

IMPLEMENTING ANTI-TORTURE STANDARDS IN COMMON LAW AFRICA: SAFEGUARDS TO PREVENT TORTURE

An overview of safeguards for persons deprived of liberty in The Gambia, Ghana, Kenya, Nigeria, South Africa, Sudan, Uganda and Zimbabwe

LEGAL AND PROCEDURAL SAFEGUARDS

Articles 2(1) and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) require States to take “effective legislative, administrative, judicial or other measures” to prevent torture and other ill-treatment in any territory under its jurisdiction. A number of legal and procedural safeguards are not only legal requirements for the administration of justice, but also vital to effectively prevent torture and other ill-treatment. The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) acknowledges that procedural safeguards for persons deprived of their liberty at all phases of detention, from the moment of initial apprehension to final release from custody, are central to preventing torture. A recent research study showed that detention practices have the strongest impact on the risk of incidence of torture and the implementation of safeguards against torture in the first hours and days after arrest contribute crucially to lessening such risks.

This Factsheet focuses on the following safeguards for persons deprived of liberty a) information about rights; b) notification of third parties upon arrest; c) access to a lawyer; d) access to an independent medical examination; e) prompt appearance before a judge.

In partnership with

REDRESS

Ending torture, seeking justice for survivors

RELEVANT INTERNATIONAL AND REGIONAL INSTRUMENTS

The safeguards in this factsheet are enshrined in the following international and regional treaties and soft law instruments:

The International Covenant on Civil and Political Rights (ICCPR)

The Robben Island Guidelines (RIG)

The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)

The African Commission on Human and Peoples' Rights (ACHPR) Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines)

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)

INFORMATION ABOUT RIGHTS

Detained individuals shall be informed of their rights and of the reasons for their detention at the time of their arrest, in a language and manner that they can understand. This important safeguard ensures individuals are aware of their rights in detention, enabling them to effectively exercise them, including the right to challenge the lawfulness of their detention and to seek release if unfounded or unlawful.

KEY RESOURCE:

THE LUANDA GUIDELINES MODEL LETTERS OF RIGHTS

The Luanda Guidelines Implementation [Toolkit](#) has developed Model Letters of Rights – one for Arrested Persons and another for People in Pre-Trial Detention. They are to be adapted by each State in conformity with national legislation, regulations and policies, and include a broad range of rights, including (but not limited to):



the right to remain silent,

the right to medical care,



the right to legal representation,

the right to be treated in a humane manner, and



the right to interpretation and translation,

the right to complain if subjected to inhumane treatment, as well as information about the complaint procedure.



the right to information,



National laws

In the reviewed States, persons deprived of their liberty have the right to be:

| Informed of the reason for their arrest or detention. | Informed in a language they can understand. | Informed of their right to remain silent. | Informed of their right to consult a lawyer. |
|---|---|---|---|
|  The Gambia |  The Gambia |  Kenya |  The Gambia |
|  Ghana |  Ghana |  Nigeria |  Ghana |
|  Kenya |  Kenya |  South Africa |  Kenya |
|  Nigeria |  Nigeria |  Zimbabwe |  Nigeria |
|  South Africa |  South Africa | |  South Africa |
|  Sudan |  Sudan | |  Uganda |
|  Uganda |  Uganda | |  Zimbabwe |
|  Zimbabwe |  Zimbabwe | | |

Regarding the timing of the notification, reviewed States’ national laws are mostly in line with international standards:



Shared challenges and proposals for States

| CHALLENGE | PROPOSALS |
|--|--|
| <ul style="list-style-type: none"> Our research has shown that the requirement for detainees to be informed of their rights in a language they can understand is not always implemented in practice in the studied States. If an individual cannot understand their rights, they will be unable to exercise them. | <ul style="list-style-type: none"> Places of detention are encouraged to have staff representing the main ethnic and language groups. Where this is not feasible, finding ways to ensure detainees have access to an officer fluent in their language or dialect prevalent in the region that the detention facility is located in. Pictorial representations of rules and regulations throughout the prison or detention facility are also helpful, especially for illiterate detainees. Detention facilities could also provide such information in the form of handouts or booklets, provided upon induction into the prison/detention facility. Law enforcement officials are to be trained and follow procedures to confirm that individuals have fully understood their rights and how to exercise them. |

NOTIFICATION OF FAMILY OR THIRD PARTY UPON ARREST

International and regional human rights standards also provide for the notification of a family member or a third party as soon as possible after the arrest. The SPT has recommended notification is made no longer than 3 hours after arrest. This legal safeguard helps protect individuals from risks of incommunicado detention, torture and other ill-treatment, and enforced disappearances. By informing a third party of the arrest or detention, its lawfulness and conditions can be more easily monitored and challenged.

National laws

The national laws of the studied States are generally compliant with international standards.



In **Uganda**, arrested or detained persons have the constitutional right to request their next-of-kin to be informed “as soon as practicable” of the deprivation of liberty. **Ugandan** legislation further requires that a relative be informed of the detention and allowed access to the person within 72 hours if under a state of emergency.



The law in **Kenya** recognises the right of the detainee to inform family members of the arrest and detention and place of detention and guarantees not only the right to communicate with a third party upon the first instance of detention, but also upon any transfer from one detention facility to another.



In **Nigeria, Ghana** and **The Gambia** notification is the responsibility of the police.

Financial costs of communication with third parties

In prisons and other places of detention, it is not always easy to communicate with the outside world, not least due to the potential financial costs involved.

In **Kenya**, in order to ensure the safeguard of notification of third parties is respected, the law commands that any communication pursuant to this right must be facilitated by authorities free of charge.

Nigeria and **Zimbabwe** similarly stipulate that notification of the relatives is to be done at no cost of the suspect.

*Shared challenges and proposals for States***CHALLENGES**

- Although all jurisdictions examined have adopted provisions related to this safeguard, these are at times subjected to limiting circumstances that may contravene international and regional standards. Such circumstances include, for example, the right to notification of a third party only arising if an individual is detained under emergency powers or if permission is granted by a court or public official.
- There have also been complaints by prisoners in some of the reviewed States that they have not been allowed to communicate with family or embassies, at times as a form of punishment.

PROPOSALS

- Amend legislation and regulatory rules to provide for the right to notify family members or a third party as soon as possible after arrest and within a specific timeframe.
- Ensure police stations and detention facilities are provided with appropriate means for arrested and detained individuals to communicate with family members or a third party in confidence, via telephone or in person.
- Any restriction to the exercise of the right to notification should be strictly justified, limited in time, and subject to supervisory oversight and judicial review.

ACCESS TO A LAWYER

A fundamental safeguard against torture and other ill-treatment is the right of prompt access to a lawyer at all stages of the investigation process and particularly from the moment of arrest. Individuals should be able to consult an independent lawyer of their choice in private. Free choice, independence and confidentiality are key elements to ensure no intimidation influences client-counsel consultations, and that access is protected to enable the individual to report allegations of torture without fear of reprisals.

National laws

All the States examined provide for the right of individuals to consult with a lawyer. Some States also provide for:

- The right to choose their lawyer (**Zimbabwe; South Africa; Nigeria**)
- The right to consult their lawyer in private (**Zimbabwe, Kenya**)

The moment when individuals are entitled to exercise such right varies between States, as shown below:



Shared challenges and proposals for States

CHALLENGES

- In practice, individuals are not always able to exercise their right to a lawyer, including due to instances of discrimination.
- Legal and financial obstacles related to legal aid may also prevent individuals without means from exercising this right, particularly where detained persons need to acquire legal assistance at their own cost.
- Imprecise terms such as ‘reasonable access’ and ‘reasonable opportunities’ can limit the scope of access to legal aid lawyers.

PROPOSALS

- Ensure individuals are able to effectively exercise this right to legal counsel by enabling private and confidential communication in person at police stations and detention facilities, for example by setting up interview rooms, or via telephone should the individual or their counsel prefer.
- Establish, implement or extend the scope of State systems of free legal aid, and provide sufficient financial resources for such schemes/programmes. Collaboration between detention facilities and legal aid providers, such as paralegal committees or civil society organisations can also be helpful to increase access.

ACCESS TO AN INDEPENDENT MEDICAL EXAMINATION

Access to independent physical and psychological medical examinations for persons deprived of their liberty is an important safeguard to deter, prevent and document torture. The right to an independent medical examination as soon as possible after arrest and immediately upon their admission at a place of detention is enshrined in regional and international instruments.

The UN [Special Rapporteur on Torture](#) has pointed to the need for “routine medical screenings at entry, periodically during incarceration, at exit, at all transfers and upon request”. This includes through subsequent referral to a forensic expert in order to conduct a specialised forensic medical examination in line with the [Istanbul Protocol](#), evaluating the consistency of findings and symptoms with allegations of torture and other ill-treatment. Medical examinations should be conducted by medical practitioners who are independent of the detention facility, and held in private (out of sight and hearing of police officers). Finally, adequate medical care is also to be provided throughout the period of detention.

National laws

| Right to access a | doctor | of their choice | who is independent | in private | without delay |
|--|--------|-----------------|--------------------|------------|--|
|  The Gambia | ✗ | ✗ | ✗ | ✗ | ✗ |
|  Ghana | ✓ | ✗ | ✗ | ✗ | ✗ |
|  Kenya | ✓ | ✗ | ✗ | ✗ | ✗ |
|  Nigeria | ✓ | ✓ | ✓ | ✗ | The right only arises after interrogation. |
|  South Africa | ✓ | ✓ | ✗ | ✗ | Yes – as soon as possible after admission to a detention facility. |
|  Sudan | ✓ | ✗ | ✗ | ✗ | ✗ |
|  Zimbabwe | ✓ | ✓ | ✓ | ✓ | ✓ |

The law in South Africa and Uganda

In **South Africa**, it is a requirement for every individual to have a health status examination as soon as possible after admission, as well as before and after making a confession.

In **Uganda**, the Prisons Rules require that prisoners be examined on admission to prison, prior to undergoing strenuous labour or corporal punishment or other punishment that may cause injury, prior to discharge and prior to transfer.

Shared challenges and proposals for States

CHALLENGES

- Some of the legislative provisions studied do not define the meaning of ‘appropriate medical care’, qualify the right by subjecting it to a reasonableness test or the discretion of public officials, or require the costs to be met by the person deprived of their liberty.
- At times, there is a lack of resources to provide adequate medical care, which is particularly concerning with regards to psychiatric evaluations of the impact of torture.

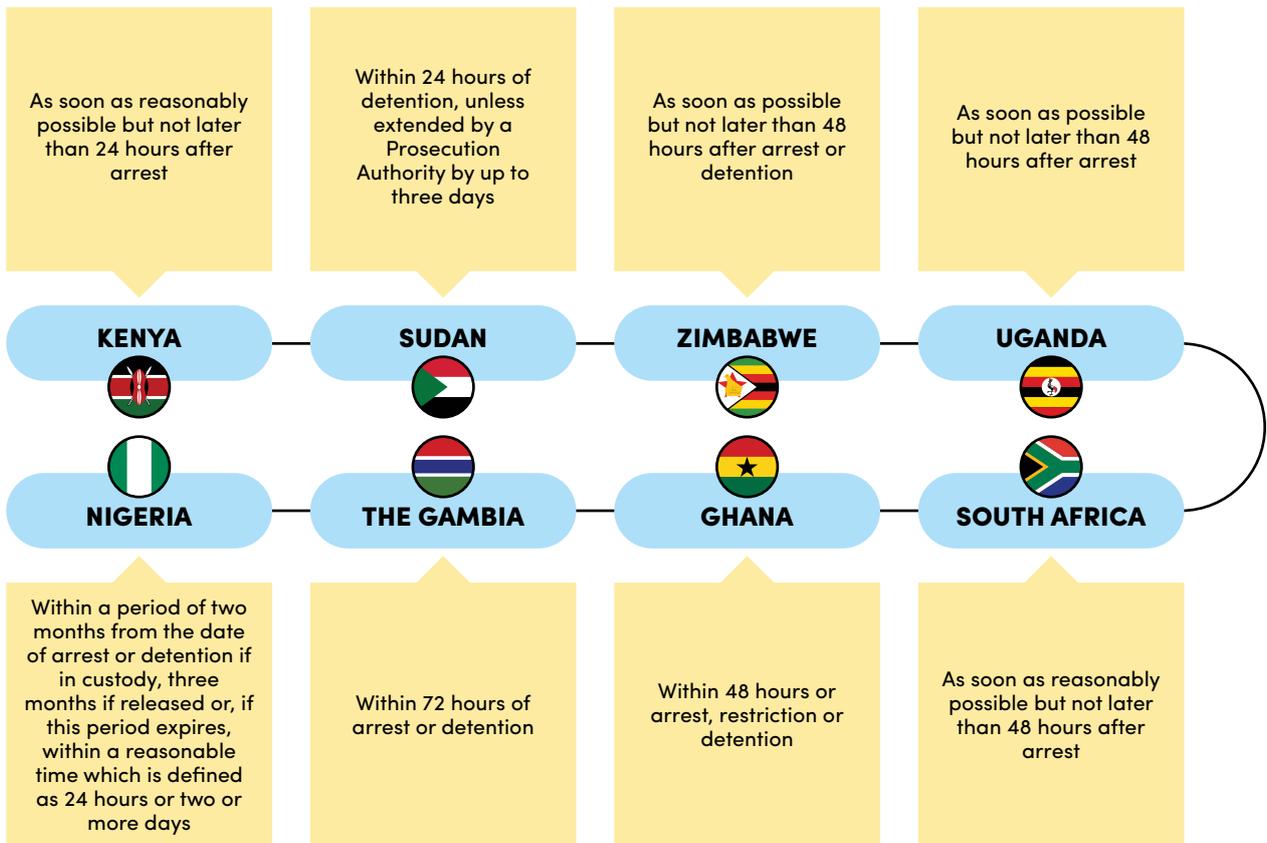
PROPOSALS

- Amend legislation and prison procedures to provide independent medical examination as soon as possible after arrest and upon admission into the detention facility, and regularly during the period of detention and upon request.
- Ensure medical examinations are conducted by medical practitioners independent of the authorities and in private.
- Ensure such examinations are properly recorded by medical staff, with comprehensive information clearly identifying the individual, time and date of inspection, any identified injuries as well as allegations made. Medical staff, prosecutors and judges shall be adequately trained on the use of the Istanbul Protocol.
- Provide training for qualified forensic experts on how to conduct forensic medical evaluations in line with the Istanbul Protocol to document medical findings consistent with allegations of torture and ill-treatment.

JUDICIAL OVERSIGHT – PROMPT APPEARANCE BEFORE A COURT

Persons deprived of liberty must be brought promptly before a competent judicial authority. Judges review the lawfulness of detention and order the release of the detained person if unlawful or arbitrary. They can also hear allegations of torture or other ill-treatment and consider whether there are any visible signs of such violations, and any allegations that may be brought by the detainee, including to order an independent forensic medical evaluation. The UN Human Rights Committee (**HRC**) interprets the term “promptly” as within 48 hours, having noted that any delay “must remain absolutely exceptional and be justified”. This is because detention longer than 48 hours without judicial oversight unnecessarily increases the risk of ill-treatment and torture, which is known to be higher during the first hours after arrest and the initial period of detention.

When are detainees or arrestees required to be brought before a court?



Shared challenges and proposals for States

| CHALLENGE | PROPOSALS |
|---|--|
| <ul style="list-style-type: none"> Increased compliance with the statutory limit is needed as reports note persons deprived of liberty are at times not brought before a judicial authority within the statutory time limit. | <ul style="list-style-type: none"> Amend legislation and regulatory rules to require individuals be brought before a judge promptly after arrest, and at most within 48 hours thereafter. Sensitise judges and prosecutors to torture prevention, particularly on its incidence during the initial period of detention, including to encourage them to regularly enquire how detainees have been treated when they are brought before the court and to investigate when allegations of torture are made. |