfincrimination but in all cases irrespectively of whether the statement has a consequence for the overall fairness of the proceeding.[65] Others departed from the principles set in *Salduz v Turkey* finding that a breach of the right of access to a lawyer may amount to a violation of Article 6 only if the subsequent proceedings 'as a whole' had been unfair.[66] This position was reiterated also in *Ibrahim and Others v the UK*. There, the ECtHR established that "safety interviews", in which framework no selfincrimination took place, did not violate the rights of access to a lawyer. The ECtHR found, however, a violation of Article 6 (3)(c) with regard to one applicant whose questioning as a witness was not interrupted when he started to self-incriminate as in this case the procedure as a whole was not deemed fair.[67] While the interpretation of the Directives also depends on the jurisprudence of the CJEU and might be subject to change, the text of the Directives requires the access to a lawyer during police interrogation irrespective of the overall fairness (see Chapter 1.4.1, also for limitations).

Nevertheless, the protection of the rights of suspects and accused accorded by EU secondary law should not be read in isolation but shall always be interpreted in light of the fundamental rights as established by the EU Charter and the ECHR.[68] More generally, the international legal framework, such as the UN treaties and conventions, should also be taken into consideration. In addition, it should also be recognised that the Directives lay down minimum rules and Member States can adopt higher safeguards. The level of protection should never fall below the standards provided by the ECHR or relevant obligations under instruments of international law to which EU Member States are party.

## 1.4. Overview about selected procedural rights

This Chapter aims at giving an overview about the existing standards in the context of some procedural safeguards and highlighting the added value of EU instruments where they do provide it, as well as practical challenges pointed out in the following selected thematic areas:[69]

1. Access to a lawyer and right to legal aid
2. Right to inform a third party
3. Right to interpretation and translation
4. Right to information
5. Presumption of innocence and the right to remain silent and the privilege against selfincrimination
6. Audio-visual recording

### 1.4.1. Right of access to a lawyer[70] and right to legal aid[71]

**RELEVANT QUESTIONS:**

- » Was there a lawyer present during the investigative phase (esp. police interrogation)?
- » If not, why? (Derogation or Waiver)
  - Was the derogation/waiver recorded?
  - Was the person adequately informed about this right? Did he/she understand the right and the consequences of a waiver?
  - Was the person also informed about the right to legal aid?
- » If there was a lawyer, was confidentiality ensured?
- » Are there general complaints about the quality of lawyers or legal aid providers (e.g., frequency of visits, expertise in other field than criminal law, etc.)?

The right of access to a lawyer is essential to ensure a fair trial and is recognised in all relevant human rights instruments as a procedural safeguard.[72] At the same time, it is also a precondition for the equality of arms and protection against self-incrimination.[73] The access to a lawyer is not only essential to ensure an appropriate defence and a fair trial, but has to be seen as a broader concept: Articles 2 and 16 CAT oblige States to take appropriate measures to prevent torture and other forms of illtreatment.[74] As research and the practice of monitoring bodies has shown, the access to a lawyer is proved to be amongst the most effective measures to prevent torture and ill-treatment.[75] Thus, the effective assistance of a lawyer is key to ensure the rights of the person deprived of liberty and prevent that authorities exceed their legal powers.[76]





#### From which point in time does the right of access to a lawyer apply?

The EU Directive states that the access to a lawyer needs to be ensured without undue delay, not only when the person is taken into custody or while being questioned, but also during other investigative procedures (e.g., identification or reconstruction). In other words, suspects should have access to a lawyer from one of the points in time that is the earliest:

a) *Before they are questioned by the police or by another law enforcement or judicial authority;*
b) *Upon the carrying out by investigating or other competent authorities of an investigative or other evidence gathering act (eg, identity parades, confrontations, reconstruction of the scene of a crime);*
c) *Without undue delay after deprivation of liberty;*
d) *Where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.*[77]

The EU Directive builds on ECtHR case law.[78] According to the ECtHR procedural safeguards, thus also the right of access to a lawyer, should be ensured from the moment of a 'criminal charge',[79] i.e. once the authorities have substantial reasons for suspecting a person of having committed a crime. Thus, what is relevant is if the person was affected by the investigation act rather than the moment of the official notification.[80]

International standards provide that access to a lawyer should be ensured as soon as the person is deprived of his/her liberty or subjected to an interrogation or questioning.[81] According to the HRC, Article 14 ICCPR "requires that the accused is granted prompt access to counsel."[82] The non-binding UN Basic Principles on the role of the lawyers states that governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer and in any case not later than forty-eight hours from the time of arrest or detention.[83]

### What situations does the right of access to a lawyer cover?

The Directive the right to access to a lawyer covers the **right to meet in private and communicate with the lawyer**, including prior to questioning. Confidentiality should be ensured for all ways of communication, i.e., meetings, correspondence, telephone conversations and other forms of communication.[84] Limitations are only justified under exceptional circumstances and if compelling reasons (eg, risk of collusion) exists.

Further, the Directive on the access to a lawyer also covers the **presence of the lawyer during the questioning.**[85] The EU standard reflects the jurisprudence of the ECtHR in the case *Salduz v Turkey* that 'Article 6 (1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police (…).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.'[86] This takes into account the role of the presence of a lawyer during police interrogations, namely that the rights of the suspect or accused person are ensured (e.g. protection against self-incrimination) and that no coercion is exercised.[87] However, as the jurisprudence of the ECtHR has evolved, the access to a lawyer during police interrogation is not recognised as an independent right but a violation assessed based on the overall fairness of the proceeding. On the contrary, building on the Salduz case, the EU Directive requires the presence of a lawyer during police interrogations irrespectively of the overall fairness of the proceeding – limitations are, however, also in the context of the Directive possible.

Finally, the Directive on the right of access to a lawyer comprises also the **effective participation during interrogation**. During such questioning 'the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.'[88] This again builds upon the case law of the ECtHR, according to which 'counsel must be able to provide assistance which is concrete and effective, and not only abstract by virtue of his presence (…).'[89]

What 'access to a lawyer' exactly means, depends largely upon the role of the lawyer. The ECtHR states:





*'An accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned. Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. (…) Counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.'*[90]

Unlike the Directives on the right to interpretation and translation as well as on legal aid, the Directive on access to a lawyer does not contain any further details regulating quality assurance.

### Under which circumstances can this right be derogated from?

While the right of access to a lawyer is recognised as being fundamental for ensuring a fair trial, it is not absolute.[91] Under the EU Directive the access to a lawyer is subject to **temporary derogations** at the pre-trial stage on the grounds of geographic remoteness or on the basis of specific compelling reasons (e.g. serious adverse consequences for the life, liberty or physical integrity of a person, prevention of substantial jeopardy to criminal proceedings, prevention of destruction or alteration of essential evidence or interference with witnesses).[92] The Directive sets limits to these temporary limitations by stating that they have to be proportionate, necessary and strictly limited in time. The limitations cannot be based exclusively on the type or the seriousness of the alleged offence; and cannot affect the overall fairness of the proceedings. In any case the limitation has to be assessed on a case-by-case basis.[93]

Also according to the case law of the ECtHR, temporary restriction are allowed only under certain conditions: first, there are compelling reasons that makes a restriction necessary. Such restrictions are only permitted in exceptional circumstances, that have to be limited in time and assessed on a case-by-case basis. Second, restrictions irretrievably prejudiced the overall fairness of the criminal proceeding. This makes it necessary to view the proceedings as whole.[94]

### How is this right of access to a lawyer exercised?

Although suspects and accused persons have the right of access to a lawyer, they also have the right to **waive** it. However to do so, it is necessary that the suspect or accused person is informed and aware of the right of access to a lawyer as well as the consequences of waiving this right. Moreover, the specific conditions of the suspect (e.g., age, mental and physical conditions) and the case (e.g. mandatory representation) have to be taken into account.[95] Also the ECtHR states in its case law that 'if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.'[96]

The existing ECtHR case-law includes fairly comprehensive standards requiring the waiver to be given unequivocally, knowingly and intelligently before it can be considered effective. The EU Directive sets similar safeguards. The suspect or accused person can waive his/her right if a) the waiver was given voluntarily and without any doubt;[97] b) the waiver is recorded, as well as the circumstances under which it was given;[98] c) the suspect or accused person is informed about the right to revoke the waiver at any time during the criminal proceedings. Such a revocation should have immediate effect.[99] The possibility to waive a right is restricted with respect to persons in vulnerable situations according to the Recommendation the right should not be waived.[100]

When procedural rights are not effectively conveyed to the suspect, the ECtHR finds that the waiver is not effective, as it considers that the decision to waive the right was not taken on a properly informed basis. Consequently, the reliance on statements obtained in that context means that a prejudice is caused to the fairness of the proceedings as a whole. The ECtHR has pointed to various factors, both objective and subjective, relating to the notification of rights which affect the validity of a waiver of the right of access to lawyer and to counsel:

- The fact that rights were notified in a language other than the suspect's native language, without the assistance of an interpreter.[101]
- The fact of the notification being given only orally in the form of a standard caution (which barely serves the purpose of acquainting the suspect with the content of the rights);[102]
- The 'stressful situation' and 'quick sequence of the events' leading to questioning of the suspect;[103]
- A 'certain confusion' in the mind of the suspect at the point of questioning;[104]
- The young age of the suspect;[105]
- The suspect's level of literacy;[106]
- Familiarity with police encounters;[107] and
- Drug dependency of the suspect.[108]

Also according to the Directive, the failure to provide access to a lawyer prior to and during police questioning will be a violation of Article 3 of the Directive. In that case, Article 12 of the Directive requires Member States to ensure an effective remedy for the violation, including the exclusion of evidence that was obtained in breach of the right to access to a lawyer.[109]

### Is the access to legal aid ensured?

According to the Directive on legal aid, EU Member States should ensure that persons who lack sufficient resources to pay a lawyer have the right to legal aid.[110] In this regard, the Directive applies to same procedural phases as the Directive on access to a lawyer, thus also to the investigative phase.[111] In principle, the Directive leaves a wide discretionary power to the EU Member States on how to organise the legal aid system, that is for example what which tests should be applied (means and merits) but also which authority is responsible to grant legal aid and for the appointment of the legal aid lawyer.[112]

However, if EU Member States apply the means or merits test they should take into account a number of criteria for the means test, all relevant and objective factors such as the income, capital, family situation as well as the costs of the assistance of a lawyer and the standard of living in the respective Member State; for the merits test, the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake should be taken into account.[113]

In addition, the Directive states that EU Member States have to ensure that legal aid is of adequate quality and an effective legal aid system is in place. However, the Directive does not provide any further guidance.[114] Suspects or accused persons have the right to have the lawyer appointed to be replaced upon request if the circumstances so require.[115]

### Main findings on the practice

In the framework of the project consultations it was mentioned that the greatest difficulties concern the right of access to a lawyer in EU Member States. This corresponds to other numerous research findings.[116] In most countries, detained suspects do not have access to a **lawyer in the early stages** of criminal proceedings. The common concern in this regard is the waiver of the right. Concerns were expressed that the manner in which the suspects or accused persons are informed do not sufficiently play tribute to the importance of the presence and participation of the lawyer. Further, oftentimes the information is not adequate in the context of legal aid and the consequences a waiver can bear. In addition, on some occasions the information provided by the authorities incentivised waivers by giving a strong emphasis on the repercussions that the exercise of the right of access to a lawyer may have on the proceedings, e.g. delays, costs and inconveniences. Finally due to the format of the protocols and records it is oftentimes difficult to prove if the waiver was given voluntarily.[117] In some countries, lawyers are appointed by the police and sometimes act in the interest of the police rather than in the interest of the person represented; this is not only because it is possible that lawyers are appointed who not necessarily effectively intervene but some lawyers are financially dependent on these appointments and thus have an interest to keep good relations with the police.[118] In addition, the availability of lawyers, especially on weekends and in remote areas, proves to be sometimes challenging. Where suspects do have access to a lawyer, research discloses significant concern in most countries about their **quality and competence**, particularly in respect of legal aid or ex officio lawyers. Many duty lawyer systems do not guarantee that a competent lawyer is available and willing to attend the police station at short notice, and even where a lawyer does attend, the facilities for **private consultation** are often inadequate or non-existent.





## 1.4.2. Right to inform third parties

**RELEVANT QUESTIONS:**

- Was a third person informed about the deprivation of liberty? Was this person nominated by the arrested or detained person?
  - If not why not? Was it considered to contact another third person? Was the process adequately recorded?
- Were the special needs of persons in vulnerable situations adequately taken into account (e.g., notification of a person with parental responsibility, guardian or an appropriate adult)?
- Could the arrested or detained person communicate with one person, nominated by him or her?
  - If not why not? Was it considered to contact another third person? Was the process adequately recorded?

The right to have a third party informed and to communicate with third parties is considered amongst the most effective measures to prevent torture and ill-treatment.[119] EU law explicitly regulates these rights together with the right of access to a lawyer in Directive 2013/48/EU. The right has two purposes, namely:

- Deterring torture and other forms of ill-treatment by informing a third party about the deprivation of liberty
- Ensuring the right to family and private life by establishing the possibility to communicate with a third person

### From which point in time does the right to inform and communicate with third parties apply?

The Directive states that suspects or accused persons have the right to nominate at least one person who should be informed without delay about their deprivation of liberty. In addition, the arrested or detained person should have the right to communicate with a third party such as relatives without undue delay.[120]

### What does the right cover?

The Directive states that suspects or accused persons have the right to nominate at least one person who should be informed without delay about their deprivation of liberty. In addition, the arrested or detained person should have the right to communicate with a third party such as relatives without undue delay.[120]

Derogations are possible if there are compelling reasons such as urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or if the criminal proceedings are risked to be substantially jeopardised. According to the Directive, derogations may be authorised only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.[122] Similarly, also the right to communicate with a third person, while deprived of liberty, is subject to deferment and limitations. Thus, imperative requirements or proportionate operational requirements may pose limits.[123] Before derogating from the right to inform or communicate with a third party, the national authorities should first consider whether the person could communicate with another person nominated by him or her.[124]

### How is this right exercised?

The arrested or detained person has to be informed about the right to nominate a third person who should be informed about the deprivation of liberty. The Directive states that the suspected or accused person has the right to have a person informed. It is not guaranteed under the Directive that the person him- or herself can give this information. The safeguards under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, are broader as it states that the person should be entitled to notify or require the competent authority to notify a third person.[125]

The right to inform a third party can be waived if the person has received clear and sufficient information about the content of the right and the consequences of the waiver; and if the waiver was given voluntarily and unequivocally.[126]





The right to communicate with a third party requires practical arrangements concerning the timing, means, duration and frequency of communication with third persons, taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty.[127]

### Main findings on the practice

The main challenges identified concern the limits regarding **who may be informed or is informed** independently of a nomination by the person deprived of liberty. Further some Member States have more **grounds for refusal** than specified in the Directive, which are partly unprecise such as 'justified reasons' or 'unreasonable difficulties'. Challenges also arise when it comes to the right to communication when it is not granted without undue delay, including during deprivation of liberty by the police. In numerous countries there are excessive **limitations on the number or duration of contacts**; in some cases even a complete ban without clear criteria.[128]

## 1.4.3. Right to interpretation and translation

**RELEVANT QUESTIONS:**

- Are there adequate procedures or mechanisms in place to assess the need of interpretation or translation?
- Did the suspect or accused person had access to an interpreter throughout the proceedings? Was an interpreter available in due time?
  - If not, why not? Was no interpreter available? Insufficient information about the right to interpretation and translation?
- Was the quality of the interpretations adequately ensuring that the suspect or accused person could follow the proceeding?
  - If the quality was not adequate, did the suspect or accused person had the possibility to complaint? And was this complain adequately addressed (eg. change of interpreter)?
- Did the person receive the translation of the essential documents?
  - Which documents were translated? (at least: decisions depriving a person of his/her liberty, any charges or indictments, and any judgements)
  - If not, why not? Was the right waived – if so, was this documented?

- Was the quality of the translation adequately ensuring that the suspect or accused person could effectively defend him- or herself?
  - If the quality was not adequate, did the suspect or accused person had the possibility to complaint? And was this complain adequately addressed (eg. new written or oral translation of the documents)?
- Were particular needs of persons in vulnerable situations (eg, minors, persons with psychosocial or intellectual disabilities) adequately taken into account in the interpretation or translation?
- Is there a register for qualified interpreters and translators established?

The right to interpretation and translation is recognized as an essential procedural right being a precondition for the effective exercise of his or her right to defense.[129] Accordingly, it is fulfilling various purposes, namely:

- Safeguarding that the suspect or accused person understands his or her procedural rights and can effectively participate in the criminal proceedings (i.e. understands the proceedings and can state his or her position);
- Ensuring that the person can communicate and consult prior to questionings as well as hearings with the legal representative
- Enabling the preparation of the defense and ensuring the equality of arms in order to safeguard the fairness of the proceedings[130]

The EU Directive regulates the right to interpretation and the right to translation of essential documents. It builds upon the standards already established in the ECtHR's case law for Article 6 ECHR.[131] The recitals of the Directive make clear that the Directive is intended to facilitate the application of rights which already exist under the ECHR.

### From which point in time does the right of interpretation and translation apply?

Persons who do not speak or understand the language of the criminal proceeding should be provided without delay, with interpretation before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.[132] Also Article 6(3)(e) ECHR provides for the right of free interpretation and translation in criminal proceedings in all stages and of all documents that are necessary for the suspect to defend him or herself in the light of a fair trial.[133] Both pre-trial and trial procedures are also covered by Article 6(3)(e) ECHR.[134] In its case law the ECtHR clarified that '[t]he assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.'[135]

Written translations of the relevant documents should be provided to the suspected and accused persons within a reasonable period of time.[136]

### What does the right of interpretation and translation cover?

The EU Directive states that all suspects and accused persons who do not understand the language of the proceedings adequately shall receive interpretation and translation assistance.[137] Accordingly, the Directive guarantees interpretation and translation in the native language of the suspects or accused persons or a language they speak or understand to be able to fully exercise their right of defence.[138] It is not in line with EU and ECtHR standards if only the lawyer but not the suspect or accused speaks the language of the criminal proceedings. This is also true if the lawyer and the suspect or accused person can communicate with each other either with or without an interpreter in a language different of the trial.[139] The reasoning behind it is that the person should be able to participate in the proceedings and interact with the lawyer about statements for his or her defence.[140]

The costs for translation and interpretation services should be born by the Member States irrespectively of the outcome of the proceedings.[141]

The Directive states that the interpretation should be provided during police interrogation and at trial, as well as for the communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing, appeal or other procedural applications.[142] In contrast, Article 6(3)(e) ECHR does not cover the interpretation services between the suspect or accused person and the counsel.[143]

Suspects and accused persons must also be provided with a written translation of the documents that are essential to exercise the right to defence. Essential documents must include at a very minimum any decisions depriving a person of his/her liberty, any charges or indictments, and any judgements. In addition, to ensure the fairness of the proceedings further relevant documents or at least the relevant passages need to be translated. Hence, depending on the circumstances of the case, Member States should translate also other relevant documents. Suspects and accused persons can request the translation of other documents and can challenge the decision finding that there is no need for the translation of specific documents.[144] Essential documents do not cover the translation of an appeal in to the language of the proceedings that was written by a suspect or accused person in his or her mother tongue. However, the right to interpretation covers free assistance of an interpreter if the suspect orally lodges an appeal at the registry. Interpretation services are also provided for the communication between the suspect and the lawyer to lodge an appeal.[145]

In comparison, ECHR standards states that[146]: '[Article 6(3)(e)] does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an "interpreter", not a "translator". This suggests that oral linguistic assistance may satisfy the requirements of the Convention.[147] In another judgement, however, the ECtHR recognised that not translating specific documents might cause considerable disadvantages for the suspect or accused person and a written translation might be preferable.[148]

Under the Directive, as an exception, an oral translation or oral summary of the essential documents may be provided, if a timely translation is not possible, and the fairness of the proceeding is ensured. The authorities have to record when an oral translation or oral summary of essential documents has been provided in the presence of an investigative or judicial authority.[149]





### Can the right to interpretation and translation be waived?

The EU Directive refers to the possibility to waive the right only in regard to translation of documents. And only if the suspected or accused person has received prior legal advice or has otherwise obtained full knowledge of the consequences of such a waiver. The waiver must be unequivocal and given voluntarily. The waiver has to be recorded.[150] The condition under which a waiver can be invoked reflects the case law of the ECtHR.[151] In contrast, under the ECHR also the right to interpretation can be waived as 'neither the letter nor the spirit of Article 6 ECHR prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.'[152]

### How is the need for an interpreter or translator assessed and the quality of the service ensured?

Members States should ensure that there are procedures or mechanisms in place that assess whether the suspect or accused person speaks the language of the criminal proceedings and whether there is the need for an interpreter. Neither the CoE nor the EU standards provide explicit guidance on which authority should be tasked with the **assessment of the need for interpretation and translation**. In the Recital the Directive states that the regulation implies that the competent authorities verify in an appropriate manner if the suspect or accused person speaks and understand it the language of the criminal proceeding. No further guidance is given in this regard.[153] The decision that an interpreter or translator is not needed can be challenged by the suspect or accused person.[154]

If the suspected or accused persons are in a potentially vulnerable position, in particular because of any physical disabilities which affect their ability to communicate effectively, the law enforcement, the prosecution

and the judicial authorities should take appropriate steps to assure a fair administration of justice. Therefore the competent authorities should ensure that persons with disabilities can effectively participate in the proceedings.[155]

The EU Directive requires concrete measures to ensure that the **quality** of the interpretation and translation is sufficient to safeguard the fairness of the proceedings.[156] In order to do so, the Directive sets that a register or registers of independent interpreters and translators who are appropriately qualified should be established.[157] In this regard the Directive goes further than the ECtHR jurisprudence.[158] Further, the Directive additionally requires the translators and interpreters to be independent.[159]

Suspects and accused should also have the possibility to **complain** that the quality of the interpretation and translation is not sufficient. If the required quality is not ensured, the competent authorities should be able to replace the appointed interpreter.[160] The oversight of the quality should be done by the courts if the issue is raised.[161]

### Main findings on the practice

Despite the detailed legal framework, the implementation of the Directive poses a number of challenges.

In some cases, it is difficult to find a translator for **rare languages and dialects**, which may lead to an overall delay in the procedure. Another challenge is **the low remuneration of interpreters** which influences their incentives to participate in the process. This is because there is not any financial provision for their payment and they usually get paid after a longer period of time.[162]

Moreover, in the majority of countries the **letter of rights was not available in a number of languages** and **prompt access to an interpreter** was often not possible. This led to many suspects not being informed of their procedural rights in a language that they understood.[163] In some other cases the suspect or accused person had basic language skills that were deemed sufficient, although the knowledge of the language were rudimentary





and did not ensure an effective participation.[164] The lack of a recognized and uniform procedure for **assessing the need for interpretation** almost certainly contributed to police officers often resorting to ploys to avoid the need to arrange for interpretation.[165]

The need for **prompt interpretation** presented several challenges in many countries. In many countries, an interpreter was rarely, if ever, present at the initial stages of detention, even though the need for interpretation had been identified, or was subsequently identified. A critical and widespread problem concerns the difficulty the police face in finding an interpreter willing and able to attend the police station at short notice.[166] Partly due to the shortage in available interpreters, in some countries there are limitations on free interpretation for lawyer/client consultations.[167]

### 1.4.4. Right to information

**RELEVANT QUESTIONS:**

- When did the person receive the information? Did he or she have enough time to consider before being questioned?
- Did the person waive any of his/her rights? If yes, why?
- If arrested or detained did the person have time to read the Letter of Rights and was it handed to the person?
- Is the Letter of Rights comprehensive and accessible?
  - Also for persons in vulnerable situations?
  - Is it available also in other languages?
- Was the person informed about the charges against him or her? When the person informed?
- Did the person or his/her lawyer have access to the materials in due time?
  - Where there any restrictions?

The right to information is of utmost relevance because without knowing the rights, suspects and accused persons cannot exercise those effectively, e.g. access to a lawyer or interpreter. A deficiency in informing the person about his or her rights may again has great impact on the subsequent proceedings.

Thus, the right to information play on many levels an important role in the defense and the overall fairness of the proceeding.[168] Thus, the right to information includes different elements: the right to be informed of procedural rights, including the Letter of Rights on arrest; the right to information about the accusation; and the right of access to the materials of the case.[169] Accordingly, the right to information is fulfilling several purposes, namely:

- Ensuring that the person is aware of his or her rights - especially when deprived of liberty - as this is a precondition for all the other procedural safeguards
- Safeguarding that the suspected or accused person has all the relevant information about the arrest and accusation and the relevant case files in order to effectively defend him- or herself, including challenging the arrest or detention, and thereby to ensure equality of arms[170]





#### From which point in time does the right to information apply?

Suspected or accused persons should be promptly provided with information concerning procedural rights in order to allow for those rights to be exercised effectively. This information has to be provided orally or in writing or if the person is arrested in the form of a written Letter of Rights.[171]

Further, suspects and accused persons should be informed about the accusation promptly and in such detail that they can prepare their defense. This means that the information should be provided latest before the first official interview by the police or the other competent authority.[172] In case a person is deprived of liberty the information about the reasons should be provided promptly. This provision reflects the case law of the ECtHR, that states that the information should be made clear promptly, either on arrest or during the interrogation.[173] The Directive provides that information must be given to the person at latest on the submission of the merits of the accusation to a court detailed.[174] Moreover, enough time must be given to the accused persons to be able to prepare their defense in order to safeguard the fairness of the proceedings.[175]

Similarly, the access to the materials of the case should be granted in due time that allows the effective exercise of the rights of the defense; where a person is arrested and detained, the access to those materials should be provided at a point of time that the lawfulness of the arrest or detention can effectively be challenged. The access to the materials should be provided at latest upon submission of the merits of the accusation.[176]

#### What does the right to information cover?

All suspected and accused persons – **arrested or not** – are entitled to be informed of their rights. The relevant provision provides that the persons should be informed about:

a) *the right of access to a lawyer;*
b) *any entitlement to free legal advice and the conditions for obtaining such advice;*
c) *the right to be informed of the accusation, in accordance with Article 6;*

d) *the right to interpretation and translation;*
e) *the right to remain silent.*[177]

Compared to the EU Directive, Article 6 ECHR does not explicitly regulate the right to information. However, the ECtHR states in its jurisdiction that the accused persons have to be informed about their right to (free) legal assistance and the right to remain silent. However, this case law does not prevent the inclusion of further rights.[178]

The main innovation of the Directive is to establish a positive obligation on the Member States to provide arrested persons with a 'letter of rights' explaining their rights. The Directive provides that in addition the suspects or accused persons have to be informed about:

a) *the right of access to the materials of the case;*
b) *the right to have consular authorities and one person informed;*
c) *the right of access to urgent medical assistance; and*
d) *the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.*

The **Letter of Rights** should include basic information about any possibility of challenging the lawfulness of the arrest, obtaining a review of the detention; or making a request for provisional release.[179] Suspects or accused persons who are arrested or detained should have the opportunity to read the Letter of Rights and to keep it in their possession throughout the time they are deprived of liberty. Persons who do not speak or understand the language of the criminal proceeding are also entitled to receive the Letter of Rights in language they understand.[180]

The information on **the reasons for arrest/detention, and about the accusation** should be given in such detail as is necessary to safeguard the fairness of the proceedings. Thus, persons must be informed about the criminal act they are suspected or accused of having committed; and if arrested or detained about the reasons therefore. Detailed information cover the nature and legal classification of the offence, as well as the nature of participation of the accused.[181] According to ECtHR case law, it is not enough to the legal basis for the arrest or detention; rather a solid legal and factual basis of the arrest that enables to challenge the lawfulness of the deprivation of liberty is required.[182]





The **right of access to the materials of the case** should include material such as documents and where appropriate photographs and audio and video recordings.[183] Access to the files must be granted free of charge.[184] The Directive provides for two divergent rights. If a person is deprived of liberty, access should be ensured to the documents that are essential to effectively challenge the lawfulness of the arrest or detention to the arrested persons or their lawyers.[185] Moreover, the authorities must also ensure that access to all material evidence is granted in due time to allow to prepare the defence. If the competent authorities have new material evidence, access should be granted as well in due time.[186] Access to material evidence not linked to the deprivation of liberty can be derogated if there is a serious threat to the life or fundamental rights of another person or a restriction is necessary to safeguard public interest, such as the ongoing investigation.[187]

### How is this right exercised?

The information about the rights have to be given in a **simple and accessible language** taking any particular needs into account. This requirement is also well established case law of the ECtHR.188 Also the Letter of Rights should be in a simple and accessible format.[189]

It should be recorded when information is provided to suspects and accused persons.[190]

### Main findings on the practice

The right to information has been largely implemented, but there are still some challenges with the exercise of these rights, e.g. there are delays in providing information and/or not all the information is provided; the Letter of Rights is overly complex and legalistic, thus not ensuring that the information is simple and accessible. Further, oral information about procedural rights is often provided in a formalistic way, and in some countries the evidence suggests that **the police discourage suspects from exercising their procedural rights**.[191]

### 1.4.5. Presumption of innocence and the right to remain silent and the privilege against self-incrimination

**RELEVANT QUESTIONS:**

- Was there any public reference to guilt during the criminal proceedings?
- How was the defendant presented during the procedure?
  - Were restraint measures such as shackles or glass boxes used?
- Did the suspect or accused remained silent during the interrogation
  - If not, why not? Was there any coercion or misguidance?

The presumption of innocence is a norm that has customary law character[192] and is recognized in numerous international standards.[193] It is often referred to as the 'golden thread' running through criminal law.[194] The Directive regulates the presumption of innocence, the right to remain silent and the privilege against self-incrimination,[195] all essential elements of a fair trial. Not only can a public reference to guilt render the proceedings unfair, but can also impact the dignity of the person, especially if the defendant is presented in a way as looking guilty (e.g. use of shackles or glass boxes).[196]

Accordingly, these rights fulfil several purposes, namely:

- Ensuring that the person is innocent until found guilty by a competent judicial authority; thereby securing the fairness of the trial, the integrity of the justice system, and the dignity of the accused[197]
- Safeguarding the right that a suspect or accused persons do not have to incriminate themselves and that the right to remain silent is not used against them or is considered as a confession
- Evidence obtained by the breach of the right to remain silent or the right not to incriminate oneself, contradict the right to a fair trial and to defense; especially statements and evidence that were obtained as a result of torture or other forms of ill-treatment must be excluded

#### Which rights does the Directive cover?

The Directive provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[198] In line with ECtHR standards, there are two main components in the context of the presumption of innocence: the public reference to guilt by state authorities; and the presentation of the defendant.[199]

With regard to the **public reference** to guilt, in the case Milev the CJEU stated that for judicial decisions on the continuation of pre-trial detention, based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty.[200] Moreover, the Directive states that the defendant must not be **presented as looking guilty** in court or public, e.g. through the use of shackles or glass boxes, except if it is strictly necessary.[201] According, to the case law of the ECtHR, the use of glass cages or metal boxes is unnecessary and a violation of Article 3 ECHR, establishing that these practices are degrading treatment.202 Finally, the Directive additionally establishes **the right to remain silent and the right not to incriminate oneself**. This is applicable throughout the proceedings. Moreover, the Directive further elaborates that exercising these rights cannot lead to the assumption that the person is guilty.

#### Main findings on the practice

Despite the recognitions of the importance of this right, violations are frequent, and may include statements about the guilt of a suspect or accused also in the media coverage. In some countries, it is common that the suspect is paraded in physical restraints at arrest, during transfer and in the court. This presents the suspect and accused persons as guilty and can affect the whole proceeding.[203]

The right to remain silent and the right not to incriminate oneself is oftentimes circumvented. Especially, the right to silence is often presented in a way that stresses the adverse consequences of its exercise. Similarly, the right to access of a lawyer is often put in a light that the request only prolongs the proceedings and as the exercise of this right directly mean that the person is guilty. Moreover, often the suspects and accused are not aware about the consequences of waiving procedural rights as they are either not fully informed or they are, but only formally without understanding those rights.[204]

### 1.4.6. Audiovisual Recording

**RELEVANT QUESTIONS:**

- » Was the interrogation audio or video recorded?
  - If not why? Not a legal requirement or was no technical equipment available?
- » Were particular needs of persons in vulnerable situations (e.g., minors, persons with psychosocial or intellectual disabilities) adequately taken into account?

International standards include numerous procedural safeguards for suspects and accused. A specific right that is, however, missing is audio-visual recordings of interrogations. Nevertheless, there is growing consensus that audio-visual recordings could not only strengthen procedural safeguards but also prevent torture and ill-treatment. Already in 2003 the Special Rapporteur on Torture stated that 'all interrogation sessions should be recorded and preferably video-recorded, (…). Evidence from nonrecorded interrogations should be excluded from court proceedings.'[205] An even more explicit reference to audio-visual recordings can be found in the 2016 report of the Special Rapporteur on Torture Méndez which calls for the establishment of a Universal Protocol for interviews.[206] Méndez states that 'The recording of interviews is a fundamental safeguard against torture, ill-treatment and coercion and ought to apply in the criminal justice system and in connection to any form of detention.'[207] On a regional level, also CPT has urged states to implement audio-visual recordings of police interrogations.[208]

However, these international recommendations are only partly reflected in thunder EU instruments audio-visual recording is only provided for in the Recommendation on procedural safeguards for vulnerable suspected or accused persons and in the Directive on Children. Article 9 of the Directive on Children states that questionings of children should be audio-visually recorded if it is proportionate in the circumstances of the case and in the best interest of the child. It should be decided on a case by case basis and circumstances that might play a role are if the child is deprived of liberty and/ or if a lawyer is present.[209]





#### Main findings on the practice

Audio or visual recordings of interrogations and hearings is not mandatory in numerous Member States and is often argued not to be carried out due to technical difficulties. However, it is difficult to prove potential violations of the rights of suspected and accused persons without audio-visual records.[210]

## 2. THE MANDATE AND ROLE OF THE NATIONAL HUMAN RIGHTS INSTITUTIONS

### 2.1. Mandate

A key reference document for NHRIs is the **'Principles relating to the Status of National Institutions (the Paris Principles)'**.[211] The Paris Principles empower NHRIs to deal with all human rights in the widest sense, including the procedural rights of suspects and accused.[212] In practice, however, the Paris Principles are phrased in very broad terms and give little practical guidance as to how to exercise their mandate.

Additionally, certain UN human rights treaties formally require national mechanisms to play a role in the monitoring and implementation of the State's treaty obligations, such as the Optional Protocol to the UN Convention against Torture (OPCAT) requiring to establish National Preventive Mechanisms (NPMs; Article 17 OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD) requiring the establishment of independent mechanisms (Article 33 CRDP). Whilst the OPCAT and the CRPD formalize the role of NHRIs in the monitoring and implementation of the respective treaties (the treaties require States to establish such mechanisms and explicitly refer to the Paris Principles), the CRC does not, although there are relevant recommendations by the CRC Committee recognising the important role of NHRIs.[213]

Neither the Paris Principles nor the OPCAT or the CRPD impose a **uniform model** of national mechanisms, but leave it open to the national authorities to decide what model is the best suited in each particular national context.[214]

As shown in *Annex 2*, in the European Union, the majority of EU NHRIs or equivalent bodies is composed by ombudsperson institutions (14); but there are also consultative bodies (3); centres/institutes (3 + Denmark); commissions (1 + UK) and specialised bodies with a specific mandate (2). Including Denmark and UK, there are 17 NHRIs accredited with A status (Bulgaria, Croatia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain); 6 NHRIs with B status (Austria, Belgium, Cyprus, Slovakia, Slovenia, Sweden);[215] and 5 Member States that do not have an accredited NHRI. 3 of them have nonetheless national equivalent institutions in place (Czech Republic, Estonia and Romania).[216] Italy and Malta have no comparable institution in place.

Although in the EU the great majority of NHRIs are Ombudsinstitutions, it is important to remember that the two institutions are different in purpose; the classical ombudsman institutions having as a main focus maladministration instances. Moreover, even when Ombudsinstitutions have been given the mandate to protect and promote human rights under national law, there are cases in which this mandate was not accompanied by the additional powers necessary to effectively carry out the NHRI functions, such as for example contestation of laws or application for authentic interpretation before the constitutional court, constitutional appeals for violation of human rights, rights to file applications before courts due to human rights violation.[217] The difference has been recently acknowledged by the Council of Europe,[218] which adopted principles specifically targeting Ombudsinstitutions: the Principles on the Protection and Promotion of the Ombudsman Institution (the "Venice Principles").[219]

Moreover, many EU NHRIs are also entrusted with additional specialised mandates. Including Denmark and the UK, out of the existent 25 EU NHRIs or equivalent bodies, 13 have an NPM mandate and 16 have a CRPD mandate (see *Annex 2*). Depending on the model and the additional specialised mandates enjoyed, the powers, functions and aims of NHRIs may vary considerably.





## 2.2. NHRIs independence

One of the key features of an NHRI and a necessary condition of its effective functioning is its independence from the government. The SCA emphasised that a NHRI shall be independent "in its structure, composition, decision-making and method of operation. It must be constituted and empowered to consider and determine the strategic priorities and activities of the NHRI based solely on its determination of the human rights priorities in the country, free from political interference".[220] The Paris Principles not only clearly stipulate that a NHRI must be able to "freely consider any question falling within its competence",[221] but also indicate a number of guarantees of the independence.

Firstly, in terms of **functional independence** the Paris Principles prescribes that NHRIs should be anchored in a constitutional or legislative text regulating their mandate and "specifying its composition and its sphere of competence".[222] Such legal foundation serves as a safeguard against interference by government.[223]

Secondly, to ensure the **financial independence** of NHRIs, the State must provide the core funding of the NHRIs, whereas additional funding from external sources can be accepted in exceptional circumstances unless they impact the independence of the NHRI.[224] The SCA recommends that NHRIs have financial autonomy on a budget line controlled by them.[225] Such an own budget line further empowers the NHRIs to have their own staff and premises[226], which is crucial to ensure their real and publicly perceived independence.[227]

Thirdly, **independence** is to be understood in a way that NHRIs have the mandate to choose their own staff. The appointment and dismissal procedure of the NHRI members should be prescribed by a legal or even constitutional statute clearly defining the criteria for appointing and dismissing NHRI members, determining the length of term in office and shielding the members against arbitrary dismissal.[228] Both procedures must be subject to due process of law to guarantee the personal independence of NHRI members. The selection and appointment process should be merits-

based and ensure pluralism in order to strengthen real and publicly perceived independence.[229] Personal independence also includes working in a pressure-free environment[230] and proper remuneration of personnel to protect it against dependency on external sources.[231] Lastly, privileges and immunities are key to prevent undue exertion of influence by the government and should be provided for by national law as well.[232] In addition, for NHRIs with specialised mandates additional guidance on independence may also be found on their respective treaties, including e.g. OPCAT (Art 18);233 CRPD (Art 33 (2)).[234]

More recently, the issue of **independence from political pressure and other forms of intimidation** was raised by the **UN Human Rights Council** that stressed that "national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations".[235]

The question of independence is also emphasised in the **Venice Principles**, adopted "following threats to these institutions in recent years".[236] Already in the very first principle, they call States to "support and protect the Ombudsman Institution and refrain from any action undermining its independence",[237] including adequate resources, stable mandate and immunity.[238] In its resolution endorsing the Venice Principle, the Parliamentary Assembly of the Council of Europe explicitly called member states to "refrain from any action aiming at or resulting in the suppression or undermining of the Ombudsman institution and from any attacks or threats against such institutions and their staff, and protect them against such acts".[239]

### 2.3. The role of NHRIs vis-à-vis public authorities

To protect and promote the procedural rights effectively it is important that the NHRIs have the power to address the police, prosecutors and judges on matters concerning human rights.





According to the Paris Principles, NHRIs are allowed to **address their recommendations to all public authorities**. Their mandate should extend 'to protect the public from acts and omissions of public authorities, including officers and personnel of the military, police and special security forces. Where such public authorities, who may potentially have a great impact on human rights, are excluded from the jurisdiction of the NHRI, this may serve to undermine the credibility of the Institution.'[240] The Paris Principles and the SCA General Observations, however, make no explicit reference to the **judiciary**, except when regulating the quasi-judicial function.[241] Thus the question arises whether and to what extent NHRIs are mandated to address the judiciary.

In this regard, some international guidance was put forward by the **OHCHR**, which affirmed that NHRIs, although they should always respect the independence of the judiciary and the rule of law, are not prevented from 'monitoring and reporting on court activities, and making independent recommendations meant to improve the application of human rights principles in the court setting or to remove undue delay in judicial proceedings.'[242] The same is also emphasised in the **Nairobi Declaration** of 2008 stating that NHRIs should consider contributing to the promotion of the role of the judiciary in promoting and protecting human rights, by providing recommendations to strengthen the legal system and judiciary, as well as promoting adherence and compliance of the judiciary to international human rights norms, including through amicus curiae and legal education.[243]

As many NHRIs in the EU are Ombudsinstitutions, it is also worth looking at the standards concerning Ombudsinstitutions. In this regard, the **2019 Venice Principles** state that 'the right to complain to the Ombudsman is an addition to the right of access to justice through the courts'[244] and that the 'competence of the Ombudsman relating to the judiciary *shall be confined to ensuring procedural efficiency and administrative functioning of that system*'.[245] The Venice Principles further add that 'the Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution'.[246] Yet even the Venice Principles state that Ombudsinstitutions should preferably have

the power 'to challenge the constitutionality of laws and regulations or general administrative acts'[247] and 'to intervene before relevant adjudicatory bodies and courts'.[248]

To conclude, it is important that Ombudsinstitutions who are also NHRIs pay sufficient attention to both mandates when thinking about their role vis-à-vis the judiciary. Given their specific mandate to protect and promote human rights and strengthen the legal system, all procedural safeguards in criminal proceedings should fall within the NHRIs' mandate. Moreover, even when the their mandate is limited in regard to their competence to receive individual complaints, all NHRIs should always be able to tackle the general human rights challenges concerning the rights of suspects and accused in criminal proceedings (see below, Chapter 5.1).

The national laws of the EU Member States regulate the powers of EU NHRIs towards such authorities in different ways. Often NHRIs, especially Ombudstype, have **powers vis-à-vis the administrative branch**, but their powers are limited when it comes to the judiciary in view of the principle of judicial independence, particularly when it comes to individual complaints (see below, Chapter 5.1). In these cases, the **NHRIs powers vis-à-vis the judiciary** are often restricted in the national laws to the 'administration of justice'. The notion of administration of justice is 'a difficult issue of classification',[249] encompassing e.g. delays in courts proceedings, impolite conduct of officials, defaults in executing judgments, deficiencies in the equipment of courts with resources and staff, as well as judicial supervision.

In some States, administration of justice is defined exclusively in a formalistic manner, with the consequence that the powers of NHRIs extend to the judiciary only when judicial authorities conducts activities falling within the notion of 'administration of justice'.[250] Similarly, whether the power of the NHRI extents to the **public prosecutor** will depend on whether under national law public prosecutors are part of the administrative branch or the judiciary. On the other hand, if a State adopted a functional definition of administration of justice the power vis-à-vis prosecutors may depend on the actual function exercised by the prosecutor.[251] The same approach is often adopted vis-à-vis **law enforcement** authorities, hence, to understand the limits of the NHRI's intervention it will be relevant to know if the law enforcement authorities act with the authorisation of the prosecutors or judges.[252] Thus, in these cases, the power of the NHRIs towards the police depends on whether the act is authorised by prosecutors or judges and thereby is part of the administration or the judiciary.

In practice, there are several examples of NHRIs, especially those with NPM mandate, addressing the police in regard to procedural rights of suspects and accused.[253] One interesting case comes from Slovenia.

***Slovenia***

*In 2017 the Slovenian Ombudsman addressed a recommendations to the police stating that in every case of restriction of freedom which involves forced detention and consequently deprivation of liberty, police officers must inform individuals of their rights, as stipulated by the Constitution of the Republic of Slovenia.[254] Similarly, in 2016 the Ombudsman pointed out that the police must consistently observe all the rights of suspects deprived of liberty, including the right to counsel. No reference was made to the EU instruments.[255]*

However, fewer examples of NHRIs addressing the judiciary could be found. This is especially the case for certain functions, such as individual complaints (see below, Chapter 5.1). Some NHRIs have used other tools to address the judiciary and more generally tackle the human rights challenges concerning procedural rights of suspects and accused persons even while there is a case pending before the judicial authorities.

***Netherlands***

*For example, the Dutch NHRI carried out a dossier study examining pre-trial detention decisions by judges and how these fulfil the requirement of "reasoned" decisions, in light of human rights standards concerning the presumption of innocence and the right to liberty.[256] The research included the analyses of around 300 court files from four district courts and two courts of appeal. It additionally envisaged the setting up of an advisory board composed also of judges, in addition*

*to lawyers and experts from the academia. In the framework of this research, the NHRI has addressed recommendations to the judiciary. The NHRI also discussed the research findings with the district courts and appeal courts examined with a view to disseminate concrete good practices from other courts that could be replicated.*

***Spain***

*In Spain, the NHRI law explicitly states that: "The Ombudsman shall not investigate individually any complaints that are pending judicial decision, and he shall suspend any investigation already commenced if a claim or appeal is lodged by the person concerned before the ordinary courts or the Constitutional Court. However, this shall not prevent the investigation of general problems raise in the complaints submitted. In all cases, he shall ensure that the Administration, in due time and manner, resolves the requests and appeals that have been submitted to it."*[257]

***Poland***

*In Poland, the Polish NHRI takes up recurring individual complaints and, if adequate, handles them as a systematic challenge by taking additional steps such as issuing general motions.*[258]

### 2.4. The role of NHRIs vis-à-vis private entities

Professional organisations, such as bar associations, translators' associations or associations of medical doctors, play a crucial role in the protection of procedural rights. Hence, it is important that NHRIs also reflect on their role vis-à-vis private entities.

The SCA recommends that the NHRIs' mandate extend to the acts and omissions of both the public and private sectors.[259] The same is said by the Venice Principles with reference to Ombudsinstitutions, which state that 'The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.'[260]





***Portugal***

*For example, the Statute of the Portuguese Ombudsman contains a broad definition of private entities including the activity of the services integrated in the central, regional and local public administration, the Armed Forces, the public institutes, the public companies or the companies whose capital is mostly public, the concessionaires operating public services or exploiting state property, the independent administrative bodies, the public associations, including professional bodies, and the private entities exercising public authority powers or providing general interest services.* [261]

The relationship between NHRIs and professional associations is in practice two-fold: while in some cases it can be one of monitoring and accountability, in the majority of cases it is one of cooperation.

***Slovenia***

*For example, the Slovenian NHRI has addressed recommendations to the Bar Association on specific occasions, e.g. recommending the Bar Association to submit a legislative proposal to amend the regulative framework concerning pro bono legal aid.*
*Moreover, although the Slovenian NHRI cannot directly consider complaints against the work of attorneys (e.g. complainants' allegations that they were insufficiently informed about the legal and actual situations of their cases; the legal representative's choice whether to appeal, particularly in cases of legal aid) because it is up to the disciplinary bodies of the Bar Association to establish whether an attorney's action violates the attorney's obligation and is subject to disciplinary liability. The NHRI may take action when the circumstances of a case show that the Bar Association or its disciplinary bodies failed to exercise their public authority, that is to say when the Bar Association fails to respond to an individual's complaint or if the procedure for handling the complaint by the disciplinary bodies takes too long.*[262]

**Poland**

*In Poland, the NHRI acted upon the concerns raised by the President of the Polish Bar Council with regard to the right to information of arrested persons by filing a motion to the Police Commander in Chief Representative on Human Rights.*[263]

## 2.5. The role of NHRIs vis-à-vis other national human rights departments and bodies

International and European standards do not impose a uniform model of national mechanism, but leave it open to the national authorities to decide what model and structure is the best suited in each particular national context.[264]

International bodies have issued a number of recommendations for the case of specialised mandates placed within the umbrella of already existing NHRIs. For example, with regard to NPMs the SPT has recommended that there should be "two different and separate structures serving two different mandates and preserving a level of autonomy" to ensure full independence, financial and functional autonomy not only from the State but also from the NHRI.[265] The CRPD Committee, taking a different approach, has encouraged States parties to appoint the Paris Principles-compliant NHRIs as the monitoring framework, provided that they are equipped "with additional and adequate budgetary and skilled human resources to appropriately discharge its mandate under article 33 (2) of the Convention."[266] As a consequence, there are several domestic human rights bodies with different mandates in the EU Member States.

On the other hand, all international bodies including the SCA, SPT, and the CRPD recognise that coordination and cooperation between the NHRIs and other domestic human rights bodies or departments within the same institution is important.

Coordination serves to avoid that human rights situations falling under all the different mandates are addressed simultaneously by various national





mechanisms creating unnecessary overlaps, contradicting messages, or remain overlooked because none of them feels responsible to address the issue. To improve coordination and increase transparency, the adoption of a **memorandum of understanding** between the NHRIs and other specialised bodies to cover referrals could be particularly useful. In the case of different departments between the same organisations **guidelines or internal regulations** could be adopted. As pointed out by the SCA: "The importance of formalizing clear and workable relationships with other human rights bodies and civil society, such as through public memoranda of understanding, serves as a reflection of the importance of ensuring regular, constructive working relationships and is key to increasing the transparency of the NHRI's work with these bodies."[267] In practice, however, even though many NHRIs, NPMs and CRPD mechanisms reported fruitful cooperation, no instances of formalised relationships with other domestic human rights bodies or departments could be identified.

Moreover, cooperation between NHRIs and other bodies or departments can also be a powerful tool to reinforce each other's role and impact. This is also recognised by the SPT, which affirmed that: "While the national preventive mechanism is charged with the core national preventive functions, this does not preclude other departments or staff of the national human rights institution from contributing to its work, as that cooperation might lead to synergies and complementarities."[268]

NHRIs have a multifunctional mandate that allows them to cover different aspects of the protection and promotion of human rights, spanning from research, training and education, to monitoring visits and complaint handling; from advising the State on the adoption of a new legal instrument to monitoring the practical application of such laws in the domestic context.[269] The breadth and flexibility of their mandate mean that NHRIs could use it to reinforce and complement the work of others.

To this extent, it is important that NHRIs and other domestic human rights bodies or departments **exchange information**, as this will enable further cooperation. In practice, there are various ways how NHRIs can effectively cooperate with other domestic human rights bodies and departments.

A detailed analysis of such methods would go beyond the scope of this research, but in the course of this project several ways of cooperation were mentioned, including:

- Establishment of working groups and conducting regular meetings
- Exchange of the respecting findings
- Access to the same information management system (e.g. Slovenia and Portugal)
- Joint activities, e.g. joint visits, joint complaints handling.

**Finland**

*In Finland the Parliamentary Ombudsman is also the NPM and that accordingly the complaints handling and the work of the NPM are automatically combined. Further, '[if], during a visit, something has arisen that needed investigating, the Ombudsman has taken up the investigation of the matter on his/her own initiative for further action.'[270] The same was reported to be the case with the monitoring mandate under the CRPD.[271]*

**Croatia**

*In Croatia the Ombudsman, within its OPCAT mandate, can involve other domestic human rights bodies in its activities, and has done so by conducting joint visits with representatives of the Ombuds on Children and for Persons with Disabilities.[272] This is seen as a way to avoid possible overlaps and better assess the rights of children and persons in a situation of vulnerability.*

### 2.6. The role of NHRIs vis-à-vis civil society

As mentioned above, NHRIs are explicitly mandated to cooperate with other national actors, including not only other specialised bodies, but also civil society and non-governmental organizations.[273] Relevant actors in the field of procedural rights may be, for example, NGOs, academia, professional associations including lawyers, doctors, and translators.[274] In practice, civil society often complements the expertise of the NHRIs.





**With academia:**

**Netherlands**

*The Dutch NHRI Institute cooperated with the Leiden University to draft its legislative position on persons with a disability in the criminal procedure.[275]*

**With NGOs:**

**Poland**

*The Polish NHRI cooperated with the Helsinki Foundation for Human Rights for the preparation of an alternative Letter of Rights for suspects and accused.[276]*

**Slovenia and Lithuania**

*Further, some NPMs often involve NGOs representatives in their monitoring visits, including in the drafting of their visiting reports[277]*

**With lawyers:**

**Croatia**

*The Croatian NHRI cooperated with lawyers in the form of joint training.[278]*

More generally, civil society also represents an important source of information for NHRIs. Practices in this regard were fewer and NHRIs mentioned several challenges, including for example the fact that reports by NGOs may not always be evidence based.[279] But many NHRIs have recognised that civil society represent an important source of practical information and expressed willingness to cooperate more. Lawyers have been identified as a particularly strong partner in the promotion and protection of procedural safeguards but many NHRIs mentioned that lawyers are often very difficult to reach.[280] One interesting case of cooperation with lawyers comes from the practice of the Spanish NPM.

**Spain**

*For example, the Spanish NPM has started a new project that encompasses a survey with the lawyers that are registered at police station. Within the framework of this project, the NPM contacts the lawyers via e-mail or in person at police stations. The survey covers questions on procedural rights, and especially the access to a lawyer.*

### 2.7. The role of NHRIs vis-à-vis other EU NHRIs

There exists several networks of NHRIs in Europe. Despite this, several NHRIs found that there is not sufficient exchange on the topic of criminal procedural safeguards and EU law and expressed interest in receiving information on good practices from other countries.

This may be in part explained with the fact that neither EU law nor procedural safeguards in the criminal procedure nor torture prevention are part of ENNHRI strategic priorities.[281] The topic of torture prevention was given more attention in the past but activities in that direction were reduced to avoid duplication when the Council of Europe started an initiative to establish a network specifically dedicated to NPMs. Moreover, ENNHRI is a network uniting all NHRIs in the wider Europe, i.e., beyond the EU. As a 'members driven network', the network focuses on activities that concern all members. Hence, though it cooperates closely with EU institutions (eg, FRA, EU Commission), it is reluctant to engage in activities specifically concerning EU law, because the topic will not be relevant for its non- EU members.[282] Nonetheless, in a few cases the network served as a forum for discussions among EU Member States, for example a sub-group of EU Members was created in the ENNHRI legal working group to discuss about the EU Directive on terrorism (Directive (EU) 2017/541). Hence, EU NHRIs could make use of this opportunity again.

The creation of an EU NPM network by the Council of Europe may represent a promising development for NPMs in this regard. However, it would be useful to increase possibilities for exchange on the topic to all NHRIs and not only to those with NPM mandates. It would be particularly beneficial if such initiatives adequately address the issue of cooperation between NHRIs and other specialised monitoring bodies, including for example NPMs and Ombudsinstitutions for children or persons with disabilities, and discuss ways in which those institutions can mutually reinforce their efforts.

# FIRST PART:
# NHRIs' TOOLS TO STRENGHTEN PROCEDURAL RIGHTS

# 3. WAYS TO PROMOTE CHANGE

## Key points

1. NHRIs should promote the universal applicability of human rights standards to all persons. Often the biggest challenge in the promotion and protection of procedural rights is that suspects and accused are seen only as subjects of 'ordinary criminal law' but not as human rights holders. In these cases, NHRIs should take part in the public debate and contribute to a necessary cultural change, through awareness raising, education activities and should make use of all press organs and a broad range of media.

2. NHRI should use all tools provided for by domestic and international law to promote procedural rights and advocate for a change in the law and practice where necessary. To this aim, NHRIs could:

   - Issue opinions on laws and practice
   - Challenge the constitutionality of laws
   - Conduct research and inquiries
   - Provide training and capacity building

3. NHRIs should make full use of EU laws and procedures to promote and protect human rights. EU law has become an important source of human rights standards and EU NHRIs should more strategically look into the opportunities that EU laws and procedure offer to promote and protect human rights.





## 3.1. Raising awareness among the general public/ Campaigns/Press Work/Press release

**PARIS PRINCIPLES**

**3(g)** To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

NHRIs should promote the universal applicability of human rights standards to all persons.[284] Frequently difficulties are encountered in the promotion of the rights of suspects and accused – especially by the broader public opinion – as suspects and accused are seen only as subjects of 'ordinary criminal law' but not as human rights holders; hence, there is a risk that those rights are forgotten.[285] Due to their broad mandate, NHRIs are ideally placed to stand up for those whose rights are neglected and would otherwise have 'no lobby'.

Moreover, with their expertise, NHRIs may offer valuable support to human rights bodies with specialised mandate (e.g. with OPCAT or CRPD mandate) in promoting human rights through education and awareness raising.[286] As also stated by the SPT "Needless to say, coordination between the national human rights institution and the national preventive mechanism could be very beneficial and joint advocacy and awareness raising campaigns could be envisaged in order to collect funds and explain the nature of each entity's work, particularly the fact that the mandates of the two entities are complimentary. […]"[287] Joint advocacy may also be particularly powerful. For example, the French NPMs and NHRIs have issued joints press releases to reinforce their message and authority vis-à-vis the State authorities.[288]

In addition to being present in the media and press, NHRIs can strongly contribute to increase public awareness by means of **public campaigns**. A positive example to be mentioned is the campaign "Torture-free State" conducted by the Polish NHRI.

**Poland**

*In October 2018, the Polish NHRI commissioned the survey "Tortures – the Opinions of Poles". As many as 71% of respondents indicated that after 1989 tortures have been used in Poland. It is also very disturbing that as many as 41% of respondents believe that using tortures may be justified in certain cases. At the same time, Poles pointed out that the use of tortures by public institutions should be given more attention in public debate – such opinion was expressed by 86% of respondents. Responding to such social expectations, the NPM decided to launch a public campaign with a slogan "Torture-free State". The main goal of this campaign was to increase public awareness and understanding of the crime of torture and its victims, often persons with low social awareness, juveniles, or persons with disabilities. As part of this campaign, educational meetings were held by representatives of the NPM with university students of faculties such as law, social work, and psychology.*[289]

Further NHRIs should explore innovative ways to promote their work in order to reach the general public. An interesting example in this regard comes from the Polish NHRI.

**Poland**

*The Ombuds office has it stands at musical festivals in Poland. This year they had a court case as a theatre play to show how a court works. They had different interactive games to show how procedural rights work. The Ombudsman himself is there and takes part in all the activities and is involved among young people.*[290]





## 3.2. Promoting an adequate legal framework

### PARIS PRINCIPLES

**3 (a)** (…) submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
**(i)** (…) the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures

### VENICE PRINCIPLES

'Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts' [291]

### OPCAT, ART 19

**(b)** To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
**(c)** To submit proposals and observations concerning existing or draft legislation.

Under the Paris Principles, the OPCAT and the CRPD[292], NHRIs also have the responsibility to make recommendations to their governments and other relevant authorities on human rights issues. Within this advisory function they can – where necessary – recommend changes or the adaption of new measures to ensure compliance with human rights standards. [93] In this regard, in the transposition process of EU law NHRIs can engage with national authorities and issue motions and opinion on laws, in order to strengthen procedural rights of suspects and accused (see Chapter 3.6.2). Many NHRIs have adopted legal opinions on the rights of suspects and accused in criminal proceedings making it the most used mode of engagement for rights of suspects and accused. Although some NHRIs have noted that their impact is rather limited on the legislative power[294], others mentioned that opinions have served as a contribution to the parliamentary discussions on **new draft bills and policies**.

### *Hungary*

*The Hungarian NHRI (Department of Public Law) regularly attended the negotiations on the codification of the new Code on Criminal Procedure, and strived for advocating for normative safeguards on the procedural rights of defendants. They advocated for the introduction of audio-visual recording of interrogations of children. This was partly into consideration in the new CCP: While audiovisual recording is discretional in most of the cases, it is obligatory in cases of procedural acts involving minors under 14 years with some limits and illiterate persons.*

The SPT urges States to 'inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow the NPM to make proposals or observations on any existing or draft policy or legislation. The State should take into consideration any proposals or observations on such legislation received from the NPM.'[295] Overall, In order to make the advisory function on draft legislation possible, States should inform the NHRI of any draft legislation (including in the framework of the transposition of EU Directives) that may be under consideration and is relevant to the NHRI mandate.[296]





### *Slovenia*

*The Slovenian NHRI was invited by the Ministry of Interior as an external member of the working group discussing the revision to the new Criminal Procedural Act. The Institute specifically addressed the position of persons with a disability in the criminal procedure.*[297]

In some cases legislative advice is given **under a specialised mandate**. For example, in the Dutch NHRI issued an opinion on the rights of suspects and accused within its **CRPD mandate** (see above, Chapter 2.5).

### *The Netherlands*

*The Dutch NHRI prepared a legislative advice in the context of the parliamentary discussions on the new code of criminal procedure acting under its CRPD monitoring mandate. The opinion focused on vulnerable suspects and more specifically on how the right to information should be tailored to these suspects. In this opinion, the Dutch NHRI also referred to the EU Recommendation on vulnerable suspects and accused.*[298]

However, in practice, some of them stated that in view of the targeted expertise and considerable resources required by this type of work it can be difficult to fulfil this part of the mandate.[299] Most NHRIs have a strong expertise on commenting on laws and, therefore, cooperation between NHRIs and specialized bodies in this area could be particularly fruitful.

Besides giving opinions on bills and proposals, NHRIs can also examine legislation and administration provisions in force. This is an especially important aspect in the context of the EU binding instruments. NHRIs have used opinions to **advocate for an amendment of existing laws and practices** in the past.

### *Poland*

*After the adoption of the EU Directive on the right to information (2012/13/EU), the Polish NHRI has put forward a motion that concerned the right to information. It referred in details to the Directive 2012/2013/*

*EU, indicating in what aspects and why the existing Letter of Rights is not compatible with the Directive also providing recommendations on how a Letter of Rights would be best drafted.[300] Since the official Letter of Rights appears to be overly formal and difficult to understand, the Polish NHRI together with Helsinki Foundation prepared his version, drafted in plain language and with visual aids, which was made available on the websites of the Commissioner and the Helsinki Foundation.[301]*

*Some other motions concerned specifically the shortages in the transposition of the EU Directive 2013/48/EU, such as an overly narrow personal scope of the transposition (possibly excluding a suspected person, who formally is not a suspect, but e.g. becomes a suspect during a questioning), lack of clear guarantees of access to a lawyer before a suspect is questioned (connected to the obligation to hear the suspect immediately after he or she is notified about the charges), or lack of judicial review in certain cases of derogation of a right to communicate with his or her lawyer.[302] Others focused on the problems arising from the existing law or the practical application of the law – for instance providing a real access to a lawyer for persons inside police custody – and used the Directive 2013/48/EU as one of the arguments for a change.[303]*

In addition to the mandate to submit opinions and recommendations on laws and practices, some NHRIs, especially Ombudsinstitutions, have the **power to engage** with the Constitutional Court; that is to start proceedings before the Constitutional Court for an abstract constitutional review of the laws and other acts (e.g. Croatia, Poland, Spain, Slovenia, Lithuania, Portugal and Hungary).304 Other NHRIs can challenge only regulations and international treaties but not laws before the constitutional court (e.g. Austria).[305]

Challenging the constitutionality of laws is often described as one of the most powerful and efficient instrument to achieve a change in the law. Nevertheless, this is often a resource intense activity requiring careful consideration of national and international standards on the protection of human rights, and it often comes with high expectations towards the NHRI to start a constitutionality review whenever seems relevant.





The power to engage with the Constitutional Court was rarely used in the context of criminal matters, but additional examples could be found in other human rights related contexts.[306] One positive example specifically concerning criminal matters comes from Poland.

***Poland***

*In 2014 the Commissioner – acting as the NPM – filed a motion to the Constitutional Tribunal for the review of some aspects of right to communicate with a lawyer of a temporary detained person, contesting the constitutionality of a provision imposing an absolute ban on the use of phones to contact lawyers by temporary detainees. The Constitutional Tribunal agreed with the Commissioner and held that the said provision was violating the constitutional right to defence.[307] As a result, the Executive Penal Code was amended in 2015, and now persons in temporary custody are allowed to use a phone (upon consent of the law enforcement authority).[308]*

*However, in the years 2015-2016 the Polish Parliament adopted several legal acts relating to the work of the Constitutional Tribunal, severely undermining its position and independence.[309] Moreover, since the end of 2016 a number of judges, appointed without a valid legal basis, took up their functions in the Constitutional Tribunal. In the aftermath of these legislative changes, the Commissioner acknowledged that "when legislation of highly political nature is adopted, citizens cannot count on independent judicial review" by the Constitutional Tribunal,[310] and, as a result, withdrew several motions for constitutional review.[311]*

As the Polish example shows, the effectiveness of a constitutionality review is highly dependent on the independence of the judiciary (i.e. Constitutional courts or tribunals). When there are these concerns, NHRIs should consider resorting to all existing international, regional and EU procedures as an additional pathway to strengthen human rights in the national context. This was for example done by the Polish NHRI, which used his power to join the proceeding at the domestic level as third party intervener to join several preliminary rulings before the CJEU concerning the question of the independence of the judiciary (see below, Chapter 5.2.3).

Some NHRIs can also lodge an appeal **requesting an authentic interpretation** to the competent authority (i.e. either the Constitutional Court or the Supreme Court). The instrument may be particularly useful to solve divergences of interpretation on specific legal provisions.[312] Our research, however, did not reveal any case in which this tool was used in the context of the rights of suspects and accused.

### 3.3. Research and inquiries

PARIS PRINCIPLES

**(3)(a)(iii)** The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

The Paris Principles urges NHRIs to prepare reports on the national situation and also other domestic human rights bodies under a specialised mandate could conduct research and inquiries.[313] However, research by NHRIs specifically in the context of procedural rights is scarce. Only the Polish NHRI has indicated to have conducted research on all the procedural rights in analysis,[314] e.g., the procedural rights of suspects and accused in the field of the right of access to a lawyer, legal aid[315] and persons suspected and accused with psychosocial and/or intellectual disabilities.[316]

Although research and inquiries are not done on regular basis in the context of procedural rights, some examples can be named nevertheless.

***Estonia***

*The Estonian NHRI, together with an inter-organisational team,[317] has composed guidelines for children, young people and parents about their rights and duties in communicating with the police.[318]*





***Austria***

*In Austria, a specific multi-disciplinary team under the auspices of the Austrian NHRI is currently advocating and researching on the topic of medical examination and quality of expert opinions in the context of the rights of persons with psychosocial and/or intellectual disabilities.[319]*

More specifically, NHRIs can conduct **thematic research into a systemic human rights problem**. This was for example done by the Hungarian NHRI.

***Hungary***

*In 2012 the Hungarian NHRI conducted a thematic research focusing on the right of access to a lawyer.[320] The investigation covered a number of specific aspects of this right, such as the legal aid system, the training system, disciplinary procedures against defence lawyers, or the circumstances of consultation between clients and lawyers.[321] In this framework, interviews were conducted with representatives of the Hungarian and regional Bar Associations, the Ministry of Public Administration and Justice, the Chief Prosecutor's Office, the National Police Headquarters, the National Penitentiary Headquarters and the Hungarian Helsinki Committee.[322] The findings shed light on various concerns, such as the failure of the investigative authorities to duly and promptly notify defence lawyers about the interrogation that prevented proper consultation with the client before the interrogation.[323] Years later in 2017 relevant provisions were enacted to guarantee the enforcement of these rights, and the reports issued by the Ombudsperson provided useful information sources to the Codification Committee.[324]*

*In addition to this positive development, the thematic investigation of 2012 impacted the system of appointment of defence counsels. One of the major findings of the investigation was that defence counsels should not be appointed by the proceeding authorities and this goal has been achieved.[325]*

***Greece***

*The Greek NHRI has specifically examined in a separate report the right to interpretation and translation and the right to information in criminal proceedings and has published:*
*(I) a Report of recommendations to the State on these rights*
*(II) a Guide to the case-law of the ECtHR and the CJEU regarding the aforementioned issues, within the context of the UNHCR mission as an actor engaged in Human Rights promotion. In its report, the UNHCR underpinned its recommendations by referring to the relevant observations and case-law of international and European bodies as well as to the existing legislation and current practice in Greece. In order to assess the current situation in Greece, the UNHCR considered both the recent literature on the subject and the findings of the consultation with stakeholders, which was held by the UNHCR in view of the adoption of its report.*[326]

NHRIs mentioned that one of the challenges to conduct more research is the limited budget and resources.[327] However, it was recognized that it would be important that NHRIs conduct studies and also start publishing articles, in order to be present in academia as well.[328] When it is not possible for NHRIs to conduct own research, NHRIs could also rely upon the research conducted by other departments as well as other external actors such as academics (see above, Chapter 2.5).

***Poland***

*The Polish NHRI has relied on the comprehensive desk research on the case law of domestic courts regarding use of torture by the Police conducted by the NPM department in his work.*[329] *The NPM research consisted of an analyses of final judgments concerning torture and ill-treatment. In the desk research, the NPM also analysed the judgments from the point of view of three basic safeguards that protect persons deprived of liberty against torture: right to access to a lawyer, right to medical examination, and the right inform a third party.*

To increase the impact of research outcomes, NHRIs should use the breadth and multi-functionality of their mandate to reinforce and complement the work of others, for example by following up to the research results conducted by other departments or organisations (see above, Chapter 2.5).





***Poland***

*There have been several motions relating to the **right of access to a lawyer** filed by the Commissioner in the last years. Many of them referred to the EU Directive on the right of access to a lawyer (2013/48/EU).*[330] *Interestingly, the motion to the Minister of Justice on the right to access to a lawyer of 18 April 2017 **was based on the comprehensive desk research conducted by the NPM department**.*[331]

## 3.4. Training and capacity building

**GANHRI, SCA GO, G.O. 1.2**

The SCA understands 'promotion' to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include (…) training, (…).

**CRPD, ART 33**

According to the CRPD Committee, 'promotion activities' include amongst others capacity building and training.

An important way to achieve change may be by **conducting training and capacity building activities**. While some specialized bodies regularly conduct such activities, others have expressed reservations about performing them. For example, among NPMs some have mentioned that trainings may go beyond the NPM's core mandate and require too many resources.[332] In such cases, the specialized bodies and the NHRIs may consider joining forces and pooling together their resources in order to organize joined trainings or agree on a division of tasks that allows one organizations to take over this task if needed.

Several NHRIs have conducted t**raining activities for police officers**. For example, the Croatian and Austrian NHRIs have provided training on the **protection of human rights for police officers**.[333]

***Austria***

*The Austrian NHRI has prepared materials for police training.[334] The manual explains the Austrian Ombudsman Board´s (AOB) mandates and gives examples where they relate to the area of policing; examples given on procedural rights are especially the right to information (eg, information in understandable language and format; possibility to contact a person of trust or a lawyer) and translation/interpretation (eg, availability of interpreters).*

Research shows that trainings are likely to be more appreciated and effective when integrated into the curriculum of e.g. the police academies and when it provided practical assistance to officials the information is more likely to be appreciated. A successful type of training is to provide police with new investigative skills as opposed to listing prohibitions.[335] Accordingly, NHRIs should strive to include such trainings in the police academies curriculum. In the past, the Lithuanian NHRI has also used an **online format for police training**, where police could register online for human rights focused courses.

The target group of trainings and capacity building is and should not be limited to law enforcement officials. Also when it comes to strengthening procedural rights in the criminal proceedings, numerous other actors play an utmost important role. Thus trainings could also be provided (jointly) to criminal justice actors such as bar associations and lawyers, interpreters and translators, doctors etc. Lithuania provides an interesting example where capacity building and trainings are provided for **law students**.

***Lithuania***

*The Lithuanian NHRI conducts training on human rights for law students, specializing in international law. Additionally, within a separate programme, students prepared an NPM check-list, which was then reviewed by the NHRI and used in prisons.*





Another tool used by NHRIs to raise awareness is the **participation in conferences and workshops**.

***Poland***

*The Polish Commissioner has repeatedly been drawing attention in many conferences to the fact that the Letter of Rights is drafted incomprehensively and thus violates the right to information and the right of access to a lawyer.[336]*

## 3.5. Engaging with EU law and procedures

**PARIS PRINCIPLES**

**3(b)** To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

**3(d)** To contribute to the reports which States are required to submit (…) to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

### 3.5.1. Engaging in the European Union Law in the legislative process

EU procedures offer various ways to engage and consult relevant stakeholders, including NHRIs and NHRIs networks. NHRIs could make use of these avenues to promote procedural safeguards already in the legislative process at the EU level.

The EU ordinary legislative procedure requires the Commission to submit a proposal to the European Parliament and Council. The Commission is obliged to engage with citizens and 'maintain an open, transparent and regular dialogue with representative associations and civil society'.[337] In this context to prepare a legislative proposal, it can carry out **consulta-**

**tions with the public, stakeholders and experts**. Subsequently, Green and White papers might be adopted. The purpose of these papers is to launch a debate with the public, stakeholders, the Parliament and the Council in order to facilitate a political consensus. Moreover, the Commission carries out **an impact assessment** to analyse the direct and indirect implications of a proposed measure that again can build up on reports and assessments of experts.[338] Particularly efficient in this sense, may be joint opinions submitted by groups of NHRIs or through NHRIs networks. The Parliament, the Council or a million citizen can invite the Commission to submit a legislative proposal. Thus, the tool to submit a **petition to the European Parliament** could also be considered by NHRIs. They can – as every natural or legal person in the EU – submit a petition to the European Parliament. For example, it can have the form of a complaint, a request or an observation concerning problems related to the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter.[339]

### 3.5.2. Engaging in the national transposition and implementation process of EU instruments

EU law requires the Member States to transpose the Directives in their national laws but also to introduce regulations and other measures that ensure that the provisions are complied with in domestic law.[340] Moreover, apart from the legal transposition process also the practical implementation of the provisions enshrined in the Directives should be assessed. Given their role and powers NHRIs could not only make sure that EU Directives are correctly transposed and implemented by the Member State but also monitor that the procedural safeguards set up in the relevant legislation are applied effectively in practice (see Chapters 3.3, 4 and 5).

***Slovenia***

*The Ombudsperson has been involved in the 2014 amendment of the criminal Procedure Act, transposing the EU Directives concerning the right to information and right to translation and interpretation. Further, the Ombudsperson under the NPM mandate, cooperated with the Ministry of Interior when adapting the forms related to arrest and police detention to ensure proper implementation.*[341]





### 3.5.3. Engaging in the infringement procedure

The Commission identifies possible infringements of EU law against a Member State either on the basis of its own investigations or following complaints or petitions from citizens, members of the public, businesses, NGOs or other organisations. NHRIs can – as any natural or legal person – file such a complaint with the European Commission.[342] This might be a useful tool if a country faces challenges in the field of rule of law and cannot rely on the national procedures to strengthen human rights.
For the concrete Procedure:[343]

- Anyone can file a complaint with the Commission free of charge.
- A complaint cannot be filed anonymously.
- Complainants do not have to demonstrate a formal interest in brining proceedings. The NHRI does not have to prove that they are principally and directly concerned by the infringement complained about.
- Once a complaint has been submitted to the Commission the a pplicant (i.e. NHRI) NHRI will lose control over the case. The Commission decides whether or not further actions should be taken on the complaint. Thus, it is essential to prepare complaints that are solidly documented, highlighting patterns of conduct rather than mere anecdotal evidence based on a small handful of individual cases.

# 4. MONITORING PLACES OF DETENTION[344]

## Key points

1. If the mandate to monitor places of detention lies with another domestic human rights body (e.g. NPMs), NHRIs should ensure close cooperation and coordination, by e.g. exchanging information, conducting joint activities, and following up on respective recommendations. However, if no specialised monitoring body exists, NHRIs should conduct monitoring visits to places of detention, whilst at the same advocating for the establishment of an NPM.

2. Procedural safeguards in the early stages of detention have been recognised as one of the most effective guarantee to prevent torture and ill-treatment as well as violations of the right to a fair trial and the right to liberty and security. With their powers and access, monitoring bodies can play an important role in verifying that procedural rights are effectively implemented in practice and that information on rights is given and understood. Hence, human rights bodies with a monitoring mandate should consider prioritising procedural rights in their monitoring strategies. If necessary, they should reflect on how to adapt their methodology. To monitor procedural safeguards, they could for example:

   - Check the relevant documentation, e.g. letter of rights, list of duty lawyers, verify custody and detention registers, audio-visual records etc
   - Check the confidentiality of lawyer-client consultations
   - Conduct private interviews with suspects and accused in police stations
   - Use retrospective interviews not only with detainees in police custody but also in pre-trial detention or in prisons
   - Undertake special thematic visits, reports, surveys on procedural rights

   To ensure reliability, findings can be cross-checked and corroborated with information gathered from other sources and methods.





3. NHRIs should make full use of EU laws while monitoring places of detention. For example, particularly useful for monitoring bodies could be EU law standards on the right to information, right of access to a lawyer and record keeping.

### PARIS PRINCIPLES

The Paris Principles state that 'a national institution shall be vested with competence to promote and protect human rights'.
**(1).** According to the SCA, this includes monitoring as well as 'unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice (G.O. 1.2).

### OPCAT, ART 19

NPMs have the powers:
**(a)** To regularly examine the treatment of the persons deprived of their liberty in places of detention;
**(b)** To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations.

### CRPD, ART 33(2)

Independent mechanisms should 'protect' and 'monitor' the implementation of the Convention.

### 4.1. Checking the relevant documentation

When visiting a facility with a view to monitor procedural safeguards, there are a number of aspects monitoring bodies should put the focus on.

#### 4.1.1. Letter of rights and other information leaflets

Monitoring bodies should check if information about procedural rights is provided to suspects and accused, in what form (i.e. if it provided orally and in writing) and languages. To this extent, monitoring bodies could verify that suspects or accused who are deprived of liberty are provided promptly with a **written Letter of Rights**, that they are given the opportunity to read and keep the Letter in their possession throughout the time that they are deprived of liberty.

***Hungary***

*For example, in the framework of its NPM mandate, the Hungarian NPM made recommendations to amend the excessively long and inaccessible letter of rights disseminated to detainees held at police stations. The NPM stated that the rights of the detainees must be expressed in clear and easily understandable manner. It further specified that when the detainees receive the letter of rights, it is necessary to verify whether they are able to read it and understand what has been written there. If the person is illiterate, he needs to be informed about his rights and obligations verbally in the presence of two witnesses in order to ensure the fair trial guarantees.*[345]

Moreover, monitoring bodies could verify that information on procedural rights are made generally known throughout all places of detention, including police station, through the use of signs or posters inside and outside cells, where detainees can see them (e.g. there is sufficient light).[346] The display of general information, however, should be additional to and not replacing the handing over of the Letter of Rights.





***Poland***

*After many years of discussions, the Polish NPM managed to persuade the Ministry of Internal Affairs and the police that the house rules including certain procedural rights should be put on the walls of detention facilities.*

Additionally, monitoring bodies may check if measures to implement the right of access to a lawyer from the early stages of detention are taken. This may include verifying if police stations are equipped with **a list of duty lawyers**, as well as that the system of appointing duty lawyers is not administered by the police but by the Bar Association to ensure the independence and quality of the legal representation.

***Poland***

*In Poland, the NPM checks during its visit whether there are lists of lawyers on duty available at police stations. They reported that while some already had it, in others no one knew that they were supposed to have it.*[347]

***Slovenia***

*The Slovenian NPM also recommended that a list of ex officio lawyers that detained people can consult and use should be compiled for each police station, in consultation with the Bar Association. The NPM also specified that such lists should be placed in the room intended for the admittance of persons deprived of their liberty and updated every three months. Furthermore, the NPM mentioned in its report that all ex officio lawyers should be reminded, through appropriate channels, of the importance of their role in preventing and, if necessary, reporting ill-treatment or intimidation by the police.*[348]

Additionally, to make sure that the right of access to a lawyer is effective monitoring bodies could check also if there are always the same lawyers present at police stations, and how long lawyers were at the police station for.

### 4.1.2. Custody and detention registers[349]

The 'meticulous registration' of all arrested and detained persons is an additional guarantee to protect individuals against arbitrary detention and torture and ill-treatment.

Monitoring bodies should verify that there exists a **central and comprehensive custody record** to register each person detained and on which to record all aspects of his custody and action taken regarding them, including procedural rights. Any fragmentation and dispersion of the information makes it in fact more difficult or impossible to trace the detention's pathway and understand the nature of alleged cases. The maintenance of such registry is not only a fundamental safeguard against torture or ill-treatment itself but also an essential condition for the effective exercise of due process guarantees, such as the right of the detainee to be brought before a judge promptly and the right to challenge the legality of the detention.[350]

Hence, monitoring bodies should also check that **detention registers include the necessary information on procedural rights**, and are compiled accurately and in line with international standards.

**Austria**

*The Austrian NPM pointed out in its 2017 annual reports that the police did not properly document whether the detained persons had been informed about their rights at the police station.[351] In this regard, the NPM recommended that 'public security officers must "verifiably" instruct detained persons of their rights ... Only in this way can the NPM – and the courts if a complaint was filed – review whether and to what extent an instruction was actually given.'[352] To overcome this problem, the Austrian Ministry of the Interior undertook a number of measures, such as sensitisation measures at individual police stations and reminded all police departments of the requirement for full documentation of detentions in a decree,[353] accepted the recommendation of the NPM to have uniform documentation of detention for the whole country (in 2016).*

*Nevertheless, in 2017[354] and 2018,[355] the NPM kept finding deficits in the documentation. In July 2017, the Ministry of the Interior adopted a decree stipulating that all police stations with usable cells must keep a compulsory detention book and arranged training and awareness measures.[356]*





Proper documentation should include not only whether information about the rights is provided but also if the detainee decides not to make use of the relevant rights **waiving** them. In such cases, the CPT recommends that the signature of the detainee should be obtained and, if necessary, the absence of a signature explained.[357]

**Slovenia**

*During its visits to police stations, the Slovenian NPM reviewed the documentation of a number of detentions. The NPM reported to have found several deficiencies at the majority of the police stations visited, e.g. incomplete information form/or use of old forms. The NPM also identified a case of an incomplete form, which was lacking specific information on the waiver by the detainees of his right to notify a third person about the deprivation of liberty. In this last case, the NPM also referred to one individual complaint on the issue received by the Slovenian NHRI and a recommendation by the CPT. The complainant claimed that during their deprivation of liberty they were not given the possibility to notify t heir family members of their arrest and detention. Police documents showed that the foreign nationals were informed of the rights of a detained person, including the right to notify family members, however, the form did not request the detainee to confirm whether it had made use or waived this right with a signature. The Ministry of Interior explained that this was not specifically anticipated in the existing forms, and that 'the form in which police officers record information on the (non) enforcement of rights of detainees will be updated with the possibility of adding the detainee's signature is encouraging.'[358]*

As mentioned above (see above Chapter 1), EU law provides a detailed framework on the procedural rights and their waiver. Moreover, EU law provides specific obligations for Member States to ensure that the information provided to suspects or accused persons is noted using the recording procedure specified in the national law. Hence, monitors should review the correctness of record keeping also in light of EU standards.

### Table: EU legislation

| Relevant right | Aspects to be recorded |
|---|---|
| Right to information (Art 8) | • If the person was informed about his/her rights<br>• If the person was given the Letter of Rights on arrest/in Arrest Warrant proceedings<br>• If the person was given information about the accusation |
| Right to interpretation and translation (Art 7) | • If they are provided with interpretation, without delay, before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings<br>• If an oral translation or oral summary of essential documents has been provided<br>• If the person has waived the right to translation |
| Right of access to a lawyer (Arts 3(3)(b), 8(2), 9(2), 10(2)(c)) | • If the lawyer has participated in questionings, or hearings in Arrest Warrant proceedings<br>• If the right was temporarily derogated with a duly reasoned decision<br>• If the right was waived under what circumstances |
| Right to communicate with a third person (Art 8 (2)) | • If the right was temporarily derogated with a duly reasoned decision |

#### 4.1.3. Audio-visual recordings

Where available, monitoring bodies should also monitor audio-visual recordings (see above, Chapter 1.4.6).

***Poland***

*During the visit the team viewed the footage from the video surveillance which documented the use of direct coercion measures against the residents of the juvenile detention centre.[359] The analysis indicated a number of irregularities concerning the legality of their application, adequacy of use and documentation.*

***CPT***

*During its visit United Kingdom/Northern Ireland in 2001, having received allegations about an incident in an interview room, the CPT delegation viewed the video tape which corresponded to the period in question. The tape contained clear images of the detainee being physically ill-treated by both uniformed and detective officers. The recorded material was based on at least three separate viewings of the video footage in question (manually adjusted to real time) by three different members of the CPT's delegation. By manually synchronising the silent video footage of interviews with the relevant audio tapes, the CPT's delegation was able to ascertain that some detectives are indeed conducting unauthorised "off-tape" interviews of up to five minutes with detainees. [360]*





### 4.2. Observing police interviewing

In addition to viewing or listening to recordings, another way for monitors to verify that procedural rights are respected is by observing interrogations. Observing police interviewing may, however, interfere with the investigative process and some noted that this may fall outside the purpose of the preventive monitoring.[361] While no practice among national monitoring bodies (i.e. NHRIs/NPMs) was found in the course of the project, the CPT has made use of such tool while conducting monitoring visits in certain cases.

***CPT***

*For example, in its visit to Norway in 2018, the CPT delegation had inter alia the opportunity to observe two police interviews of criminal suspects at Oslo Police Headquarters.[362]*

### 4.3. Checking the confidentiality of lawyer-client consultations

An additional element that can be verified by the monitors is whether there are adequate facilities to guarantee the **confidentiality of lawyer-client consultation** in the facility.

***Hungary***

*For example, after exchanging with the Hungarian Bar Association, the Hungarian NPM identified communication between detainees and their lawyers as a problematic issue. One case, for example, concerned a*

*detainee who could not consult and his lawyer properly because due to a Plexiglas between them they could not hear each other, or because they could not exchange documents because the openings serving this purpose were welded.*

### 4.4. Interviewing detainees

Interviews with detainees are key sources of information with regard to the rights of suspects and accused. Over the course of the project, monitoring bodies raised some concerns in this regard.

It was highlighted that procedural safeguards in early hours of detention are more difficult to monitor in practice, compared to prisons conditions. In police stations, the population is continually changing and, therefore, monitoring can be challenging.[363] For these reasons, some monitoring bodies said they would interview the suspects, only if they are present at the police station during their visits.[364]

However, monitoring bodies can overcome this situation by conducting **retrospective interviews with persons in pre-trial detention (remand custody) or in prisons** about their experience in police custody. A CPT representative confirmed that it is true that it may be difficult to monitor police custody because often detainees are held in police stations only for a very restricted period of time, but also added that CPT overcomes this issue in two main ways: by i**nterviewing people in remand custody** about their experience in police custody; and by using **good interviewing techniques**, e.g. avoiding leading questions, but starting with open "chronological questions" (e.g. "can you tell us what happened when you have been arrested"), and only at the end, if information are missing, asking further specific questions.[365]

***Austria***

*Retrospective interviews with pre-trial detainees were conducted by the former Austrian Human Rights Advisory Council of the AOB (Menschenrechtsbeirat). In the interviews, the HRAC addressed specifically the arrest and all earlier phases of the detention.[366] At the time, a special agreement was reached to conduct interviews with pre-trial detainees in JA Josephstadt in the area where detainees would normally receive their visits. The interviews dealt with the arrest and earlier phases of their detention. They were cross-checked with protocols and 'Haftberichte' in their JA files. However, this activity was not further pursued after the NPM was established.*





The key advantage of retrospective interviews with detainees in pre-trial detention or prison is that the risk of reprisals is lower.

*'It is not just "knowing about the right" it is also about "having the confidence to speak about it". When people are in prison, they are more ready to speak about the time of their arrest, because they do not fear reprisals from police officers. But if asked about it at police stations they might not speak about it.'*

*Richard Carver, 1 September 2019*

Other monitoring bodies, given the limited number of detainees in police stations during the day, have taken the approach of conducting **night visits to police stations** (e.g. Croatia).

### 4.5. Triangulation: combining different sources and methods

When monitoring procedural rights monitoring bodies should have a strong focus on cross-checking information and on substantive questions and depart from only formalistic approaches.[367]

To make sure that findings are reliable, monitors should cross-check different sources of information according to the principle of triangulation, including for example direct observations made by the team during the visit, information received through interviews with the authorities, staff and professionals taking care of the persons deprived of their liberty.[368]

While interviews with detainees and staff in charge of their care remain an important source of information, a thorough assessment of the practice of police and pre-trial detention requires information to be gathered from a broad range of stakeholders and methods.

Ways to cross-check information may include additionally e.g.:

- Interviewing different detainees persons deprived of their liberty. In this regard, a CPT representative mentioned that they often interview different detainees that have never met/are in different facilities, and if all allegations correspond then they find allegations to be highly credible.[369]
- Interviewing and/or gathering information from other sources including for example ministries of justice, health and finance; prosecutors; judges; magistrates; professional associations; legal aid providers; trade unions of police officers and prison guards; civil society organizations; faith-based organizations; the media.[370]
- If available, reviewing files and registers in the place of detention and audio-video recordings.
- Gathering information from individual complaints, e.g. the number of similar complaints behind an allegation that can indicate a systematic problem in practice.
- Using other methods such as thematic visits, thematic reports, surveys etc.

***United Kingdom***

*An interesting example comes from the UK the Criminal Justice Inspection Northern Ireland which (within its NPM mandate) conducted a 'survey of prisoners'. The survey posed a series of questions about the prisoners´ most recent experience of police custody. It included questions on procedural safeguards, such as the right of access to a lawyer, right to information and right to interpretation. Based on the 'survey of prisoners', the NPM published a report depicting the experiences of the prisoners also in relation to ensuring their procedural safeguards in police custody.*[371]

***Croatia***

*The Croatian NPM cross-checks the information received by inmates against police custody records and interviews with police officers. In additional, medical files are cross cross-checked against the relevant documentation in police stations and interviews with medical staff.*





# 5. COMPLAINTS HANDLING AND PARTICIPATION IN COURT PROCEEDINGS

## Key points

1. Where the mandate to handle individual complaints lies with another domestic human rights bodies, the NHRI should ensure close cooperation and coordination with those bodies, e.g. by exchanging information as well as following up on their recommendations.

2. Although the important principle of the independence of the judiciary should always be safeguarded, NHRIs with complaints handling mandate should have the power to receive complaints on criminal procedural rights at a minimum concerning the investigation phase, e.g. police proceedings. If the national laws provide for exceptions in which the NHRIs can receive individual complaints when a case is simultaneously pending before a court, such as 'excessively long proceedings', 'evident abuse of authority', 'in cases of manifest abuse of power', these should be interpreted broadly. In any event, the fact that an individual complaint is inadmissible should never prevent the NHRI from tackling the more general human rights issues arising from the case.

3. All NHRIs should be active in promoting the adherence and compliance of the judiciary to international human rights norms and should support the judiciary to protect and promote human rights. To this aim, NHRIs could for example:
   - Refer cases to the attention of the judicial authority
   - Initiate proceedings before courts and/or lodge appeals
   - Intervene as third parties in legal proceedings at the national, regional and international level

   These proceedings are formal avenues of cooperation between the NHRIs and the judiciary that acknowledge a clear divisions of roles and ensure the respect of the court's independence. In doing so, NHRIs should make full use of EU laws and procedures in exercising their mandate.

## 5.1. Individual complaints before the NHRIs

### PARIS PRINCIPLES

The Paris Principles provide that quasi-judicial powers, such as complaints handling concerning individual petitions, are only optional and not a necessary element of NHRIs' mandate.[372]

### CRPD

**Art 33(2)** CRPD states that independent mechanisms should 'protect' the implementation of the Convention. The CRPD Committee interprets it as 'taking into consideration individual or group complaints alleging breaches of the Convention' and 'conducting inquiries'. [373]

### VENICE PRINCIPLES

**Preamble** "… The right to complain to the Ombudsman is an addition to the right of access to justice through the courts".

In the EU area, a considerable number of NHRIs (14 out of 24) have the power to handle individual complaints.[374] All 14 NHRIs are ombudsinstitutions.

In some countries the mandate to handle individual complaints lies with domestic human rights body other than NHRIs (e.g. France, Sweden, and Netherlands). Also these bodies often play an important role in protecting procedural rights. One interesting example comes from the French Ombudsperson (Defender of Right).[375]

***France***

*In 2017 a claim was lodged with the Defender of Rights (Ombudsperson) regarding the practice of using glass boxes in criminal courts and whether they infringed the rights of defence, including the presumption of innocence as well as if they amounted to degrading treatment. In April 2018 the French Ombudsperson made the decision that the systematic appearance of defendants in secured glass boxes in court restricts their defence rights, especially the right to be presumed innocent and may amount to degrading treatment in certain conditions.[376] The the French Ombudsperson further pointed out that the systematic installation of secure boxes was not proportionate to alleged security concerns, as no individual risk assessment is carried out before the hearings.[377] In this case, the defendant recalled both the* ***jurisprudence of the ECtHR*** *(Karachentsev v Russia[378]. Svinarenko et Slyadnev v Russia)[379] and the* ***EU Directive on the Right to be Presumed Innocent****.[380] He decided that the indiscriminate use of glass boxes in criminal courts especially runs contrary to EU legislation, including the Directive on the Right to be Presumed Innocent.[381] This Directive requires Member States to "[…] take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public […]" (Art 5 Directive)[382].*

In those cases, NHRIs should ensure close cooperation and coordination, for example by exchanging information as well as following up on their recommendations. These could be done by following on the issues arising by the case by conducting promotional activities, writing opinions for a change in law and in practice, conducting general human rights investigations or other activities such as monitoring visits to places of detention.

In the EU, however, the power to handle complaints lies with the NHRI in most cases. Nevertheless, the competence of NHRIs to receive complaints in regard to procedural rights is rather limited due to the principle of independence of the judiciary (see above, Chapter 2.3). Most NHRIs laws establish a **principle of subsidiarity** with a view to preserve their complementary in respect to the judiciary.[383] This in practice means that complaints that are simultaneously pending before a court are inadmissible and that complainants are thus first required to exhaust domestic remedies (e.g. Croatia, Slovenia, Austria, Cyprus, and Spain).[384] Other laws additionally define as inadmissible complaints that have already been decided by a court of law (e.g. Hungary, Lithuania, Czech Republic, Estonia and Slovakia).[385]

However, many NHRIs can receive complaints about procedural rights especially when they are relating to the investigative phase, e.g. police proceedings and the pre-trial phase. Some interesting examples in this sense come from the practice of the Slovenian Ombudsman.

**Slovenia**

*The NHRI of Slovenia stated that so far they received only a few individual complaints, namely 2-3 cases per year concerning free legal aid. For example, in 2017 it received a complaint about an individual who needed a lawyer during the summer holiday. In this case, the police did not manage to find a lawyer, since the one potential lawyer was on holiday and, hence, unreachable. In such a case, the NHRI recommended to the bar association to prepare a list of lawyers available during the holidays.*[386]

**Slovenia**

*In 2017 the Slovenian NHRI processed a petition put forward by three foreign nationals detained by the police. They claimed that during their deprivation of liberty they were not given the* ***possibility to notify their family members of their arrest and detention****. Police documents showed that the foreign nationals were informed of the rights of a detained person, including the right to notify family members, however, while they did not request family members or other people be notified, they did not confirm this with their signature. The Ministry of Interior explained that this was not specifically anticipated in the existing forms. The CPT also perceived problems in this area during its 2017 visit to Slovenia. At the end of the visit, the delegation suggested that the Slovenian authorities include the information as to whether the detainee availed themselves of their rights or waived them in a document to be signed by the detainee. The communication by the Government of the Republic of Slovenia that the form in which police officers record information on the (non) enforcement of rights of detainees will be updated with the possibility of adding the detainee's signature is encouraging."*[387]





Even beyond police proceedings and the pre-trial phase, many NHRIs laws also provide for exceptions and some NHRIs can receive individual complaints even when a case is simultaneously pending before a court in certain specific cases, such as 'excessively long proceedings' (e.g. Austria, Slovenia and Croatia)[388] but also 'evident abuse of authority' (e.g. Slovenia),[389] 'in cases of manifest abuse of power' (e.g. Croatia).[390] These exceptions are normally justified because they are considered to fall within the notion of 'administration of justice', and therefore are considered as 'admissible' interferences to the judiciary (see above, Chapter 2.3). Given their specific mandate to protect and promote human rights, NHRIs should consider interpreting these exceptions in a broad manner.

In any event, the fact that an individual complaint is inadmissible should never prevent the NHRI from investigating the more general human rights issues arising from the case. As recommended by Amnesty International, "[t]he fact that a complaint has been charged and a criminal prosecution is under way should not be a pretext for stopping NHRIs from acting on a complaint, or taking any other action within their mandate to address human rights concerns. Where prosecutions are pending, the NHRI should not consider the substance of the criminal charge, but should be able to look at ancillary matters relating to human rights of the accused person, for example, allegations that he or she has been tortured while in custody."[391] Some national laws explicitly regulate this situation.

**Spain**

*Art 17 (2) El Defensor Del Pueblo, Organic Law*
*"The Ombudsman shall not investigate individually any complaints that are pending judicial decision, and he shall suspend any investigation already commenced if a claim or appeal is lodged by the person concerned before the ordinary courts or the Constitutional Court. However, this shall not prevent the investigation of general problems raise in the complaints submitted. In all cases, he shall ensure that the Administration, in due time and manner, resolves the requests and appeals that have been submitted to it."*[392]

## 5.2. Engaging with courts

### PARIS PRINCIPLES

The Paris Principles provide that NHRIs should have an advisory function but do not contain any explicit reference on the participation of NHRIs in court proceedings. Many NHRIs have the power to intervene in court proceedings as one means of undertaking this function. Moreover, Article 3 (3) (e) of the Paris Principles explicitly provides that NHRIs have the responsibility to cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the area of the protection and promotion of human rights. Many NHRIs use this provision to justify their mandate to intervene in international and regional court proceedings.

### NAIROBI DECLARATION

Additional guidance is included in the Nairobi Declaration which encourages NHRIs to contribute to the promotion of the role of the judiciary in promoting and protecting human rights by not only providing recommendations to strengthen the legal system and judiciary, but also by promoting 'adherence and compliance of the judiciary to international human rights norms, including through amicus [curiae] and legal education'.

### CRPD, ART 33

'Protection activities include … referring cases to the courts; participating in judicial proceedings'

### VENICE PRINCIPLES

**19(2)** The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts





Besides handling individual complaints, NHRIs have several other ways to protect the individual rights of suspects and accused. This may include referring cases to competent authorities, initiating procedures before courts or lodging appeals, as well as intervening in legal proceedings. These are formal ways for NHRIs to engage with courts, governed by clear legal procedures and acknowledging the importance of the principle of judicial independence.[393]

### 5.2.1. Referring cases to other competent authorities

Given the nature of their quasi-judicial powers, NHRIs will inevitably receive individual complaints that they do not have the competence to deal with. Their practice should be to refer such complaints to the appropriate body.[394] A referral by NHRIs may increase the probability of a sanction, although all decision is ultimately with the judiciary.[395]

### 5.2.2. Right to initiate proceedings and lodge appeals

Some NHRIs are mandated to initiate legal proceeding. When it comes to initiate criminal proceedings, NHRIs may have the power to demand to **initiate criminal investigations or police inquiries** in cases involving offences prosecuted *ex officio*. However, only few NHRIs have this power (e.g. Poland and Finland) and also those who have it seem to use it very rarely, hence, no concrete example could be found over the course of the project.

***Poland***

*The Polish NHRI is entitled to demand that criminal proceedings (i.e. an investigation or inquiry) be initiated by a competent prosecutor in cases involving offences prosecuted ex officio.*[396]

***Finland***

*The Ombudsman may order that a police inquiry, as referred to in Police Act (493/1995) or pre-trail investigation, as referred to in the Pre-Trial Investigation Act (449/1987) be carried out in order to clarify a matter under investigation by the Ombudsman.*[397]

Additionally, some NHRIs are entitled to lodge appeals before upper courts.

**Poland**

*The Polish NHRI is entitled to lodge appeals before the Supreme Court. In particular, if the NHRI is lodging a cassation in favour of the accused, it is not bound by any time-limits. The NHRI has used this power in several occasions concerning procedural rights before the Supreme Court, including the right to information, the right to interpretation and translation, the right to access to a lawyer filed cassations, and the procedural rights of vulnerable persons. In none of these cases, however, the relevant EU instruments have been mentioned.*[398]
*For example, in December 2018 the Polish NHRI filed a cassation with the Supreme Court in the case of Piotr P., a man with intellectual disability convicted to 25 years for a double murder on basis of his testimony given first during an informal interrogation without a defence lawyer. After he confessed, he was subsequently heard as a witness and only afterwards as a suspect. It was only at this last stage when he was informed about his procedural rights. In the cassation, the Polish NHRI among others indicated that the minutes of the hearing of Piotr M., which served as the basis for the key factual findings unfavourable to the accused, are not reliable in a case where a person with intellectual disability, susceptible to suggestions, was heard without a lawyer and the questions of police officers were not included in the minutes.*[399] *The case is still pending before the Supreme Court.*

Another important power that NHRIs may have is to lodge an **appeal concerning an individual violation of human rights before the Constitutional Court** (e.g. Spain and Slovenia).[400] No examples relating to procedural rights could be found in the course of this research. Such power has however been used several times to protect other fundamental rights, and could in principle be used also for procedural rights in criminal procedure.

**Slovenia**

*For example, in 2015, with the consent of the person affected, the Slovenian Ombudsman filed a constitutional complaint against the decisions of the court of first instance (Ljubljana District Court), second instance (High Court in Ljubljana), and the highest court in the country (the Supreme Court of the Republic of Slovenia). The Constitutional Court of the Republic of Slovenia informed us that the panel, during the procedure for examining the constitutional complaint at its session of 12 July 2016, adopted the Decision (number Up-563/15-7) to accept the constitutional complaint for consideration. In 2017, at the Constitutional Court of the Republic of Slovenia, the Ombudsman was successful with a constitutional complaint against the decisions of the court of first instance (Ljubljana District Court), second instance (High Court in Ljubljana), and the highest court in the country (the Supreme Court of the Republic of Slovenia) with regard to involuntary detention for treatment in a psychiatric hospital.*[401]





### 5.2.3. Interventions in court proceedings

Third party interventions are interventions made with a view to support the court in taking a certain decision. Third party interventions are thus a very useful tool for NHRIs to support judicial authorities in protecting and promoting human rights and can play an important role in the human rights education of judges,[402] e.g. with the presentation of information on the practical information of national laws, national case law or statistics.[403] More generally, they can be a useful resource for the whole community of human rights defenders.

Some NHRIs laws explicitly grant the power to intervene in legal proceedings (e.g. Ireland), yet many national laws are silent on the point of third party interventions.

**Ireland**

*Section 30(1) Equality Act 2006 which states: "The Commission shall have capacity to … intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function."*

***Slovenia***

*Slovenian laws states that that the NHRI may submit its opinion from the perspective of protection of human rights and fundamental freedoms to any authority in a case under consideration, regardless of the type or level of procedure that is concerned before these authorities.*[404]

***Netherlands***

*The national laws neither explicitly allows nor excludes third party interventions. It says however that the NHRI has the responsibility to cooperate with international organizations. Hence, the NHRI interprets the national law as to allow third-party intervention as a means to cooperate with international organizations.*[405]

At the **national level**, few EU NHRIs laws explicitly allow to intervene as third parties in criminal proceedings.[406] Oftentimes the powers of NHRIs to intervene are limited only to civil and administrative proceedings.[407] There are however examples of third party interventions in criminal proceedings at the national level in Ireland. It shall be noted however that normally in order to intervene as a third party, NHRIs must obtain the permission of the Court to ensure the respect of the court's independence.[408]

***Ireland***

*In the 2019 case **Sweeney v Ireland**, the Irish Equality and Human Rights Commission has been granted leave to intervene before the Supreme Court in a significant case examining the right to silence when a person is questioned as part of a criminal investigation.*[409]

*When granting liberty to intervene in a court proceeding the judiciary can also identify specific areas upon which the intervener may seek to assist the Court. For example, in the **Celmer** case the Irish NHRI was granted leave to provide a submission on specific areas, such as the standard of proof, the burden of proof, the evidentiary standards to identify fair trails infringements.*[410]





NHRIs can also intervene before international or regional courts.[411] This possibility has been used on several occasions **before the ECtHR** in the past and the number of cases in which NHRIs do so is growing.[412] Under the ECtHR system, an amicus curiae is a person or organization who has an interest in or views on the subject of a case and who, without being a party, asks the ECHR for permission to submit a brief proposing factual and legal arguments to support a decision in accordance with their own views.

Third parties may be allowed to submit written comments[413] or take part in a hearing once notice of an application has been given to the respondent Contracting Party.[414] While the Court has referred to this possibility as a "right to intervene",[415] it still requires for the President of the Court to authorize the intervention…". Generally speaking authorizations are routinely granted.[416] There is no specific form for an intervention, no fee for requesting permission nor the need to seek the consent of the parties.[417]

***Netherlands***

*This possibility has been used for example by the **Netherlands Institute for Human Rights** in cases with a relevance for criminal proceedings. For example, in Hasselbaink v. the Netherlands (73329/16) and in Maassen v. The Netherlands (10982/15). The brief focused on the right to liberty and security (Article 5 ECHR) and, more specifically, on the importance of a well-reasoned detention order, underlining the value for Dutch criminal law judges of a judgement by the ECtHR on the matter.*[418]

*Another interesting case concerned the submission in **Magee v. Ireland** (53743/09) by the Irish Human Rights Commission comments on the refusal of legal aid to a woman whose son died in custody and then sought legal aid for the inquest.*[419] *The IHRC focusses in its submission on the structure and reform initiatives of the coroners system, civil legal aid and standards in police custody in Ireland, thus providing relevant insights on national circumstances. The case was later settled between Ireland and the applicant.*

Under EU law the possibility for NHRIs to **participate in cases before the CJEU** is significantly more limited. The CJEU specifies that only specific actors may participate before the CJEU.[420] This is possible in both preliminary references and direct action.[421] The more relevant actions are however preliminary references.[422] In order to participate in a preliminary reference proceeding, the NHRI would need to be party to the main domestic proceedings prior to the reference being made.[423] Any party to the national case can request a preliminary ruling before the CJEU. Also an intervener in domestic proceedings has the possibility to recommend in its oral or written submissions that the court makes a preliminary reference on an issue that it has raised. Should the domestic court conclude that a reference is required it will submit the reference to the CJEU. This submission will usually be drafted by the party requesting it. The court may then give the intervener the chance to commentate on the suggested draft reference.

Yet an intervention in domestic proceedings does not assure being recognized as a main party before the CJEU and still requires the CJEU authorisation. This was clarified in **R (British American Tobacco UK Ltd) v Secretary of State for Health**,[424] where the CJEU pointed out that not every intervener can be considered automatically a party and that "some level of proportionate restraint should be exercised and encouraged on the part of domestic courts in the categorisation of all those anxious to participate as "parties"."[425] Interveners with 'adequate interest' in the result of the proceedings will however typically be granted standing to appear in the CJEU. Much like in domestic proceedings, the CJEU will not allow an intervention for no reason and is especially sensitive to interventions that may delay the proceedings for no justifiable reason.[426]

Despite the limited opportunities provided by EU law, there are some examples of NHRIs who have participated in proceedings before the CJEU, although not on cases concerning procedural rights.

### *Poland*

*The Polish NHRI is currently involved in four cases before the CJEU. All of the four cases concerned the question of the independence of the judiciary. Two are civil cases held before the Supreme Court[427], one is an o*





*administrative case held before the Supreme Administrative Court[428] and the last is a joined case from two common courts[429]. The Polish NHRI used his power to join the proceedings at the domestic level as third party intervener to become a participant before the CJEU.[430]*

In general, however, EU law makes NHRIs participation before the CJEU very difficult, because it requires NHRIs to first be a party or a third part of domestic proceedings. If this certainly protects the CJEU from receiving too many amicus curiae briefs, it also poses an obstacle to a possible fruitful dialogue between NHRIs and the CJEU on the fundamental rights, and may be an additional reason why NHRIs do not often use or refer to EU law in their work. It is therefore advisable to amend the relevant EU law provisions in order to grant NHRIs the right to intervene before the CJEU similarly to that before the ECtHR.

Particularly effective may be **joint submissions** that is amicus curiae submitted by a coalition of NHRIs or a network. Joint interventions can give NHRIs' voice more authority and limit the impact on the workload of courts. Moreover, joint submissions can be used to provide courts with a comparative overview of the different national systems.

### *Joint submissions*

*Thus far there was no intervention regarding the rights of suspects and accused but the possibility was used in other instances, such as the cases **Strøbye v. Denmark** (25802/18) and **Rosenlind v. Denmark** (27338/18) submitted by ENNHRI under the lead of the Danish Institute of Human Rights;[431] and the case **Gauer and others v. France** (61521/08) in the framework of which IHRC worked in cooperation with the CNCDH and on behalf of the European Group of NHRIs (now ENNHRI).[432]*

*In the **Strøbye v. Denmark** (25802/18) and **Rosenlind v. Denmark** (27338/18) the submission by ENNHRI provided the ECtHR with an overview of the international human rights framework but also of the relevant legislation and jurisprudence across the 17 EU Member States.*

# 6. CONCLUSIONS

After an overview of the key standards on procedural rights as well as the mandate and practice of EU NHRIs, this part concludes the Guidebook by identifying the main recommendations for a greater involvement of NHRIs in the promotion and protection of the procedural rights of suspects and accused in criminal proceedings.

## 1. Prioritize the rights of suspects and accused in criminal proceedings in your strategies.

Although almost all NHRIs have worked on procedural safeguards in criminal proceedings in a way or another, criminal procedural rights do not seem to be among the strategic priorities of NHRIs, and sometimes they are even perceived to fall outside their mandate.

- Procedural rights are 'gateway rights' or in other words crucial safeguards to ensure the respect of a numerous human rights, including the prohibition of torture and ill-treatment, the right to a fair trial, and the right to liberty and security.

- The Paris Principles empower NHRIs to deal with all human rights in the widest sense, including the rights of suspects and accused in criminal proceedings. Moreover, procedural rights are defined as 'core protection issues'.

## 2. Make sure that no rights are overlooked and stand up to safeguard the rights of those who fall outside the protection of other institutions or have no other lobby

Often the biggest challenge in the promotion and protection of procedural rights is that suspects and accused are seen only as subjects of 'ordinary criminal law' but not as human rights holders. There is a risk that those rights are forgotten and overlooked.

- Due to their broad mandate, NHRIs are ideally placed to safeguard the rights of those who fall outside the protection of other institutions or those who have no other lobby





- NHRIs should promote the universal applicability of human rights standards to all persons and raise awareness on the fact that the procedural rights of suspects and accused are human rights

## 3. Interpret your mandate broadly - NHRIs are empowered to address all public authorities, including also the police and the judiciary; as well as private entities (e.g. bar associations, interpreters associations etc.)

Some NHRIs are reluctant to work on procedural rights as they see it as an interference with the judiciary.

- NHRIs with complaints handling mandate should have the power to receive complaints on criminal procedural rights, at a very minimum when they concern the investigation phase, i.e. proceedings before the police and the pre-trial phase. If the national laws limit NHRIs' competence to receive complaints when the same case is simultaneously pending before a court, the laws should also provide for a number of exceptions, such as 'excessively long proceedings', 'evident abuse of authority', 'in cases of manifest abuse of power', which should be interpreted broadly.

- The fact that an individual complaint is inadmissible or that the NHRI does not have a complaint handling mandate should never prevent the NHRI from investigating the more general human rights issues arising from the case. As recommended by Amnesty International, "[t]he fact that a complaint has been charged and a criminal prosecution is under way should not be a pretext for stopping NHRIs from acting on a complaint, or taking any other action within their mandate to address human rights concerns. Where prosecutions are pending, the NHRI should not consider the substance of the criminal charge, but should be able to look at ancillary matters relating to human rights of the accused person, for example, allegations that he or she has been tortured while in custody."

- Further guidance by international bodies on the role of NHRIs vis-à-vis the judiciary is recommended.

### 4. Choose your intervention strategically and make full use of all the tools at your disposal

Some NHRIs replied that they had not undertaken any activities on the rights of suspects and accused because they receive hardly any individual complaints on these issues.

- NHRIs have a broad and multi-functional mandate and should conduct a variety of activities to promote and protect the rights of suspects and accused, spanning from research, training and education, to monitoring visits and complaint handling; from advising the State on the adoption of a new legal instrument to monitoring the practical application of such laws in the domestic context.

- NHRIs should make full use of EU laws and procedures to promote and protect human rights. EU law has become an important source of human rights standards and EU NHRIs should more strategically look into the opportunities that EU laws and procedure offer to promote and protect human rights.

- Further training on the use EU law instruments to promote and protect the rights of suspects and accused in criminal proceedings would be beneficial.

### 5. Coordinate and cooperate with other domestic actors to increase impact

Several NHRIs stated that they have not (yet) worked on the rights of suspects and accused because other bodies (eg, NPMs, Ombudsinstitutions for children) exist in the national context, which are more suited to deal with those issues.

- NHRIs are ideally placed to play a coordination role between the domestic actors, acting a bridge between the different actors involved in the field.





- The breadth and flexibility of the mandate of NHRIs mean that they could use it to reinforce and complement the work of others, for example by following up their recommendations or undertaking awareness raising activities, such as training, education.

- Although this will always depend on the national context, our research showed that there are a number of areas where the cooperation of an NHRI in the field of procedural rights of suspects and accused may bring a specific added value, including:
  - » Promotion activities and public awareness
  - » Training and capacity building
  - » Drafting opinions on laws/draft laws
  - » Monitoring places of detention, especially if no specialized monitoring body exists; but also in order to complement the work of other specialised bodies or departments with OPCAT and CRPD mandate, e.g. by conducting joint visits.
  - » Participation before courts, e.g. appeals for constitutionality review before constitutional courts, and third party interventions before national, regional and international courts

  These powers could be particularly useful to complement the work of other domestic human rights bodies or departments within the same organisation and can contribute to the strengthening of procedural rights.

Moreover, although professional associations and lawyers have been identified as a particularly strong partner in the promotion and protection of procedural safeguards, many NHRIs mentioned that cooperation is often lacking or difficult.

- Initiatives facilitating exchange with professional associations and NHRIs on procedural safeguards of suspects and accused can further enhance the promotion and protection of those rights

### 6. Increase exchange with other EU NHRIs

Several NHRIs found that there is not sufficient exchange on the topic of criminal procedural safeguards especially on an EU level and expressed interest in receiving information on good practices from other countries.

- Initiatives facilitating exchange among NHRIs on procedural safeguards of suspects and accused can further enhance the promotion and protection of those rights.

- It would be beneficial if such initiatives adequately address the issue of cooperation between NHRIs and other domestic human rights bodies, including for example NPMs and Ombudsinstitutions for children or vulnerable persons, and discuss ways in which those institutions can mutually reinforce their efforts.





## BIBLIOGRAPHY


- Amnesty International, 'Amnesty International's Recommendations on Effective Protection and Promotion of Human Rights' (October 2001) <https://www.amnesty.org/download/Documents/128000/ior400072001en.pdf> accessed 6 December 2019
- Austrian Ombudsman, 'Volksanwältin Brinek: Qualität von psychiatrischen Gutachten muss verbessert werden [Quality of Psychiatric Opinion must be improved]' (2018) <http://volksanwaltschaft.gv.at/artikel/Volksanwaeltin-Brinek-Qualitaet-von-psychiatrischen-Gutachten-muss-verbessert-werden?topic_type=topic&topic=9&archiv=0> accessed 30 October 2018
- Austrian Ombudsman, Report on the activities of the NPM 2014
- Austrian Ombudsman, Report on the activities of the NPM 2015
- Austrian Ombudsman, Report on the activities of the NPM 2016
- Austrian Ombudsman, Report on the activities of the NPM 2017
- Austrian Ombudsman, Report on the activities of the NPM 2018
- Asia Pacific Forum (APF), 'A Manual on National Human Rights Institutions' (May 2018)
- APT (Association for the Prevention on Torture), 'Developing International Guidelines on Investigative Interviewing and Associated Safeguards' https://www.apt.ch/en/universal-protocol-on-non-coercive-interviews/ accessed 6 December 2019
- APT, 'Safeguards to prevent torture' <www.apt.ch/en/detention-safeguards/> accessed 30 October 2018
- APT, 'Towards the Effective Protection of LQBTI Persons Deprived of Liberty: A Monitoring Guide' (APT 2018)
- APT, 'Torture Prevention Works!' <www.apt.ch/en/torture-prevention-works/> accessed 30 October 2018
- APT, APT Briefing Series, 'National Human Rights Institutions as National Preventive Mechanisms: Opportunities and challenges' (APT 2013)
- APT, Monitoring Police Custody: A Practical Guide (APT 2013)
- APT, Legal Briefing, Legal Safeguards to Prevent Torture, The right of Access to Lawyers for Persons Deprived of Liberty (APT 2019)
- APT and Penal Reform International (PRI), 'Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment' (2edn, 2015) <https://apt.ch/content/files_res/factsheet-1_pre-trial-detention-en.pdf> accessed 19 July 2019
- APT and PRI, 'Video recording in police custody: Addressing risk factors to prevent torture and ill-treatment' (2nd edn, 2015) <https://apt.ch/content/files_res/factsheet-2_using-cctv-en.pdf> accessed 19. July 2019

- Bizeps, 'Volksanwältin Brinek: „Qualität von psychiatrischen Gutachten muss verbessert werden"' (18 September 2018) <www.bizeps.or.at/volksanwaeltin-brinek-qualitaet-von-psychiatrischen-gutachten-muss-verbessert-werden/> accessed 30 October 2018
- Carver R, 'A new Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' [2010] 10 HRLR 25
- Carver R, Handley L (eds), Does Torture Prevention Work? (Liverpool University Press 2016)
- Carver R, 'One NHRIs or Many? How many Institutions Does it Take to protect human rights? Lessons from the European Experience', Journal of Human Rights Practice 3 (2011)
- Cerny M, Krammer R, Nachprüfende Verwaltungskontrolle und Präventive Menschenrechtskontrolle Kurzskriptum: Kurzskriptum zur Präsentation des Volksanwaltschaftsmoduls in der Polizeigrundausbildung [Lecture notes for the basic police training on the Austrian Ombudsman's mandate] (Schriftenreihe der Volksanwaltschaft – Volume IV, 2017)
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'A brief introduction to investigative interviewing' (2018)
- CPT, 'Access to a lawyer as a means of preventing ill-treatment: Extract from the 21st General Report of the CPT' (2011) CPT/Inf(2011)28-part1
- CPT, '28th General Report of the CPT' (2018) CPT/Inf(2019) 9
- CPT, 'Report to the United Kingdom' (2002) CPT/Inf (2002) 6
- CPT, 'Report to Spain' (2013) CPT/Inf (2013) 6
- CPT, 'Report to Norway' (2019) CPT/Inf (2019) 1
- CPT, 'Juveniles deprived of their liberty under criminal legislation: Extract from the 24th General Report of the CPT' (2015) CPT/Inf(2015)1-part rev1.
- CRPD Committee, 'Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities' (2016) CRPD/C/1/Rev.1, Annex
- Council of the European Union, 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters' OJ C 12, 15 January 2001
- Council of the European Union, 'Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance)' OJ C 295, 4 December 2009
- Criminal Justice Inspection Northern Ireland, 'Police Custody: The detention of persons in police custody in Northern Ireland' (March 2016) <www.rqia.org.uk/RQIA/files/16/16b4138d-4716-4325-9a2a-382930cf615e.pdf> accessed 30 October 2018
- Convention against Torture Initiative (CTI), 'CTI Training Tools 1/2017: 'Investigative Interviewing for Criminal Cases' (CTI 2017)
- De Beco G, Article 33 of the UN Convention on the Rights of Persons with Disabilities National Structures for the Implementation and Monitoring of the Convention (Brill 30 May 2013)







- De Beco G, Murray R, A Commentary on the Paris Principles on National Human Rights Institutions (Cambridge University Press 2014)
- De Beco G, 'Article 33(2) of the UN Convention on the rights of persons with disabilities: another role for National Human Rights Institutions?' (2011) 29 NQHR pp. 84-106
- Bodnar A, 'The situation of the Rule of Law in Poland, in particular as regards the independence of the judiciary' (20 November 2018) <https://www.rpo.gov.pl/en/content/adam-bodnar-public-hearing-%E2%80%9C-situation-rule-law-poland-particular-regards-independence-judiciary> accessed 6 December 2019
- European Network of National Human Rights Institutions (ENNHRI), 'Guide on Third Party Interventions before the European Court of Human Rights' (forthcoming)
- ENNHRI, 'Guide on Third Party Interventions Before the Court of Justice of the European Union' (forthcoming)
- ENNHRI, 'Strategic Plan 2014-2017' <http://ennhri.all2all.org/IMG/pdf/ennhri_strategic-plan_web-2.pdf> accessed 30 October 2018
- ENNHRI, 'Strategic Plan 2018-2021' <http://ennhri.org/IMG/pdf/ennhri__strategic-plan_2018-21.pdf> accessed 30 October 2018
- ENNHRI, Written observations in ECtHR, Strøbye v. Denmark and Rosenlind v. Denmark, No. 25802/18 and 27338/18 <http://ennhri.org/IMG/pdf/ennhri_submission_to_ecthr_on_strobye_v._denmark_and_rosenlind_v._denmark.pdf> accessed 6 December 2019
- EU Agency for Fundamental Rights (FRA), 'National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture of the EU I' (FRA 2010)
- FRA, 'Rights in practice: Access to a lawyer and procedural rights in criminal and EAW proceedings' (FRA 2019)
- FRA, 'Rights of suspected or accused persons across the EU: translation, interpretation and information in criminal proceedings' (FRA 2016)
- European Commission (EC), 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', COM/2011/0327 final
- EC, 'Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings' OJ C 378, 24 December 2013
- EC, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty' (2019) COM(2019) 560 final
- EC, 'Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union' (2003) COM/2003/75 final

- European Council, Tampere European Council Presidency Conclusions, 1999
- European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' (2010) 2010/C 115/01
- European Parliament, 'The End of the Transition Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?' (2014) <www.europarl.europa.eu/RegData/etudes/STUD/2014/509998/IPOL_STU(2014)509998_EN.pdf> accessed 30 October 2018
- European Group of NHRI, Amicus Brief in ECtHR, Gauer and others v. France No. 61521/08, 16 August 2011 < https://it.scribd.com/document/73416199/ECHR-Gauer-v-France-amicus-curiae-EGNHRI> accessed 6 December 2019
- Fair Trials, 'Effective Legal Assistance in Pre-Trial Detention Decision-Making' <https://www.fairtrials.org/sites/default/files/publication_pdf/Fair-Trials-EFPTD-regional-handbook.pdf> accessed 11 December 2019
- Fair Trials, 'Glass boxes in courtrooms violate presumption of innocence, finds French Ombudsperson' (24 April 2018) <http://www.fairtrials.org/news/glass-boxes-courtrooms-violate-presumption-innocence-finds-french-ombudsperson> accessed 6 December 2019
- Fair Trials, 'Roadmap Practitioners Tools: Interpretation and Translation' <https://www.fairtrials.org/sites/default/files/publication_pdf/Access%20to%20Interpretation%20and%20Translation%20Toolkit.pdf> accessed 5 December 2019
- Fair Trials, 'Roadmap Practitioners Tools: Access to a Lawyer Directive' <https://www.fairtrials.org/wp-content/uploads/A2L-Toolkit-FINAL.pdf> accessed 5 December 2019
- Fair Trials, 'Roadmap Practitioner Tools: Right to Information Directive', <https://www.fairtrials.org/sites/default/files/publication_pdf/Right%20to%20Information%20Toolkit%20.pdf> accessed 10 December 2019
- Fair Trials, 'Written comments of Fair Trials to Beuze v Belgium App. No 7149/10 (Grand Chamber)' <www.fairtrials.org/wp-content/uploads/2017/11/171020-Beuze-v-Belgium-Intervention.pdf> accessed 30 October 2018
- Global Alliance of National Human Rights Institutions and UNICEF, 'Children's Rights in National Human Rights Institutions: A Mapping Exercise' (2018) <https://nhri.ohchr.org/EN/News/Documents/GANHRI%20UNICEF%20-%20Children%E2%80%99s%20Rights%20in%20National%20Human%20Rights%20Institutions.pdf> accessed 30 October 2018
- GANHRI, 'General Observations of the Sub-Committee on Accreditation' (2018)
- GANHRI, Subcommittee on Accreditation (SCA), Northern Ireland Report (May 2016)
- Grzelak A, 'Choosing between two Evils: the Polish Ombudsman's Dilemma' in Verfassungsblog (6 May 2018) <https://verfassungsblog.de/choosing-between-two-evils-the-polish-ombudsmans-dilemma> accessed 6 December 2019
- Hungarian Commissioner for Fundamental Rights, Annual Report of 2012
- Hungarian Commissioner for Fundamental Rights, Annual Report of 2017







- Hungarian Commissioner for Fundamental Rights, Report in case No. AJB-3107/2012 and in case No. AJB-3464/2012
- Hungarian Commissioner for Fundamental Right, Report in case No. AJB-3203/2012
- Hungarian Commissioner for Fundamental Right, Annual Report of the NPM of 2018
- International Council on Human Rights Policy and Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Assessing the Effectiveness of National Human Rights Institutions' (International Council on Human Rights Policy 2005) <https://www.ohchr.org/Documents/Publications/NHRIen.pdf> accessed 6 December 2019
- Irish Equality and Human Rights Commission, Submission in the Case Sweeney v. Minister for Justice, Ireland and the Attorney General (12 March 2019) <https://www.ihrec.ie/documents/24211/> accessed 11 December 2019
- JUSTICE, 'To Assist the Court: Third Party Interventions in the Public Interest' (2016) <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf> accessed 6 December 2019
- Kanev, 'Right to a Lawyer and to Legal aid in Criminal Proceedings in Five European Jurisdictions: Comparative Report' (2018)
- Kneihs and Lienbacher (eds), Rill-Schäffer-Kommentar Bundesverfassungsrecht, Art 148a B-VG (2017)
- Kolendowska-Matejczuk M, Konstytucyjne prawo do obrony: w działalności Rzecznika Praw Obywatelskich [Constitutional Right to Defence in the Activity of the Human Rights Defender] (Biuro Rzecznika Praw Obywatelskich 2013)
- Kolendowska-Matejczuk M, Szwarc K (eds.), Prawo do obrony w postępowaniu penalnym: Wybrane aspekty [Selected aspects on the right to defence in penal procedure] (Biuro Rzecznika Praw Obywatelskich 2014)
- Kozma J and Rachlew, 'Combating Torture during Police Custody and Pre-Trial Detention' (2018) <https://rm.coe.int/1680797130> accessed 11 December 2019
- Kucsko-Stadlmayer G, 'European Ombudsman-Institutions: A Comparative Legal Analysis regarding the Multifaceted Realisation of an Idea' (Springer 2008)
- Lenaerts K, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (2015)
- Lloyd-Cape E, 'Inside Police Custody 2: An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries' (2018) <https://www.fairtrials.org/sites/default/files/publication_pdf/Inside-Police-Custody-2-JUSTICIA-Comparative-Report.pdf> accessed 11 December 2019
- Ludwig Boltzmann Institute of Human Rights (BIM) and Human Rights Implementation Centre of the University of Bristol (HRIC), 'Enhancing Impact of National Preventive Mechanisms. Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward' (May 2015)
- Marcisz P, 'Creating a Safe Venue of Judicial Review. AG Tanchev on the Admissibility of

Preliminary References re Polish Disciplinary Proceedings', Verfassungsblog, 11.10.2019, <https://verfassungsblog.de/creating-a-safe-venue-of-judicial-review/> accessed 6 December 2019

- Mc Bride, 'Human Rights and criminal procedure: The case law of the European Court of Human Rights' (CoE 2009)
- Mitsilegas V, Bergström M, Konstadinides T (eds), Research Handbook on EU Criminal Law (Edward Elgar 2016)
- Mitsilegas V, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' in (2012) Yearbook of European Law 31 pp 319–372
- Netherlands Institute for Human Rights, Annual Report 2016
- Netherlands Institute for Human Rights, Annual Report 2016
- Netherlands Institute for Human Rights, 'Teksten uitleg Onderzoek naar de motivering van voorlopige hechtenis' (March 2017) <https://publicaties.mensenrechten.nl/file/34fa2dbc-ad61-4ee5-af8d-5ae916c96fbc.pdf> accessed 6 December 2019.
- Nowak M, Birk M, Monina G, 'The United Convention against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019)
- Olejnik M, Wachowiec P, 'Supreme Court queries ECJ about new appointee' (14 June 2019) <https://ruleoflaw.pl/supreme-court-queries-ecj-about-new-appointee/> accessed 6 December 2019
- Peers S, 'Statewatch Analysis: The "Third Pillar acquis" after the Treaty of Lisbon enters into force' (3 November 2009) <www.statewatch.org/analyses/no-86-third-pillar-acquis-post-lisbon.pdf> accessed 30 October 2018
- Reif L, 'The Ombudsman, Good Governance and the International Human Rights System' (Springer 2004)
- Polish Commissioner for Human Rights, 'RPO przedstawia Informację o stanie praw człowieka i obywatela sejmowej komisji sprawiedliwości. Przewodniczący komisji przerywa jego wystąpienie' 18 July 2018, <https://www.rpo.gov.pl/pl/content/rpo-przed-komisja-sprawiedliwosci-sejmu> accessed 6 December 2019
- Polish Commissioner for Human Rights, 'Sytuacja osób z niepełnosprawnością intelektualną lub psychiczną w jednostkach penitencjarnych [The situation of people with intellectual or mental disabilities in penitentiary institutions]' (9 December 2017) <www.rpo.gov.pl/pl/content/kpo/panel/panel-sytuacja-osob-z-niepelnosprawnoscia-intelektualna-lub-psychiczna-w-jednostkach-penitencjarnych> accessed 30 October 2018
- Polish Commissioner for Human Rights, 'Jesteś świadkiem, podejrzanym lub pokrzywdzonym? Poznaj swoje prawa! Wzory pouczeń ludzkim językiem przygotowane przez RPO i Helsińską Fundację Praw Człowieka' [Are you a witness, a suspect or a victim? Know your rights!] (2017-2018) <www.rpo.gov.pl/pl/content/wzory-pouczen-dla-swiadka-podejrzanego-pokrzywdzonego-zatrzymanego-obwinionego-tymczasowo-aresztowanego> accessed 30 October 2018





- Polish Commissioner for Human Rights, 'Zastępca RPO dr Maciej Taborowski dla tv.rp.pl o postępowaniach w sprawie praworządności w Polsce', (29 July 2019) <https://www.rpo.gov.pl/pl/content/zast%C4%99pca-rpo-dr-maciej-taborowski-dla-tvrppl-o-post%C4%99powaniach-w-sprawie-praworz%C4%85dno%C5%9Bci-w-polsce> accessed 6 December 2019
- Polish Commissioner for Human Rights, 'Alternative Report to the Committee Against Torture - 15 October 2011 to 15 September 2017'
- Polish Commissioner for Human Rights, Annual Report of 2017
- Polish Commissioner for Human Rights, Notice on the opinion of CJEU Advocate General E. Tanchev regarding joined cases: C-558/18 and C-563/18, 11.10.2019, <https://www.rpo.gov.pl/en/content/notice-polish-commissioner-human-rights-opinion-cjeu-advocate-general-e-tanchev> accessed 6 December 2019
- Polish Helsinki Foundation of Human Rights, 'To Luxembourg instead of Strasbourg? A report in the role of the Court of Justice of the European Union in the protection of human rights' (September 2018) <http://www.hfhr.pl/wp-content/uploads/2018/10/Pytania-prejudycjalne-raport-EN-web.pdf> accessed 10 December 2019
- Polish Helsinki Foundation for Human Rights, 'Constitutional Crisis In Poland – Attacks On The Independence Of The Constitutional Tribunal' (2017) <http://www.hfhr.pl/wp-content/uploads/2017/10/HFHR_independence-of-justice-system_October-2017.pdf> accessed 6 December 2019
- Ruggeri S (ed), Human Rights in European Criminal Law (Springer 2015)
- Schabas W A, 'The European Convention on Human Rights: A Commentary' (OUP 2015)
- Slovenian Ombudsman, Annual Report of the Ombudsman of 2016
- Slovenian Ombudsman, Annual Report of the Ombudsman of 2017
- Slovenian Ombudsman, Annual Report of the Ombudsman of 2018
- Slovenian Ombudsman, Annual Report of the NPM of 2017
- Subcommittee on Prevention of Torture (SPT), 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1
- SPT, 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Gabon' (2015) CAT/OP/GAB/1
- SPT, 'Visit to Romania undertaken from 3 to 12 May 2016: Observations and Recommendations addressed to the State Party, Report of the Subcommittee' (2018) CAT/OP/ROU/1
- SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives' (2019) CAT/OP/MDV/1
- Special Rapporteur on Torture (SRT, Méndez, Juan), 'Interim Report' (2016) A/71/298
- SRT (Theo van Boven), 'Report of the Special Rapporteur' (2003) E/CN.4/2004/56

- Tomkin J, Zach G, Crittin T and Birk M, 'The Future of Mutual Trust and the Prevention of Ill-treatment: Judicial cooperation and the engagement of National Preventive Mechanisms' (2017)
- Trainac, 'Assessment good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings' (2016)
- UN, OHCHR, 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010)
- UN, OHCHR, 'The role of NPMs - Professional Training Series No. 21' (2018)
- UN, OHCHR, 'Human rights Implications of Overincarceration and Overcrowding' (2015) A/HRC/30/19
- UN, UNDP and OHCHR, 'Toolkit for collaboration with National Human Rights Institutions' (2010)
- Welch R M, 'National Human Rights Institutions: Domestic Implementation of International Human Rights Law' in Journal of Human Rights 16 (1), pp. 96–116
- Wouters J and Meuwissen K (eds), The European Union And National Human Rights Institutions (Intersentia 2013)






# TABLE OF CASES

## Court of Justice of the European Union

- A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa, C-824/18 (CJEU, pending)
- An Post v Deutsche Post and Commission, C-130/06 P(I) (Order of the President of the Court, 6 April 2006)
- Costa v E.N.E.L., C-6/64 (CJEU, 15 July 1964)
- Covaci, C-216/14 (CJEU, 15 October 2015)
- Joined cases Football Association Premier League Ltd and Others v QC Leisure and Others, C-403/08 and Karen Murphy v Media Protection Services Ltd, C-429/08 (CJEU, 4 October 2011, GC)
- Kolev and others, C-612/15 (CJEU, 5 June 2018)
- M.F. v J.M., C-508/19 (CJEU, pending)
- Joined Cases Miasto Łowicz v Skarb Państwa – Wojewoda Łódzki, C-558/18 (CJEU, pending) and Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) v VX, WW, XV, C-563/18 (CJEU, pending)
- Milev, C-310/18 PPU (CJEU, 19 September 2018)
- Provincia di Ascoli Piceno and Comune di Monte Urano v Sun Sang Kong Yuen Shoes Factory and others, C-461/07 P(I) (Order of the President of the Court, 25 January 2008, currently Appeal case before the General Court T-409/06)
- Van Duyn v Home Office, C-41/47 (CJEU, 4 December 1974)
- Van Gend en Loos v Administratie der Belastingen, C-26/62 (CJEU, 5 February 1963)
- W.Ż., C-487/19 (CJEU, pending)

## European Court of Human Rights

- Aras v Turkey (No. 2), App no 15065/07 (ECtHR, 18 November 2014)
- Artico v Italy, App no 6694/74 (ECtHR, 13 May 1980)
- A.T. v Luxembourg, App No 30460/13 (ECtHR, 9 April 2015)
- Bandaletov v. Ukraine, App no 23180/06, (ECtHR, 31 October 2013)
- Baytar v Turkey, App no 45440/04 (ECtHR, 14 October 2014)

- Beuze v Belgium, App no 7149/10 (ECtHR, 9 November 2018, GC)
- Brozicek v Italy, App no 10964/84 (ECtHR, 19 December 1989)
- Brusco v France, App no 1466/07 (ECtHR, 14 October 2010)
- Cuscani v the United Kingdom, App no 32771/96 (ECtHR, 24 September 2002)
- Daktaras v Lithuania, App no 42095/98 (ECtHR, 10 October 2000)
- Dayanan v Turkey, App no 7377/03 (ECtHR, 13 October 2009)
- Diallo v Sweden, App no 13205/07 (ECtHR, 5 January 2010)
- Eckle v Germany, App no 8130/78 (ECtHR, 15 July 1982)
- Engel and others v The Netherlands, App nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976)
- Fox and others v the United Kingdom, App nos 12244/86; 12245/86; 12383/86 (ECtHR, 30 August 1990)
- Garycki v Poland, App no 14348/02 (ECtHR, 6 February 2007)
- Gungor v Germany, App no 31540/96 (ECtHR, 17 May 2001)
- H.B. v Switzerland, App no 26899/95 (ECtHR, 5 April 2001)
- Hermi v Italy, App no 18114/02, (ECtHR, 18 October 2006, GC)
- Hovanesian v Bulgaria, App no 31814/03 (ECtHR, 21 December 2010)
- Ibrahim and others v the United Kingdom, App nos 50541/08; 50571/08; 50573/08 and 40351/09 (ECtHR, 13 September 2016)
- Imbriosca v Switzerland, App no 13972/88 (ECtHR, 24 November 1993)
- K. v France, App no 10210/82 (ECtHR, 7 December 1983)
- Kaciu and Kotorri v Albania, Apps nos 33192/07 and 33194/07 (ECtHR, 25 June 2013)
- Kamasinski v Austria, App no 9783/82 (ECtHR, 19 December 1989)
- Karachentsev v Russia, App no 23229/11 (ECtHR, 17 April 2018)
- Murray v the United Kingdom, App no 14310/88 (ECtHR, 28 October 1994)
- Nechiporuk and Yonkalo v Ukraine, App no 4231/04 (ECtHR, 21 April 2011)
- Nestak v Slovakia, App no 65559/01 (ECtHR, 27 February 2007)
- Panovits v Cyprus, App no 4268/04 (ECtHR, 11 December 2008)
- Parkhomenko v Ukraine, App no 40464/05 (ECtHR, 16 May 2017)
- Petko Petkov v Bulgaria, App no 2834/06 (ECtHR, 19 February 2013)
- Pishchalnikov v Russia, App no 7025/04 (ECtHR, 24 December 2019)
- Plonka v Poland, App no 20310/02 (ECtHR, 31 March 2009)
- Ramishvili and Kokhreidze v Georgia, App no 1704/06 (ECtHR, 27 January 2009)
- Saadi v. Italy, App no 37201/06 (ECtHR, 28 February 2008, GC)
- Sakhnovskiy v Russia, App no 21272/03 (ECtHR, GC, 2 November 2010)
- Salduz v Turkey, App no 36391/02 (ECtHR, 27 November 2008, GC)
- Saman v Turkey, App no 35292/05 (ECtHR, 5 April 2011)
- Simeonovi v Bulgaria, App no 21980/04 (ECtHR, 12 May 2017)
- Stojkovic v France and Belgium, App no 25303/08 (ECtHR, 27 October 2011)
- Svinarenko and Slyadnev v Russia, App nos 32541/08; 43441/08 (ECtHR, 17 July 2014)
- Timergaliyev v Russia, App no 40631/02 (ECtHR, 14 October 2008)
- Truten v Ukraine, App no 18041/08 (ECtHR, 23 June 2016)
- X. v Austria, App no 6185/73 (ECtHR, 29 May 1975)
- Zaichenko v Russia, App no 33720/05 (ECtHR, 1 February 2007)

# ANNEX 1
## OVERVIEW OF EU LEGAL INSTRUMENTS ON THE RIGHTS OF SUSPECTS AND ACCUSED[1]

| | Adoption | Transposition |
|---|---|---|
| **Measure A on translation and interpretation** | | |
| Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (Directive on interpretation and translation | 20 October 2010 | 27 October 2013 |
| **Measure B on information on the rights and information about the charges** | | |
| Directive 2012/13/EU on the right to information in criminal proceedings (Directive on the right to information) | 22 May 2012 | 2 June 2014 |
| **Measure C1 on legal advice** | | |
| * Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive on access to a lawyer) | 22 October 2013 | 27 November 2016 |
| **Measure C2 on legal aid** | | |
| Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (Directive on legal aid) | 26 October 2016 | 25 May 2019 |
| **Measure D on communication with Relatives, Employers and Consular Authorities** | | |
| * Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive on access to a lawyer) | 22 October 2013 | 27 November 2016 |
| **Measure E on special safeguards for suspected or accused persons who are vulnerable** | | |
| Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (Directive on children) | 11 May 2016 | 11 June 2019 |
| Recommendation from 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (Recommendation on vulnerable persons) | 27 November 2013 | Not applicable |
| **Measure F on pre-trial detention** | | |
| No legislative measures so far | | |
| **Further instruments outside the Roadmap** | | |
| Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Directive on presumption of innocence) | 9 March 2016 | 1 April 2018 |

1 Council of the European Union, 'Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance)' OJ C 295, 4 December 2009. The European Commission, 'Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings' OJ C 378, 24 December 2013, is not an integral part of this study. It should only be mentioned for the sake of comprehensiveness.

* Directive 2013/48/EU covers Measure C and D.

# ANNEX 2
## OVERVIEW NHRIS MANDATES

| Country | Status | Type | NPM | CRPD |
|---|---|---|---|---|
| Austria: Austrian Ombudsman | B | Ombudsman | Yes | Yes, partly (together with the Monitoring Committee for the Implementation of the UN CRPD) |
| Belgium: The Interfederal Centre for Equal Opportunity and the fight against racism and discrimination | B | Specialised institutions (Equality Body, Migration Centre, Combat Poverty Service) | No (no OPCAT ratification) | Equality Body |
| Bulgaria: Bulgarian Ombudsman | A | Ombudsman | Yes | No |
| Croatia: Croatian Ombudsman | A | Ombudsman | Yes, in cooperation with representatives of the academic community and human rights NGOs | No, but Ombudswoman for Persons with Disabilities |
| Cyprus: Commissioner for Administration and Human Rights | B | Ombudsman | Yes | Yes |
| Czech Republic: Public Defender of Rights | n/a | Ombudsman | Yes | Yes |
| Denmark[2]: Danish Institute for Human Rights (DIHR) | A | Institute/Centre | Yes, together with Danish Parliamentary Ombudsman, and DIGNITY | Yes, together with the Danish Disability Council and the Parliamentary Ombudsman |
| Estonia: Chancellor of Justice | n/a | Ombudsman | Yes | Yes |

2 Denmark is not covered by the present project.





| Country | Status | Type | NPM | CRPD |
|---|---|---|---|---|
| Finland: Finnish National Human Rights Institution (Parliamentary Ombudsman, the Human Rights Centre and the Human Rights Delegation) | A | Multiple: Ombudsman, Human Rights Centre, Human Rights Delegation | Ombudsman | Ombudsman, Human Rights Centre, Human Rights Delegation |
| France: The French National Consultative Commission on Human Rights | A | Consultative body | No, but Contrôleur général des lieux de privation de liberté | Yes |
| Germany: German Institute for Human Rights | A | Institute/Centre | No, but Federal Agency for the Prevention of Torture & Joint Commission of the states | Yes |
| Hungary: Commissioner for Fundamental Rights | A | Ombudsman | Yes | No, but Office of the Commissioner for Fundamental Rights |
| Ireland: Irish Human Rights and Equality Commission | A | Commission | No (no OPCAT ratification) | Yes, partly (together with the Disability Advisory Committee) |
| Italy | n/a | n/a | n/a, but National Authority for the rights of persons deprived of liberty | n/a, but National Observatory on the Conditions of Persons with Disabilities |
| Latvia: Latvian Ombudsman | A | Ombudsman | No (no OPCAT ratification) | Yes |
| Lithuania: Lithuanian Ombudsman | A | Ombudsman | Yes | Yes, partly (together with Council for Disability Affairs) |
| Luxembourg: Consultative Commission on Human Rights | A | Consultative Body | No, but Ombudsman | Yes, partly (together with Centre for Equal Treatment) |
| Malta | n/a | n/a | Board of Visitors for the Prisons & Board of Visitors for Detained Persons | Commission for the Rights of Persons with Disability |

| Country | Status | Type | NPM | CRPD |
|---|---|---|---|---|
| Netherlands: Netherlands Institute for Human Rights | A | Institute/Centre | No, but Inspectorate of Security and Justice, the Health Care Inspectorate, the Inspectorate for Youth Care & Council for the Administration of Criminal Justice and Protection of Juveniles | Yes |
| Poland: Commissioner for Human Rights | A | Ombudsman | Yes | Yes |
| Portugal: Portuguese Ombudsman | A | Ombudsman | Yes | Yes |
| Romania: Romanian Ombudsman (People's Advocate) | n/a | Ombudsman | Yes | Council for the Monitoring of the Implementation of the CRPD |
| Slovakia: Slovak National Centre for Human Rights | B | Institute/Centre | No (no OPCAT ratification) | No, but Commissioner for Persons with Disabilities |
| Slovenia: Slovenian Human Rights Ombudsman | B | Ombudsman | Yes, in collaboration with NGOs (Slovenian Red Cross, Legal Information Center for NGOs, Primus Institute, Slovenian Federation of Pensioners' Organisations and Novi paradoks) | No, but Council for Persons with Disabilities of the Republic of Slovenia (Svet za invalide Republike Slovenije) |
| Spain: Spanish Ombudsman | A | Ombudsman | Yes | No, but Spanish Committee of Representatives of Persons with Disabilities (CERMI) |
| Sweden: Equality Ombudsman | B | Specialised institution | No, but Parliamentary Ombudsman | No |
| United Kingdom[3] | A | Commissions | Yes | Yes |

3 The UK is not covered by the present project.





# ANNEX 3
## OVERVIEW OF NHRIS WITH COMPLAINTS HANDLING MANDATE

| Country | Status | Type | Complaint Handling Mandate |
|---|---|---|---|
| Austria | B | Ombudsman | Yes |
| Belgium | B | Specialised institution | Yes, but only non-discrimination cases and CRPD |
| Bulgaria | A | Ombudsman | |
| Croatia | A | Ombudsman | Yes |
| Cyprus | B | Ombudsman | Yes |
| Czech Republic | n/a | Ombudsman | Yes |
| Denmark[4] | A | Institute/Centre | No, but Parliamentary Ombudsman |
| Estonia | n/a | Ombudsman | Yes |
| Finland | A | Ombudsman, Human Rights Centre, Human Rights Delegation | Yes, Ombudsman |
| France | A | Consultative body | No, but Defensor des Droits |
| Germany | A | Institute/Centre | No |
| Greece | A | Consultative Body | No, but Greek Ombudsman |
| Hungary | A | Ombudsman | Yes |
| Ireland | A | Commission | Yes |
| Italy | n/a | n/a | n/a |
| Latvia | A | Ombudsman | Yes |
| Lithuania | A | Ombudsman | Yes |
| Luxembourg | A | Consultative Body | No |
| Malta | n/a | n/a | No, but Parliamentary Ombudsman |
| Netherlands | A | Institute/Centre | No, but Ombudsman |
| Poland | A | Ombudsman | Yes |
| Portugal | A | Ombudsman | Yes |
| Romania | n/a | Ombudsman | Yes |
| Slovakia | B | Institute/Centre | No |
| Slovenia | B | Ombudsman | Yes |
| Spain | A | Ombudsman | Yes |
| Sweden | B | Specialised institution | No, but Parliamentary Ombudsman |
| United Kingdom[5] | A | Commission | Yes, partly |

4 Denmark is not covered by the present project.
5 The UK is not covered by the present project.

## ANNEX 4
### INSTITUTIONS/EXPERTS WHO HAVE PARTICIPATED IN THE INTERVIEWS

| | Institution | Day, Month, Year |
|---|---|---|
| Austria | NHRI representative 1 | 15 July 2018 |
| | NHRI representative 2 | 30 April 2018 |
| | External expert | 14 July 2018 |
| | NPM representative 3 | 21 August 2019 |
| Hungary | NHRI staff | 24 May 2018 |
| | External expert | 30 May 2018 |
| Poland | External expert | 11 June 2018 |
| | Bar Association | 12 June 2018 |
| | NHRI representative | 29 June 2018 |
| Slovenia | NHRI representative | 23 May 2018 |
| Netherlands | NHRI representative | 8 March 2019 |
| International stakeholders | ENNHRI representative | 2 July 2018; 5 March 2019 |
| | International expert | 29 May 2018; 2 September 2019 |
| | APT representative | 12 June 2018 |
| | SPT representative | 2 September 2019 |
| | CPT representative | 30 August 2019 |
| | FRA representative | 3 December 2019 |
| | GANHRI representative | 3 April 2019 |
| | Representative from the academia | 5 March 2019 |
| | Representative from the academia | 15 May 2019 |
| | Representative from the academia | 13 May 2019 |





## ANNEX 5
### CONSULTATIONS CONDUCTED IN THE FRAMEWORK OF THE PROJECT

| | Name of event | Date, Place, how many participants? |
|---|---|---|
| 1 | International Consultaton Workshop | 12-13 February 2019, Budapest, Hungary |
| 2 | National Workshop, Poland | 21 May 2019, Warsaw, Poland |
| 3 | National Workshop, Austria | 18 June 2019, Vienna, Austria |
| 4 | National Workshop, Slovenia | 28 May 2019, Ljubljana, Slovenia |
| 5 | National Workshop, Hungary | 29 May 2019, Budapest, Hungary |
| 6 | International Final Conference, Vienna | 24 October 2019, Vienna, Austria |

## ANNEX 6
### INSTITUTIONS THAT HAVE REPLIED TO THE SURVEY

| | Name of event | Date, Place, how many participants? |
|---|---|---|
| 1 | Bulgaria | Bulgarian Ombudsman |
| 2 | Croatia | Croatian Ombudsman |
| 3 | Cyprus | Commissioner for Administration Human Rights |
| 4 | Czech Republic | Public Defender of Rights |
| 5 | Estonia | Chancellor of Justice |
| 6 | Finland | Parliamentary Ombudsman of Finland |
| 7 | France | French National Consultative Commission on Human Rights |
| 8 | Hungary | Commissioner for Fundamental Rights |
| 9 | Ireland | Irish Human Rights and Equality Commission |
| 10 | Italy | National Guarantor for the Rights of Persons Detained or Deprived of Personal Liberty (NPM) |
| 11 | Lithuania | Lithuanian Ombudsman |
| 12 | Luxembourg | Consultative Human Rights Commission of Luxembourg |
| 13 | Netherlands | Netherlands Institute for Human Rights |
| 14 | Poland | Commissioner for Human Rights |
| 15 | Slovakia | Slovak National Centre for Human Rights |

# FOOTNOTES

1 Carver/Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016), pp 67ff (hereinafter Carver/Handley); Association for the Prevention of Torture (APT), 'Torture Prevention Works!' (2018) <https://apt.ch/en/torture-prevention-works/> accessed on 3 December 2019.
2 Carver/Handley, pp 67ff .
3 See below, Chapter 1 and Annex 1.
4 Lloyd-Cape, 'Inside Police Custody 2: An empirical study of suspects´ rights at the investigative stage of the criminal process in nine EU countries', (2018) (hereinafter Lloyd-Cape); see also below, Chapter 1.
5 UNGA, Principles Relating to the Status of National Institutions, Res 48/134 of 20 December 1993 (Paris Principles) (hereinafter The Paris Principles). See also Global Alliance of National Human Rights Institutions (GANHRI), General Observations of the Sub-Committee on Accreditation, adopted by the GANHRI Bureau at its Meeting on 21 February 2018, Geneva, G.O.1.2, Justification, para (ii), p 8 (hereinafter GAHNRI, SCA GO) .
6 De Beco/Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (2014), pp 93 and 100 (hereinafter De Beco/Murray, 2014).
7 For guidance for oversight mechanisms on how to develop a strategy see Ludwig Boltzmann Institute of Human Rights (BIM) and Human Rights Implementation Centre of the University of Bristol (HRIC), 'Enhancing Impact of National Preventive Mechanisms. Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward' (May 2015), p 88 (hereinafter BIM/HRIC, 2015). See also Moritz Birk and Walter Suntinger, 'A systemic approach to human rights practice', NWV 2019 or Stroh, Systems Thinking For Social Change, 2015.
8 UNDP/OHCHR, 'Toolkit for collaboration with National Human Rights Institutions' (2010), xiii.
9 UNDP/OHCHR, Toolkit, 2010, xiii.
10 Consultation Workshop, Budapest (February 2019).
11 The Paris Principles .
12 Kozma/Rachlew, 'Combating Torture During Police Custody and Pre-Trial Detention' (2018) (hereinafter Kozma/Rachlew).
13 Monina, 'Article 11: Review of Detention and Interrogation Rules' in Nowak/Birk/Monina (eds), The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019) (hereinafter Nowak/Birk/Monina) pp. 318ff.
14 See below, Annex 1.
15 e.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Access to a lawyer as a means of preventing ill-treatment: Extract from the 21st General Report of the CPT' (2011) CPT/Inf(2011)28-part1 p 1 (hereinafter CPT, Access to a lawyer, 2011). See also CPT, '28th General Report of the CPT' (2018) CPT/Inf(2019), p 30 (hereinafter CPT, 'Annual Report 2018', 2019), which also explicitly recalls the EU Directives at p 31.
16 Lloyd-Cape, p 17.
17 See European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty' (2019) COM(2019) 560 final, p5 (hereinafter European Commission, COM (2019) 560 final).
18 See EU Agency for Fundamental Rights (FRA), 'Rights in practice: access to a lawyer and procedural rights in criminal and EAW proceedings' (September 2019), pp 30 ff (hereinafter FRA, 'Rights in practice', 2019).
19 GANHRI, SCA GO, G.O.1.2, 7.
20 GANHRI, SCA GO, G.O. 1.2.
21 e.g. Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1 (hereinafter SPT, Assessment Tool, 2016).
22 CRPD Committee, 'Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities' (2016) CRPD/C/1/Rev.1, Annex.
23 See below, Annex 1.
24 Mitsilegas, 'The Limits of Mutual Trust in Europe´s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' in Yearbook of European Law, (2012) Vol.31 (1) pp 320 ff. (hereinafter Mitsilegas, The Limits of Mutual Trust, 2012).
25 Art 82 ff. TFEU; see also, European Council, Tampere European Council Presidency Conclusions, 1999, para 33.
26 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW), OJ 2003/ L 109/1; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (ToP), OJ 2008/L 327/27; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions (PAS), [2008] OJ 2008/L 337/102; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to pre-trial detention (ESO), OJ 2009/L 294/20.
27 European Commission, Green Paper on Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327 final, p 4 (hereinafter European Commission, COM (2011) 327 final).
28 Council of the European Union, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ 2001 L C12/10, p 10.
29 Paragraph 6 of the Programme also names freedom, democracy and the rule of law according to Art 3 TEU. See also Lenaerts, 'The Principle of mutual recognition in the Area of Freedom, Security and Justice' (2015) p 4 (hereinafter Lenaerts).
30 Council of the European Union, Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings, OJ 2009/C 295/01 (4 December 2009), Rec.1, 2 (hereinafter Council of the European Union, OJ 2009/C 295/01); European Commission, COM (2011) 327 final, p 3.
31 European Commission, COM (2011) 327, p 3.
32 Council of the European Union, OJ 2009/C 295/01; European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ 2010/C 115/01.

33 European Commission, COM (2011) 327, p.3., Council of the European Union, OJ 2009/C 295/01, Rec.8.
34 Lloyd-Cape, p 17.
35 Imbriosca v Switzerland, App No 13972/88 (ECtHR, 24 November 1993) § 36.
36 Salduz v Turkey, App No 36391/02 (ECtHR, 27 November 2008, GC) (hereinafter Salduz v Turkey); Beuze v Belgium App No 7149/10 (ECtHR, 9 November 2018, GC) (hereinafter Beuze v Belgium).
37 Kamasinski v Austria, App No 9783/82 (ECtHR, 19 December 1989), § 74; Baytar v Turkey, App No 45440/04 (ECtHR, 14 October 2014).
38 Hovanesian v Bulgarie, App no 31814/03, (ECtHR, 21 December 2010), § 37.
39 See European Commission, COM (2019) 560 final, p5.
40 Lloyd-Cape, p 5.
41 FRA, 'Rights in practice' (2019), p 30.
42 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (hereinafter: Directive on interpretation and translation; Directive 2012/13/EU on the right to information in criminal proceedings (hereinafter: Directive on right to information).
43 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (hereinafter: Directive on access to a lawyer), Recital 21.
44 Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (hereinafter: Directive on legal aid), Art 2(3); Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereinafter: Directive on children), Art 2(4); Directive on access to a lawyer, Recital 21. See also e.g. European Commission, COM (2019) 560 final, p 5.
45 Directive on access to a lawyer, Recital 21. Directive on legal aid, Recital 10; Directive on children, Recital 29.
46 See also eg, Bandaletov v. Ukraine, App No. 23180/06, (ECtHR, 31 October 2013),§ 56; Nechiporuk and Yonkalo v Ukraine, App No. 4231/04 (ECtHR, 21 April 2011); Brusco v France, App No 1466/07 (ECtHR, 14 October 2010) § 57.See also, Kanev, *Right to a lawyer and to legal aid in criminal proceedings in five European jurisdictions: Comparative report* (2018), p9 (hereinafter Kanev).
47 FRA, 'Rights in practice' (2019), p 32.
48 FRA, 'Rights in practice' (2019), pp 30 ff.
49 Winter, 'The EU Directive on the Right to a Lawyer: A Critical Assessment', in Ruggeri (ed), *Human Rights in European Criminal Law*, (Heidelberg, etc. Springer, 2015) p.116 (hereinafter Winter).
50 Directive on access to a lawyer, Art 2(4); Directive on children, Recital 14, 15 and 16, Art.2(6); Art (2); Directive on right to Information, Recital 17; Directive on interpretation and translation, Art 1(3), Recital 16; Directive on legal aid, Art 2(4), Recital 11 and 12. Winter, p116.
51 Art 2(4) Access to a lawyer; Art 2(6) Recital 14, 15 and 16 Directive on the Rights of Children; Art (2), Recital 17 Directive on the Right to Information; Art 1(3), Recital 16 Directive in Right to Interpretation and Translation; Art 2(4), Recital 11 and 12 Directive on Legal Aid.
52 See Art 6(3)(c) ECHR; Kanev, p. 8; Engel and others v The Netherlands, App nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) §§82-83. See Mc Bride:, *Human Rights and criminal procedure: The case law of the European Court of Human Rights* (CoE, 2009) p 11; Winter, p 116.
53 Despite the above mentioned EU instruments were all adopted after 2009, it is worth noting that the entry into force of the Treaty of Lisbon in 2009 introduced significant developments into the previous architecture of the area of Justice and Home Affairs matters. It marked the formal abolition of the pillar structure, thereby 'comunitarising' the former third pillar on police and judicial cooperation in criminal matters (PJCC). This, in practice, means that PJCC acts are now adopted under the ordinary legislative procedure in the form of Directives or Regulation, are subject to the normal effect of EU law (direct effect and supremacy) and the normal enforcement powers recognised by the Treaties to the European Commission and the Court of Justice of the European Union (CJEU), in particular, references on the validity and interpretation of EU measures in this area from all courts and tribunals in all Member States, and the power of the Commission to sue Member States for infringement of the laws in this area. For more information see, amongst others, European Parliament, 'The End of the Transition Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty. Who Monitors Trust in the European Justice Area?', (2014); and Peers, 'Statewatch Analysis: The "Third Pillar acquis" after the Treaty of Lisbon enters into force' (3 November 2009) <www.statewatch.org/analyses/no-86-third-pillar-acquis-post-lisbon.pdf> accessed 30 October 2018
54 Kanev, p11.
55 Hodgson, Chapter 8: Criminal procedure in Europe´s Area of Freedom, Security and Justice: the rights of suspects in Mitsilegas/Bergström/Konstadinides, 2016, p 174 (hereinafter Hodgson, 2016).
56 Kamasinski v Austria, App no 9783/82 (ECtHR, 19 December 1989) (hereinafter Kamasinski v Austria).
57 See also Cuscani v UK; Gungor v Germany, App no 31540/96 (ECtHR, 17 May 2001); FRA, 'Translation, Interpretation and information' (2016), p 26 ff.
58 Directive on interpretation and translation, Art 5(1) and (2).
59 Art 6(3)(c) ECHR.
60 Artico v Italy, App no 6694/74 (ECtHR, 13 May 1980), § 33 and 36; Kamasinski v Austria, § 65.
61 Directive on legal aid, Art 7(1)(a) and (b).
62 Treaty on the Functioning of the European Union (TFEU), Arts 258-260.
63 TFEU, Art 260 (2); Jacqueline Hodgson, 2016, pp 170 and 174.
64 Salduz v Turkey, §55.
65 E.g., Dayanan v Turkey, App No 7377/03 (ECtHR, 13 October 2009) (hereinafter Dayanan v Turkey), Aras v Turkey (No2), App No 15065/07 (ECtHR, 18 November 2014).
66 Simeonovi v Bulgaria App no 21980/04 (ECtHR, 12 May 2017) (hereinafter Simeonovi v Bulgaria); see also Artur Parkhomenko v Ukraine App no 40464/05 (ECtHR, 16 May 2017); Fair Trials, 'Written comments of Fair Trials to Beuze v Belgium App No 7149/10 (Grand Chamber)', (2017).
67 Ibrahim and others v the United Kingdom App Nos50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016) (hereinafter Ibrahim and others v the United Kingdom). See also Beuze v Belgium, where the court found that the combination of various factors had rendered the proceedings unfair as a whole.
68 See the non-regression clauses, eg Art 15 Directive on access to a lawyer.
69 The authors have clustered the rights not according to Directives but to thematic areas.
70 Directive on access to a lawyer; see also FRA, 'Rights in practice' (2019); Fair Trials, 'Roadmap Practitioners Tools: Access to a Lawyer Directive' <https://www.fairtrials.org/wp-

content/uploads/A2L-Toolkit-FINAL.pdf> accessed 5 December 2019 (hereinafter Fair Trials, 'Roadmap: Access to a Lawyer Directive'); Fair Trials, 'Effective Legal Assistance in Pre-Trial Detention Decision-Making' <https://www.fairtrials.org/sites/default/files/publication_pdf/Fair-Trials-EFPTD-regional-handbook.pdf> accessed 11 December 2019(hereinafter Fair Trials, 'Effective Legal Assistance'); Lloyd-Cape; Council of Bars and Law Societies of Europe (ECCB) and European Law Foundation, 'TRAINAC – Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings' (2016) <http://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf> accessed 11 December 2018; European Commission, COM (2019) 560 final.

71 Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (hereinafter Directive on legal aid).

72 ICCPR, Art 14(d); CRPD, Art 13; ECHR, Art 6(3)(c); EU Charter, Art 48(2). Non-Binding soft laws: UN Basic Principles on the Role of Lawyers; UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

73 See e.g., Salduz v Turkey, §54. FRA, 'Rights in practice' (2019), p38. See also APT, 'Legal Briefing, Legal Safeguards to Prevent Torture, The Right of Access to Lawyers for Persons Deprived of Liberty' (March 2019) p. 2 (hereinafter APT, Legal Briefing (2019)); SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives' (2019) CAT/OP/MDV/1, para 62; Fair Trials, 'Effective Legal Assistance', p 22.

74 Nowak/Birk/Monina, Article 2 CAT at pp 72ff, and Article 16 CAT at 441ff.

75 Carver/Handley, p 69; APT, 'Torture Prevention Works!' (2018); APT, Legal Briefing (2019) p 2; HRC, GC 20 (10 March 1992) § 11; CAT, GC 2 (24 January 2008) § 13; Kozma/Rachlew; Nowak/Birk/Monina, Article 11 CAT at 318ff; CPT, '28th General Report of the CPT' (2018) CPT/Inf(2019) 9, para 66; FRA, 'Rights in practice' (2019), p 38; Beuze v Belgium, §§125-130.

76 APT, Legal Briefing (2019), p 2. At the same time, the presence of the lawyer can also work as a protection for police officers against unfounded allegations of ill-treatment, see also audio-visual recordings.

77 Directive on access to a lawyer, Art 3(2)..

78 Directive on Access to a lawyer, Recital 53; see also Dayanan v Turkey, § 32; Beuze v Belgium, §§ 125-130.

79 See Eckle v Germany, App No 8130/78 (ECtHR, 15 July 1982), § 73; Simeonovi v Bulgaria, § 110.

80 Eckle v Germany, App No 8130/78 (ECtHR, 15 July 1982), § 73. Truten v Ukraine, App no 18041/08 (ECtHR, 23 June 2016) §66. See also FRA, 'Rights in Practice' (2019), p 38.

81 APT, Legal Briefing (2019), p 5.

82 HRC, 'General Comment No 32 on Article 14' (2007) CCPR/C/GC/32. See also UN Basic Principles on the Role of Lawyers, para 7, which states: 'Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case no later than forty-eight hours from the time of arrest or detention'.

83 UNODC, The UN Basic Principles on the role of the lawyers, Special safeguards in criminal justice matters (7).

84 Directive on access to a lawyer, Art 3(3), Art 4; Recital 33; e.g. A.T. v Luxembourg, App No 30460/13 (ECtHR, 9 April 2015); Sakhnovskiy v Russia, App no 21272/03 (ECtHR, GC, 2 November 2010), § 102.





85 Directive on access to a lawyer, Art 3(3)(b).

86 Salduz v Turkey, § 55.

87 CCPR/C/GC/32, para34; UN Basic Principles 5 and 8.

88 Directive on access to a lawyer, Art. 3(3)(b) and Recital 25.

89 A.T. vs Luxembourg, App No 30460/13 (ECtHR, 9 April 2015).

90 Dayanan v. Turkey.

91 See e.g., Salduz v Turkey, §55; Ibrahim and others v the United Kingdom, §258;; Simeonovi v Bulgaria, §112.

92 Directive on access to a lawyer, Art 3(5 and 6); Recital 32.

93 Directive on access to a lawyer, Art 8.

94 See e.g., Salduz v Turkey, §55; Ibrahim and others v the United Kingdom, §263-265. FRA, 'Rights in Practice' (2019), p.39, Fair Trials, 'Effective Legal Assistance', p 9.

95 Directive on access to a lawyer, Recital 39.

96 Pishchalnikov v Russia, App no 7025/04 (ECtHR, 24 December 2019), § 78; Simeonovi v Bulgaria, § 128.

97 Directive on access to a lawyer, Art 9(1)(a) and (b).

98 Directive on access to a lawyer, Art 9(2).

99 Directive on access to a lawyer, Art 9(3), Recital 41.

100 European Commission, Recommendation from 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (hereinafter Recommendation on vulnerable persons), Recommendation 11.

101 Saman v. Turkey, App No 35292/05 (ECtHR, 5 April 2011), § 35 (hereinafter Saman v Turkey).

102 Panovits v. Cyprus App No 4268/04 (ECtHR, 11 December 2008),§ 74 (hereinafter Panovits v Cyprus).

103 Zaichenko v. Russia App No 33720/05 (ECtHR, 1 February 2007),§ 55.

104 Stojkovic v. France and Belgium, App No 25303/08 (ECtHR, 27 October 2011), § 53.

105 Panovits v. Cyprus, § 67.

106 Kaciu and Kotorri v. Albania, App Nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), § 120.

107 Pishchalnikov v Russia, App No 7025/04 (ECtHR, 24 December 2019), §80.

108 Plonka v. Poland, App No. 20310/02 (ECtHR, 31 March 2009), §38.

109 Fair Trials, 'Roadmap: Access to a Lawyer Directive', p.13.

110 See also EU Charter: Art 47; ECHR: Art 6(3)(c); ICCPR: Art 14(3)(d); UN, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Resolution A/67/458.

111 Directive on legal aid, Art 4.

112 Directive on legal aid, Recitals 19 and 24, Art 4.

113 Directive on legal aid, Art 4. See also UNODC, 'Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners' (UN 2014).

114 See UNODC, *Model Law on Legal Aid in Criminal Justice Systems with Commentaries* (UN 2017); UNODC, H*andbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes. Practical Guidance and promising practices* (UN 2019).

115 Directive on legal aid, Art 7.

116 Lloyd-Cape, p 5; Carver/Handley, p 69.

117 Fair Trials, 'Roadmap: Access to a Lawyer Directive', pp 22 ff.

118 Carver/Handley, p 199.

119 Carver/Handley, pp 69 ff; CPT, 'Juveniles deprived of their liberty under criminal legislation: Extract from the 24th General Report of the CPT' (2015) CPT/Inf(2015)1-part rev1CPT.
120 Directive on access to a lawyer, Art 5(1) and 6.
121 Directive on access to a lawyer, Art 5(2) and (4).
122 Directive on access to a lawyer, Art 5(3) and Art 8(3).
123 Directive on access to a lawyer, Art 6(2).
124 Directive on access to a lawyer, Recital 35 and 36.
125 UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, resolution 43/173 of 9 December 1988; Principle 16(1).
126 Directive on access to a lawyer, Art 9 (1).
127 Directive on access to a lawyer, Recital 43.
128 European Commission, COM (2019) 560 final, p 12.
129 ECHR: Art 5 (2); Art 6(1)(a)(b)(e); ICCPR: Art 14(2)(a)(b)(f); CRC: Art 40(2)(b)(vi.); CRPD: Art 13; UDHR: Art 11(1).
130 See e.g. Cuscani v UK, App no 32771/96 (ECtHR, 24 September 2002) § 38 (hereinafter Cuscani v UK); Kamasinski v Austria, §74. See also FRA, 'Rights of suspected and accused persons across the EU: translation, interpretation and information in criminal proceedings' (2016), p. 9 ff. (changes may have been made, report is from 2016 (hereinafter FRA, 'Translation, Interpretation and information' (2016)).
131 Directive on the right to interpretation and translation, Recital 14.
132 Directive on interpretation and translation, Art 2(1) and (2).
133 e.g. Hermi v Italy, App no 18114/02, (ECtHR, GC, 18 October 2006) § 69 (hereinafter Hermi v Italy).
134 Kamasinski v Austria, § 74; Hermi v Italy.
135 Diallo v. Sweden, App No 13205/07 (ECtHR, 5 January 2010) § 24 and 25.
136 Directive on interpretation and translation, Art 3(1).
137 K. v France, App No 10210/82 (ECtHR, 7 December 1983); See also UN HRC, Dominique Guesdon v France, Communication No. 219/1986, CCPR/C/39/D/219/1986 (1990), 23 August 1990, § 10.2.
138 Directive on the right of interpretation and translation, Recital 22.
139 Kamasinski v Austria, §74; Cuscani v UK, §38. Cf UN HRC, Harward v Norway, Communication No 451/1991, CCPR/C/51/D/451/1991 (1994), 15 July 1994, §9.5.
140 See FRA, 'Translation, Interpretation and information' (2016), p 21.
141 Directive on interpretation and translation, Art 4.
142 Directive on interpretation and translation, Recital 19 and 20; Art 2(1) and (2).
143 X v Austria, App No 6185/73 (ECtHR, 29 May 1975) p68; FRA, 'Translation, Interpretation and information' (2016), p 21.
144 Directive on interpretation and translation, Recital 17 and 30, Article 3(5).
145 Covaci, C-216/14 (CJEU, 15 October 2015).
146 Fair Trials, 'Roadmap Practitioners Tools: Interpretation and Translation', p 37 (hereinafter Fair Trials, 'Roadmap: Interpretation and Translation').
147 Hermi v. Italy, para 70.
148 Kamasinski v Austria, para 70; Fair Trials, 'Roadmap: Interpretation and Translation', p 37.
149 Directive on interpretation and translation, Art 3(7) and 7.
150 Directive on interpretation and translation, Art 3(8) and 7.
151 Bayter v Turkey, App No 45440/04 (ECtHR, 14 October 2014).





152 Salduz v Turkey, § 59.
153 Directive on interpretation and translation, Recital 21; Article 2(4). FRA, 'Translation, Interpretation and information' (2016), p 26.
154 Directive on interpretation and translation, Art 2(5) and 3(5).
155 Directive on interpretation and translation, Recital 27.
156 Directive on interpretation and translation, Art 2(8), 3(9) and 5(1).
157 Directive on interpretation and translation, Art 5(2).
158 Cuscani v UK; Gungor v Germany, App no 31540/96 (ECtHR, 17 May 2001); Kamasinski v Austria; FRA, 'Translation, Interpretation and information' (2016), p 26 ff.
159 See FRA, 'Translation, Interpretation and information' (2016), p 26.
160 Directive on interpretation and translation, Recital 26, Art 2(5) and 3(5).
161 See FRA, 'Translation, Interpretation and information' (2016), p65.
162 Fair Project, 'The Right to Interpretation and Translation in Criminal Proceedings: Findings from Greece' (26 July 2019).
163 Lloyd-Cape, p. 5.
164 Lloyd-Cape, p 5 ff.
165 Lloyd-Cape, p 23.
166 Lloyd-Cape, p 24.
167 Lloyd-Cape, p 24 ff.
168 See also Fair Trials, 'Roadmap: Interpretation and Translation', p 14.
169 Directive on the Right to information, Arts 3, 4, 6 and 7.
170 FRA, 'Translation, Interpretation and information' (2016), pp 22 ffreplace with: ; Fair Trials, 'Roadmap Practitioner Tools: Right to Information Directive', p 14 (hereinafter Fair Trials, 'Roadmap: Right to Information').
171 Directive on the right to information, Arts 3(1) and (2), 4(1). If the Letter of Rights is not available in a language that the suspects or accused persons understand, they should be informed orally. A Letter of Rights in a language they understand should be given to them nevertheless without undue delay. Directive on the right to information, Art 4(5).
172 Directive on the right to information, Recital 28.
173 Directive on the right to information, Art 6; Fox and others v UK, App No 3455/05 (ECtHR, GC; 19 February 2009) (hereinafter Fox and others v UK); Murray v UK, App No 14310/88 (ECtHR, 28 October 1994).
174 Kolev a.o., C-612/15 (CJEU, 5 June 2018).
175 Directive on the right to information, Art 5(3) ECHR and Article 7(3).
176 Directive on the right to information, Art 7. See also FRA, 'Translation, Interpretation and Information' (2016), p22.
177 Directive on the right to information Art 3.
178 Panovits v Cyprus, § 72; FRA, 'Translation, Interpretation and Information' (2016), p 28
179 Directive on the Right to information, Art 4(2) and (3). See also FRA, 'Translation, Interpretation and Information' (2016), p109.
180 Directive on the right to information, Art 4.
181 Directive on the right to information, Art 6(3). ECHR: Art 5(3); See also ECHR: Art 6(1)(a)(b) and ICCPR: Art 9(2) and 14 (3)(a). Fox and others v UK, § 40; UN General Assembly, A/HRC/30/37, 6 July 2015.
182 Murray v UK, App No 14310/88 (ECtHR, 28 October 1994); H.B. v Switzerland, App No 26899/95 (ECtHR, 5 April 2001); see also FRA, 'Translation, Interpretation and Information' (2016), p 22; Petko Petkov v Bulgaria, App No 2834/06 (ECtHR, 19 February 2013), § 61 (hereinafter Petkov v Bulgaria).

183 Directive on the right to information, Recital 31.
184 Directive on the right to information, Art 7(5).
185 Directive on the right to information, Art 7(1).
186 Directive on the right to information, Art 7(2) and (3).
187 Directive on the right to information, Art 7(4).
188 Directive on the right to information, Art 3(2); Timergaliyev v Russia, App No 40631/02 (ECtHR, 14 October 2008) (hearing disabilities); Brozicek v Italy, App No 10964/84 (ECtHR, 19 December 1989); Saman v Turkey; Panovits v Cyprus, App No 4268/04 (ECtHR, 11 December 2008). See also FRA, 'Translation, Interpretation and Information' (2016), p. 23 and Fair Trials, 'Roadmap: Right to Information', p 25. See also, In the context of minors see: Beijing Rules Art 7(1); CRPD Art. 2. See FRA, 'Translation, Interpretation and Information' (2016), p24 with further references.
189 Directive on the right to information, Art 4(4).
190 Directive on the right to information, Art 8.
191 Lloyd-Cape, p 5.
192 HRC, 'General Comment No 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (1994) CCPR/C/21/Rev.1/Add.6, para 8.
193 ICCPR: Art 14(2); UDHR : Art 40 (2)(b)(i) ; ECHR: Art 6.
194 FTE, 'Innocent until proven guilty? The presentation of suspects in criminal proceedings. The presentation of suspects and accused', (June 2019) p4 (hereinafter: FTE, The presentation of suspects and accused).
195 The Directive on presumption of innocencealso sets standards for the presence at the trial. However, in the framework of this project that aspect will not be dealt with.
196 FTE, The presentation of suspects and accused, p 8.
197 FTE, The presentation of suspects and accused, p 13.
198 Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings – Art 3 (hereinafter: Directive on Presumption of innocence); see also Art 11 (1) UDHR.
199 Arts 4 and 5 Directive on Presumption of innocence; see also Nestak v Slovakia, App no 65559/01 (ECtHR, 27 February 2007); Garycki v Poland, App no 14348/02 (ECtHR, 6 February 2007); Daktaras v Lithuania, App No 42095/98 (ECtHR, 10 October 2000); Petkov v Bulgaria.
200 Milev, C-310/18 PPU (CJEU, 19 September 2018).
201 Directive on presumption of innocence, Art 5.
202 Ramishvili and Kokhreidze v Georgia, App No 1704/06 (ECtHR, 27 January 2009); Karachentsev v Russia, App no 23229/11 (ECtHR, 17 April 2018) (hereinafter Karachentsev v Russia); Svinarenko et Slyadnev v Russia, App Nos 32541/08; 43441/08 (ECtHR, 17 July 2014).
203 FTE, The presentation of suspects and accused, pp 4 ff.
204 Lloyd-Cape, pp64, 66; FRA, 'Rights in practice' (2019), pp 29 ff.
205 SRT (Theo van Boven), 'Report of the Special Rapporteur' (2003) E/CN.4/2004/56, para 34.
206 CAT Committee, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 14.
207 Special Rapporteur on Torture (SRT, Méndez, Juan), 'Interim Report' (2016) A/71/298.
208 CPT, 'Police custody: Extract from the 2nd General Report of the CPT' (1992), CPT/Inf(92)3-part1, paras 39 and 40; CPT, '12th General report on the CPT's activities' (2002), CPT/Inf (2002) para 15.
209 Fair Trials, 'ProCam International desk report: Audiovisual recordings during interrogations' (January 2018), pp 9 and 10.
210 The Hungarian Helsinki Committee (HHC), 'Procedural rights observed by the camera' (2019), p 21 ff
211 The Paris Principles; GAHNRI, SCA GO; as well as the Declarations taken over the years in the framework of the International Conferences of NHRIs.
212 The Paris Principles, section A.1 and A.2; GANHRI, SCA GO, G.O.1.2, Justification, para (ii), p 8.
213 On the relationship between NHRIs and the UN see Katrien Meuwissen, 'NHRI participation to United Nations Human Rights Procedures: International Promotions versus Institutional consolidation?' in Jan Wouters and Katrien Meuwissen (eds.) *National Human Rights Institutions in Europe: Comparative, European and International Perspectives* (Intersentia 2013) pp 263-286; GANHRI and UNICEF, 'Children's Rights in National Human Rights Institutions: A Mapping Exercise' (2018) p 15, in particular footnote 16.
214 GAHNRI, SCA GO, para 7.
215 Slovenia has applied to the SCA in relation to the 2017 legislative change on promotional functions and will be reviewed in March 2020 session. The relevant legislative change is: Slovenia, Act Amending the Human Rights Ombudsman Act (Zakon o dopolnitvah Zakona o varuhu človekovih pravic (ZVarCP-B)), Official Gazette RS No. 54/2017.
216 Estonia has applied to the SCA in relation to the 2018 legislative change and will be reviewed in March 2020 session. The relevant legislative change is the Amendment to the Chancellor of Justice Act adopted on 13.06.2018 that entered into force on 1.01.2019.
217 Kucsko-Stadlmayer, *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer 2008) pp 62-69 (hereinafter Kucsko-Stadlmayer, 2008). See also Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Springer 2004).
218 Parliamentary Assembly of the Council of Europe, Resolution 2301 (2019) on Ombudsman institutions in Europe - the need for a set of common standards, 2 October 2019.
219 Principles on The Protection and Promotion of the Ombudsman Institution adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019) (hereinafter The Venice Principles).
220 GAHNRI, SCA GO, para 1.9. On independence see also Katrien Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?' (2015) HRLR 15 pp 441–484.
221 The Paris Principles, Methods of Operation, A
222 The Paris Principles, Principle 2, A.
223 See Office of the High Commissioner of Human Rights (OHCHR), 'Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe', pp 13ff.
224 OHCHR, 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010), p 41 (hereinafter OHCHR, 'NHRI' (2010)).
225 OHCHR, 'NHRI' (2010), p 42.
226 OHCHR, 'Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe', p 50.
227 OHCHR, 'NHRI' (2010), p 41.

228 OHCHR, 'NHRI' (2010), pp 41f.
229 GANHRI, SCA GO, p 22.
230 De Beco/Hoefmans, 'National Structure for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities' in Gauthier De Beco, *Article 33 of the UN Convention on the Rights of Persons with Disabilities National Structures for the Implementation and Monitoring of the Convention* (Brill 30 May 2013), p 36 (hereinafter De Beco/Hoefmans, 2013).
231 De Beco/Murray, 2014, p 88.
232 GANHRI, SCA GO, p 37; De Beco/Murray, 2014, p 8.
233 See SPT, 'Report on the visit made by the SPT for the purpose of providing advisory assistance to the national preventive mechanism of Moldova'(2014) CAT/OP/MDA/1 para 16; SPT, 'Guidelines on national preventive mechanisms'(2010) CAT/OP/12/5 para 32.
234 See CRPD/C/1/Rev.1, para 15 and De Beco/Hoefmans, 2013, p 38.
235 Human Rights Council, 'National human rights institutions', Resolution from 27 September 2018, A/HRC/39/L.19/Rev.1, parreplace with: a 4.
236 Council of Europe Press Release, '25 'Venice Principles' - Democratic ABCs for ombudsman institutions', Ref DC 052(2019).
237 The Venice Principles, para 1.
238 The Venice Principles, para 21: 'Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. […]'; The Venice Principles, para 11: 'The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. […]'; The Venice Principles, parreplace with: a 23: 'The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution'.
239 Parliamentary Assembly of the Council of Europe, Resolution 2301 (2019) on Ombudsman institutions in Europe - the need for a set of common standards, 2 October 2019, parreplace with: a 9.5.
240 GANHRI, SCA GO, G.O.2.6. See also e.g. GANHRI, SCA, Northern Ireland Report, May 2016.
241 GAHNRI, SCA GO, G.O. 2.10; De Beco/Murray, 2014, p 115. On the relationship between NPMs and the judiciary see also Tomkin/Zach/Crittin and Birk, 'The Future of Mutual Trust and the Prevention of Ill-treatment: Judicial cooperation and the engagement of National Preventive Mechanisms' (2017) pp 71-72 (hereinafter Tomkin/Zach/Crittin and Birk, 2017).
242 OHCHR, 'NHRI' (2010), p 33. See also BIM/HRIC, 2015 and Tomkin/Zach/Crittin and Birk, 2017, p 69.
243 Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights: Nairobi Declaration (Nairobi, Kenya, 21-24 October 2008) para 3 (hereinafter Nairobi Declaration).
244 The Venice Principles, preamble.
245 The Venice Principles, para 13 (3).
246 The Venice Principles, para 17.
247 The Venice Principles, para 19 (1).
248 The Venice Principles, para 19 (2).
249 Kucsko-Stadlmayer, 2008, pp 22 ff.
250 Kucsko-Stadlmayer, 2008, pp 22 ff.
251 Kucsko-Stadlmayer, 2008, pp 22 ff.





252 Kucsko-Stadlmayer, 2008, pp 22 ff.
253 e.g. Austria and Croatia.
254 Slovenian Ombudsman, Annual Report of 2017, p 243.
255 Slovenian Ombudsman, Annual Report of 2016.
256 Netherlands Institute for Human Rights, Teksten uitleg Onderzoek naar de motivering van voorlopige hechtenis, March 2017. See also Netherlands Institute for Human Rights Annual Report 2016, p 21.
257 Spain: Art 17 (2) El Defensor Del Pueblo, Organic Law(hereinafter Spain: NHRI law).
258 Interview with NHRI representative, Poland, 29 June 2018.
259 GANHRI, SCA, G.O. 1.2.
260 The Venice Principles, Art 13 (2).
261 Portugal: Statute of the Portuguese Ombudsman Law No. 9/91, of April 9 (as amended by Law No. 30/96, of August 14, Law No. 52-A/2005, of October 10, and Law No. 17/2013, of February 18), Art 2(1)(hereinafter Portugal: Ombudsman law).
262 Slovenian Ombudsman, Annual Report 2018, p 188. See also Slovenian Ombudsman, Annual Report 2016, p 128.
263 The Commissioner's motion to the Police Commander in Chief Representative on Human Rights from 29.04.16, II.5150.9.2014.MK.
264 GAHNRI, SCA GO, para 7; see also Richard Carver, 'One NHRIs or Many? How many Institutions Does it Take to protect human rights? Lessons from the European Experience', Journal of Human Rights Practice 3 (2011) 1-24, p 4.
265 SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016), CAT/C/57/4, para 18 (hereinafter CAT/C/57/4); see also UN, OHCHR, 'The role of NPMs - Professional Training Series No. 21' (2018) p16, (hereinafter OHCHR, 'The role of NPMs', 2018) and APT, 'National Human Rights Institutions as National Preventive Mechanisms: Opportunities and challenges' (December 2013).
266 CRPD/C/1/Rev.1, para 10.
267 GAHNRI, SCA GO, G.O. 1.5.
268 SPT, CAT/C/57/4, para 19.
269 Interview with APT representative, 12 June 2018.
270 Reply to the project survey, Finland.
271 Reply to the project survey, Finland.
272 See Croatian Ombudsman, Annual Report of the NPM, (2016); Croatian Ombudsman, Annual Report of the NPM, (2017). Cooperation with other domestic bodies was facilitated by the 2015 amendment of the Croatian Act on National Preventive Mechanisms, No. 71-05-03/1-11-2, 2 February 2011, which removed the limit of the participation of maximum 2 external representatives (from civil society, experts) in monitoring visits.
273 GAHNRI, SCA GO, G.O. 1.5.
274 SPT, CAT/C/57/4, para 86; see also APT and Penal Reform International (PRI), 'Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment' (2 edn, 2015) p 10 (hereinafter APT/PRI, 'Pre-trial detention' (2015)).
275 Netherlands, Annual Report 2016, p 21. A similar practice was mentioned also by Lithuania.
276 Rzecznik Praw Obywatelskich (Commissioner for Human Rights), 'Jesteś świadkiem, podejrzanym lub pokrzywdzonym? Poznaj swoje prawa! Wzory pouczeń ludzkim językiem przygotowane przez RPO i Helsińską Fundację Praw Człowieka' [Are you a witness, a suspect or a victim? Know your rights!] (2017-2018).

277 Reply to the project survey, Slovenia; reply to the project survey, Lithuania.
278 Reply to the project survey, Croatia.
279 International Consultation Workshop, Budapest, 12-13 February 2019.
280 International Consultation Workshop, Budapest, 12-13 February 2019.
281 European Network of National Human Rights Institutions (ENNHRI), 'Strategic Plan 2018-2021', p 7; ENNHRI, 'Strategic Plan 2014-2017'.
282 Interview with ENNHRI representative, 2 July 2018.
283 Interview with ENNHRI representative, 2 July 2018.
284 See also GANHRI, SCA GO, G.O. 1.2.
285 Interview with NHRI representative 2, Austria, 30 April 2018.
286 CRPD/C/1/Rev.1, Annex; SPT, 'Analytical Assessment tool for national preventive mechanisms' (2016) CAT/OP/1/Rev.1, §para9(b).
287 SPT, CAT/C/57/4, Annex, para 14.
288 French representative, International Consultation Workshop, Budapest, 12-13 February 2019.
289 Polish Commissioner for Human Rights, Alternative Report to the seventh periodic report of the Republic of Poland on its implementation of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the period from 15 October 2011 to 15 September 2017, p 18 (hereinafter Poland, Alternative report).
290 Final Conference Report, Vienna, 24 October 2019..
291 The Venice Principles, para 19 (1).
292 CRPD/C/1/Rev.1, Annex.
293 The Paris Principles, Art 3(a)(i).
294 Hungarian Commissioner for Fundamental Rights, Annual report on the activities conducted in 2017, p 211 (hereinafter: Hungary, Annual Report 2017).
295 SPT, CAT/OP/12/5 para 28 and 35; CAT/OP/1/Rev.1 para 40.
296 See in this regard SPT, Assessment Tool, 2016, para 40. Wouters/Meuwissen/Barros, 'The European Union and National Human Rights Institutions' in Wouters/Meuwissen (eds), *The European Union And National Human Rights Institutions* (Intersentia 2013) pp 198 ff.
297 Slovenian Ombudsman, Annual Report 2015, p 85.
298 Netherlands Institute for Human Rights, Annual Report 2018, p 33.
299 BIM, Enhancement impact study, 2015, p 62.
300 Polish Commissioner's motion to the Minister of Justice from 26 April 2016, II.510.363.2016.VV.
301 Reply to the project survey.
302 e.g. The Polish Commissioner's motion to the Minister of Justice from 5 June 2017, II.5150.9.2014; The Commissioner's motion to the Prime Minister from 4 July 2018, II.5150.9.2014.MM.
303 e.g. The Polish Commissioner's motion to the Police Commander in Chief Representative on Human Rights from 29 April 2016, II.5150.9.2014.MK; the Commissioner's motion to the Police Commander in Chief Representative on Human Rights from 29 April 2016, II.5150.9.2014.MK.
304 Croatia: Art 6 Ombudsman Act of 3 July 2012 (hereinafter Croatia: Ombudsman Act); Poland: Art 16 Act on the Commissioner for Human Rights of 15 July 1987 (hereinafter Poland: Commissioner's Act); Spain: Art 29 NHRI law; Lithuania: Art 19(11) Law on the Seimas Ombudsmen of 3 December 1998 NoVIII-950 (as last amended on 13 May 2010 – NoXI-808); Portugal: Art 20(3) Ombudsman law; Hungary: Art 1, Section 2, para 3, Act CXI of 2011 on the Commissioner for Fundamental Rights (hereinafter Hungary: Commissioner's Act).
305 Austria (Art 139 (1) 5 and 6; Art 140a) however, not of laws (see Art 140Austrian Federal Constitution).
306 Slovenian Ombudsman, Annual Report 2017, p 14.
307 Judgement of the Constitutional Court from 25 November 2014, case no. K 54/13; see also Press Release after the Hearing, 'Pre-Trial Detention; The Lack of the Possibility of Telephone Communication between a Person Detained Pending Trial and his/her Counsel for the Defence'.
308 Poland, Alternative report p 18. Partners in this action were: Association for the Prevention of Torture (APT), National Bar Council, National Chambers of Attorneys, Kantar Millward Brown Agency, the Council of Europe, ODIHR/OSCE and Association for the Prevention of Torture in Geneva.
309 Helsinki Foundation for Human Rights, 'Constitutional Crisis In Poland – Attacks On The Independence Of The Constitutional Tribunal' (2017).
310 Bodnar at the Public Hearing on 'The situation of the Rule of Law in Poland, in particular as regards the independence of the judiciary', 20. November 2018; see also RPO przedstawia Informację o stanie praw człowieka i obywatela sejmowej komisji sprawiedliwości. Przewodniczący komisji przerywa jego wystąpienie, 18.July 2018; as well as Grzelak, 'Choosing between two Evils: the Polish Ombudsman's Dilemma', Verfassungsblog 6 May 2018 (hereinafter Grzelak, 2018).
311 e.g. Bodnar withdrew from the Constitutional Tribunal motion regarding the Act of 10 June 2017 on Counter-Terrorism Measures, 2 May 2018; see also: Grzelak, 2018.
312 Poland (Art 16 point 2 Commissioner Act in connection with Art 83 Act on the Supreme Court from 8 December 2017).
313 CRPD/C/1/Rev.1, AnnexSPT, 'Analytical Assessment tool for national preventive mechanisms' (2016) CAT/OP/1/Rev.1, para 9(f).
314 Reply to the project survey, Poland.
315 It has published a monograph (see Kolendowska-Matejczuk, Konstytucyjne prawo do obrony: w działalności Rzecznika Praw Obywatelskich [Constitutional Right to Defence in the Activity of the Human Rights Defender] (Biuro Rzecznika Praw Obywatelskich 2013), which to a large extent, referred to certain aspects of the right of access to a lawyer (the book was published before Directive 2013/48/EU was adopted and as such it does not make any reference to it). Another joint publication (see Kolendowska-Matejczuk and Szwarc (eds), Prawo do obrony w postępowaniu penalnym: Wybrane aspekty [Selected aspects on the right to defence in penal procedure] (Biuro Rzecznika Praw Obywatelskich 2014)), which partly referred to the right to legal aid and right of access to a lawyer mentioning the Directive 2013/48/EU.
316 The Polish Commissioner for Human Rights, People with intellectual and mental disabilities (2017), which mentions the Directive 2016/800 on procedural safeguards for children and Directive 2013/48/EU on the right of access to a lawyer as well as the Commission Recommendation 2013/C 378/02 on procedural safeguards for vulnerable persons.
317 Officials from the Ministry of Justice, the police, Boarder Guard and representatives from the Estonian Union for Child Walfare as well as members of the advisory body to the Ombudsman for Children set up at the Chancellor´s Office.
318 Reply to the project survey. The activity was conducted under the mandate of the ombuds institution for children.

319 Brinek, *Gutachten als Schlüsselfaktoren im Maßnahmenvollzug* (2019)p 8.
320 The investigations were based on Art B) paragraph 1), Arts XXIV and XXVIII of the Fundamental Law of Hungary on the rule of law, fair trial guarantees and the right of access to a lawyer.
321 Summary report on the project in Hungarian: „Emberi jogok kint és bent ombudsmani szemmel" – A büntetés-végrehajtás fogvatartottjainak, a külföldiek idegenrendészeti és menedékjogi fogva tartásának alapjogi összefüggéseit, valamint az ügyvédek és a hozzájuk fordulók jogait vizsgáló projekt, AJB Projektfüzetek, 2013/2, pp 131-147.
322 Report of the Commissioner for Fundamental Rights (in Hungarian) in case No AJB-3107/2012 and in case No AJB-3464/2012
323 Hungarian Commissioner for Fundamental Rights Annual report on the activities conducted in 2012, pp 248-250 (hereinafter: Hungary, Annual Report 2012).
324 Hungary: Act No. XC of 2017, the new Code on Criminal Procedure (CCP) entered into force on 1 July 2018. The amendment aimed at – among other objectives – the implementation of the relevant EU Directives. (See at CCP, Article 878) The New CCP sets forth that if the suspect or the formally not charged person who is suspected of having committed an offence wishes to retain a lawyer, or if the authority appoints a defence counsel, the authority shall immediately notify the defence counsel and shall postpone the questioning until the defence counsel's arrival, but for a maximum of two hours. If within this time the defence counsel does not appear, or if – after consulting the defence counsel – the suspect agrees that the questioning can be started, the authority commences the interrogation. (See at New CCP, Article 387(3))
325 Hungary: CCP, Article 46
326 Consultation with Greek NHRI, 17.12.2019.
327 Interview with NHRI representative 2, Austria, 30 April 2018; Consultation Workshop Budapest.
328 Final Conference Report, Vienna, 24 October 2019.
329 The Polish Commissioner's motion to the Minister of Justice from 18 April 2017, KMP.570.3.2017.RK.
330 e.g. The Polish Commissioner's motion to the Minister of Justice from 29 April 2016, II.5150.9.2014.MK; The Commissioner's motion to the Minister of Foreign Affairs from 7 February 2017, II.510.1297.2016.MH; The Commissioner's motion to the Minister of Justice from 18 April 17, KMP.570.3.2017.RK; The Commissioner's motion to the Minister of Justice from 5 June 2017, II.5150.9.2014; The Commissioner's motion to the Minister of Justice from 14 November 2017, IX.517.1268.2017.MM; The Commissioner's motion to the Minister of Justice from 29 March 2018, IX.517.812.2018.MM; The Commissioner's motion to the Prime Minister from 4 July 2018, II.5150.9.2014.MM.
331 The Polish Commissioner's motion to the Minister of Justice from 18 April 2017, KMP.570.3.2017.RK.
333 Reply to the project survey, Croatia.
334 See Cerny and Krammer, *Nachprüfende Verwaltungskontrolle und Präventive Menschenrechtskontrolle Kurzskriptum: Kurzskriptum zur Präsentation des Volksanwaltschaftsmoduls in der Polizeigrundausbildung* [Lecture notes for the basic police training on the Austrian Ombudsman's mandate] (Schriftenreihe der Volksanwaltschaft – Volume IV, 2017).
335 Carver/Handley, p 99.
336 Interview with NHRI representative, Poland, 29 June 2018; interview with the Bar Association, Poland, 12 June 2018. Further a conference on the general situation of vulnerable persons (people with intellectual or mental disabilities) detained in penitentiary institutions was organised and the procedural rights of vulnerable persons was one of the several topics covered. Rzecznik Praw Obywatelskich (Commissioner for Human Rights), 'Sytuacja osób z niepełnosprawnością intelektualną lub psychiczną w jednostkach penitencjarnych [The situation of people with intellectual or mental disabilities in penitentiary institutions]' (9 December 2017) (hereinafter Commissioner for Human Rights, People with intellectual and mental disabilities (2017)).
337 Art 294(2) TFEU; Art 11(2) and (3) TEU.
338 European Parliament, *Handbook on the ordinary legislative procedure,* 2017, p.6. Wouters/Meuwissen/Barros, 'The European Union and National Human Rights Institutions' in Wouters/Meuwissen (eds), *The European Union And National Human Rights Institutions* (Intersentia 2013) pp 198 ff.
339 More: https://petiport.secure.europarl.europa.eu/petitions/en/home
340 Art 288 TFEU; Lloyd-Cape, pp 11ff.
341 Interview with NHRI representative, Slovenia, 23 May 2018. The Ombudsperson has not been involved in the transposition of the other Directives.
342 Art 258 and 259 TFEU.
343 The European Commission has published an online form for complaints that can be found here: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/index.html
344 APT, 'Monitoring Police Custody: A Practical Guide' (2013) (hereinafter APT, 'Monitoring Police Custody' (2013)); APT and PRI, 'Video recording in police custody: Addressing risk factors to prevent torture and ill-treatment' (2nd edn, 2015) (hereinafter APT/PRI, 'Video recording' (2015)); APT/PRI, 'Pre-trial detention' (2015); UN High Commissioner for Human Rights, 'Human rights implications of overincarceration and overcrowding', A/HRC/30/19, 10 August 2015.
345 Hungarian NPM, Az alapvető jogok biztosa, mint OPCAT nemzeti megelőző mechanizmus jelentése az AJB-496/2018. számú ügyben, 2018, p 23.
346 e.g. SPT, 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Gabon' (2015) CAT/OP/GAB/1.
347 National Workshop in Warsaw, May 2019; see also visit reports, e.g. NPM Visit Report from the Police station in Marki, KMP.570.1.2019.JZ, 10.10.2019, p 8.
348 Slovenian Ombudsman, Annual Report 2017, p 69.
349 APT/PRI, 'Pre-trial detention' (2015).
350 SPT, 'Visit to Romania undertaken from 3 to 12 May 2016: Observations and Recommendations addressed to the State Party, Report of the Subcommittee' (2018), CAT/OP/ROU/1, para 44.
351 Austrian Ombudsman Board, Annual Report on the activities of the Austrian National Preventive Mechanism (NPM) 2017, p 165 (hereinafter NPM Annual Report 2017); Austrian Ombudsman Board, Annual Report on the activities of the Austrian NPM 2016, Page 150f (hereinafter NPM Annual Report 2016); Austrian Ombudsman Board, Annual Report on the activities of the Austrian NPM 2014, p 132ff (hereinafter NPM Annual Report 2014).
352 Austrian Ombudsman Board, Annual Report on the activities of the Austrian NPM 2015 (hereinafter Austria, NPM Annual Report 2015).
353 Austria, NPM Annual Report 2015, p140.
354 Austria, NPM Annual Report 2017, p 157
355 Austrian Ombudsman Board, Annual Report on the activities of the Austrian NPM 2018, p 158 (hereinafter NPM Annual Report 2018).
356 Austria, NPM Annual Report 2018, p 151
357 e.g. CPT, 'Report on Slovenia' (2017) CPT/Inf (2017) 27, para 19.
358 Slovenian Ombudsman, Annual Report 2017, p 155.
359 Poland, Annual Report 2017, p 43.

360 CPT, Report to the United Kingdom (2002) CPT/Inf (2002) 6, paras 26, 27, 33, 123, 124, pp 13-15, 41. See also: CPT, 'Report to Spain' (2013) CPT/Inf (2013) 6 para 24, p 22; APT/PRI, 'Video recording' (2015).
361 APT, 'Monitoring Police Custody' (2013), p 79.
362 CPT, Report to Norway (2019) CPT/Inf (2019) 1, paras 29, 30, pp 17/18. See also CPT/Inf (2001) 6, paras 26, 27, 33, 123, 124, pp 13-15, 41.
363 International Consultation Workshop, Budapest, 12-13 February 2019.
364 Interview with NPM representative, Austria, 21 August 2019.
365 Extracts from Interview, 30 August 2019.
366 Interview with external expert, Austria, 14 July 2018. Such interviews could also be conducted with prisoners who are serving their sentence after a final judgement.
367 APT, 'Monitoring Police Custody' (2013), p 46.
368 APT, 'Monitoring Police Custody' (2013); APT, 'Towards the Effective Protection of LQBTI Persons Deprived of Liberty: A Monitoring Guide' (2018), p 49; APT/PRI, 'Video recording' (2015), p 7.
369 Interview with CPT Representative, September 2019.
370 SPT, Ninpara para 86; see also APT/PRI, 'Pre-trial detention' (2015).
371 Criminal Justice Inspection Northern Ireland, 'Police Custody: The detention of persons in police custody in Northern Ireland' (March 2016).
372 GAHNRI, SCA GO, G.O. 2.9; see also De Beco/Murray, 2014, p 103; Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' [2010] 10 HRLR 25.
373 CRPD/C/1/Rev.1 Annex.
374 The 14 countries are: Austria, Bulgaria, Croatia, Cyprus, Estonia, Finland, Hungary, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovenia. Netherlands and Slovakia which have a mandate for individual complaints only regarding non-discrimination cases.
375 In France the Defender of Rights, which is different from the NHRIs (Commission nationale consultative des droits de l'homme) and the NPM (Contrôleur général des lieux de privation de libert) is the institution competent to handle complaints. For more information see <https://www.defenseurdesdroits.fr/en> accessed 10 December 2019.
376 France, Défenseur des Droits, Décision du Défenseur des droits n°2018-128,(17 April 2018).
377 Fair Trials, 'Glassboxes in courtrooms violate presumption of innocence, finds French Ombudsperson' (24 April 2018) <https://www.fairtrials.org/news/glass-boxes-court-rooms-violate-presumption-innocence-finds-french-ombudsperson> accessed 3 December 2018.
378 Karachentsev v Russia.
379 Karachentsev v Russia.
380 Karachentsev v Russia.
381 Karachentsev v Russia.
382 Directive on Presumption of innocence, Art 5 Presentation of suspects and accused persons: '1.Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint. 2. Paragraph 1 shall not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.'
383 On the principle of subsidiarity see also Kucsko-Stadlmayer, 2008, p 20.





384 Slovenia: Arts 24, 27, 30 Human Rights Ombudsman Act Official Gazette RS No. 71/1993 (hereinafter Slovenia: Ombudsman Act); Croatia: Art. 22 Ombudsman's Act; Austria: Article 148a (1) Austrian Federal Constitution. See also Thienel/ Leitl-Staudinger in Kneihs/ Lienbacher (eds), Rill-Schäffer-Kommentar Bundesverfassungsrecht, Art 148a B-VG (2017), p 20.
385 Hungary: Section 18 Commissioner Act); Lithuania: Arts 13-17 Ombudsman law (complaints relating to the matter has already been resolved); Czech Republic: Section 12 (d) Act 349/1999 Coll. of 8 December 1999 on the Public Defender of Rights, as lastly amended by 396/2012 Coll; Slovakia: Section 15 (b), (c)The Act 564/2001 Coll. of Laws on Public Defender of Rights 4 December 2001; Estonia: Section 25 (2)Chancellor of Justice Act, RT I 1999, 29, 406, as amended in 2018. .
386 International Consultation Workshop, Budapest, 12-13 February 2019..
387 Slovenian Ombudsman, Annual Report of 2017, p 155.
388 Austria: Art 148a(4) Austrian Federal Constitution; Slovenia: Art 24 Ombudsman Act; Croatia: Art. 22 Ombudsman's Act.
389 Slovenia: Art 24 Human Rights Ombudsman Act.
390 Croatia: Art 22 Ombudsman's Act. See also Gabriele Kucsko-Stadlmayer, pp. 22 ff.
391 Amnesty International, 'Amnesty International's Recommendations On Effective Protection And Promotion Of Human Rights' (Amnesty International, October 2001), pp 29 ff.
392 Spain: Art 17 (2) NHRI law
393 Asia Pacific Forum (APF), 'A Manual on National Human Rights Institutions (May 2018)', p 319 (hereinafter APF, 2018).
394 International Council on Human Rights Policy and OHCHR, 'Assessing the Effectiveness of National Human Rights Institutions' (2005), p 22.
395 Welch R M, 'National Human Rights Institutions: Domestic Implementation of International Human Rights Law' in Journal of Human Rights 16 (1), pp 96–116.
396 Poland: Art 14 (5) Commissioner's Act.
397 Finland: Section 110 Constitution of Finland and Art 8 Parliamentary Ombudsman Act.
398 Poland: Art 14(8) Commissioner's Act
399 Kasacja RPO w sprawie mężczyzny z niepełnosprawnością umysłową skazanego za morderstwo, 24 December 2018; see also: Polish Helsinki Foundation, 'Man talked into murder. Application to ECtHR involving person with intellectual disability', 9 February 2017 (before the Commissioner filed the cassation with the Supreme Court, the HFHR filed an application to the ECtHR).
400 Spain: Art 29 NHRI law; Slovenia: Arti 50 of the Constitutional Court Act (ZUstS) grants the Ombudsman the right to file a constitutional complaint concerning a violation of human rights or fundamental freedoms of individuals or legal entities with an individual document of a state or local authority or a holder of public powers.
401 Slovenian Ombudsman, Annual Report of 2017, p 28 ff.
402 Nairobi Declaration; APF, 2018, p 184;
403 Helsinki Foundation of Human Rights, 'To Luxembourg instead of Strasbourg? A report in the role of the Court of Justice of the European Union in the protection of human rights', September 2018, p 57f (hereinafter Helsinki Foundation if Human Rights, 2018).
404 Slovenia: Slovenian Ombudsman Act, Art 25.
405 Interview with NHRI representative of the Netherlands, 2019.
406 For examples outside the EU see APF, 2018, pp 300 ff.
407 See National Report Poland, p 3. For an example from the Canadian system see Magonet, 'Should the Dispute Remain Between the Accused and the Crown? Third-Party Interven-

tion in Criminal Proceedings' (June 2016) <https://ablawg.ca/2016/06/08/should-the-dispute-remain-between-the-accused-and-thecrown-third-party-intervention-in-criminal-proceedings/comment-page-1/> accessed 15 December 2019.

408 APF, 2018, p 188 (with examples on the national laws of Australia and Indonesia).

409 See Irish Human Rights and Equality Commission (IHREC), Submission in the case Sweeney v. Minister for Justice, Ireland and the Attorney General (12 March 2019).

410 IHREC, Submission in the case Artur Celmer v. Minister for Justice and Equality (2 July 2019).

411 For more guidance on third party interventions see ENNHRI, 'Guide on Third Party Interventions Before the European Court of Human Rights' (forthcoming).

412 e.g. IHREC in the case O'Keeffe v. Ireland, App no 35810/09 (ECtHR, 28 January 2014); IHREC in the name of the European Group of National Human Rights Institutions (now ENNHRI) in the case Gauer and others v. France, App No 61521/08 (ECtHR, 23 October 2012) (hereinafter Gauer and others v France); European Group of National Human Rights Institutions (now ENNHRI) in the case D.D. v. Lithuania, App No 13469, (ECtHR, 14 February 2012). See also Laurens Lavrysen and Claire Poppelwell-Scevak, 'Third Party Interventions before the ECtHR: A Rough Guide' (24 February 2015).

413 Rule 44 §3 Rules of Court and Art 36 §2 ECHR. "Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant".

414 Rules 51 (1) or 54 (2)(b).

415 Saadi v. Italy, App No 37201/06 (ECtHR GC, 28 February 2008); §7.

416 Schabas, *The European Convention on Human Rights: A Commentary*, (OUP 2015) Art 36, p 792.

417 JUSTICE, 'To assist the Court: Third Party Interventions in the Public Interest' (2016), p 60 (hereinafter JUSTICE, 'To assist the Court', (2016))

418 Netherlands Institute for Human Rights, Submission in the case Hasselbaink v. the Netherlands (73329/16) and in Maassen v. The Netherlands (10982/15) (December 2017) <https://mensenrechten.nl/nl/publicatie/38255, https://mensenrechten.nl/nl/publicatie/36606> accessed 18 December 2019.

419 IHREC, Submission in the case Theresa Magee v Ireland (8 March 2012).

420 Art23 of the Statute of the CJEU and Art 96 of the Rules of Procedure, which state that these are: the parties to the main proceedings, the Member States, the European Commission, the institution that adopted the act the validity or interpretation of which is in dispute, the States other than the Member States which are parties to the EEA Agreement, EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling, non-Member States which are parties to an agreement relating to a specific subject matter which is concluded with the Council and where the agreement so provides and also where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

421 Art 50(2) Statute of the Court of Justice of the European Union. In direct actions third parties must be able to show a direct, existing interest in the ruling on the form of order sought by the parties (Order of the President of the Court of 6 April 2006 in Case C-130/06 P(I) An Post v Deutsche Post and Commission, para 8). Order of the President of the Court of 25 January 2008 in Case C-461/07 P(I) Provincia di Ascoli Piceno and Comune di Monte Urano v Sun Sang Kong Yuen Shoes Factory, para 5.

422 Art 267 TFEU.





423 According to Arts 96 and 97 Rules of Procedure of the Court of Justice. Joined cases Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) (CJEU GC, 4 October 2011), para 6. See also JUSTICE, 'To assist the Court', (2016), p 63.

424 R (British American Tobacco UK Ltd) v Secretary of State for Health [2014] EWHC 3515 (Admin).

425 R (British American Tobacco UK Ltd) v Secretary of State for Health [2014] EWHC 3515 (Admin), para 41.

426 JUSTICE, 'To assist the Court', (2016), p 64, 19.11.

427 M.F. v J.M., C-508/19 (CJEU, pending), initiated by the request for a preliminary ruling from the Sąd Najwyższy (Supreme Court in Poland) lodged on 3 July 2019; W.Ż., C-487/19 (CJEU, pending) initiated by the request for a preliminary ruling from the Sąd Najwyższy (Supreme Court in Poland) lodged on 26 June 2019.; see also Martyna Olejnik, Patryk Wachowiec, 'Supreme Court queries ECJ about new appointee', 14 Juni 2019.

428 Krajowa Rada Sądownictwa, C-824/18 (CJEU, pending), initiated by the request for a preliminary ruling from the Naczelny Sąd Administracyjny ( Supreme Administrative Court in Poland) lodged on 28 December 2018; see also: RPO do TSUE: kandydaci niezgłoszeni przez KRS do powołania na sędziów Sądu Najwyższego - z prawem do odwołania, 22 October 2019; RPO przyłączył się do odwołania w NSA sędziego niepowołanego do SN. NSA zadał pytania prejudycjalne, 19 March 2019.

429 Joined Cases Miasto Łowicz v Skarb Państwa – Wojewoda Łódzki, (C-558/18, CJEU, pending), initiated by the request for a preliminary ruling from the Sąd Okręgowy w Łodzi (District Court, Łódź, Poland) and Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) v VX, WW, XV, (C-563/18, CJEU, pending), initiated by the request for a preliminary ruling from the Sąd Okręgowy w Warszawie (District Court, Warsaw, Poland); see also: Polish Commissioner for Human Rights, 'Notice on the opinion of CJEU Advocate General E. Tanchev regarding joined cases: C-558/18 and C-563/18', 11 October 2019; Pawel Marcisz, 'Creating a Safe Venue of Judicial Review. AG Tanchev on the Admissibility of Preliminary References re Polish Disciplinary Proceedings', Verfassungsblog, 11 October 2019.

430 Polish Helsinki Foundation, Polish National Report (forthcoming). See also: Zastępca RPO dr Maciej Taborowski dla tv.rp.pl o postępowaniach w sprawie praworządności w Polsce, 29 July 2019; This possibility was also seized by, among others, the international non-governmental organisation Article 19, which in November 2017 submitted an amicus curiae brief in the proceedings before the French Council of State that led to the submission to the CJEU of the request for a preliminary question on "the right to be forgotten", for more information see: Helsinki Foundation if Human Rights, 2018, p. 58.

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