



Declassified*

AS/Jur (2016) 34

5 December 2016

ajdoc34 2016

Committee on Legal Affairs and Human Rights

Securing access of detainees to lawyers

Information memorandum

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1. Introduction

1. The aim of this information memorandum is to present the various international legal instruments that guarantee detainees' right of access to a lawyer and the many constituent parts of this right, as interpreted by the European Court of Human Rights ("the Court") in its case law.

2. International legal instruments concerning detainees' access to a lawyer

2.1. Council of Europe

2. In the Council of Europe's human rights protection system, the right to be assisted by a lawyer in a criminal case is clearly set out in Article 6.3.c of the European Convention on Human Rights ("the Convention"): "*Everyone charged with a criminal offence [has the right] to defend himself in person or through legal assistance of his own choosing.*" Access to a lawyer is crucial for the exercise of the rights set out in Articles 3 (prohibition of torture and inhuman or degrading treatment), 5.4 (right to appeal against a decision on deprivation of liberty) and 6.1 (right to a fair trial) of the Convention. Obstacles to or failure to provide such access or interference in consultations between lawyers and detainees frequently lead to findings of violations by the Court. Mention might also be made of the *Imbrioscia v. Switzerland* judgment, in which the Court states: "*Certainly the primary purpose of Article 6 (of the Convention) as far as criminal matters are concerned is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', but it does not follow that the Article (art. 6) has no application to pre-trial proceedings.*"¹ In its *Salduz v. Turkey* judgment, the Court affirmed the following principles: "*(I)n order for the right to a fair trial to remain sufficiently 'practical and effective' (...), 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, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (...). 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.*"²

3. The Council of Europe's Committee of Ministers has adopted numerous resolutions and recommendations on matters relating to justice and, more specifically, the role of lawyers, in particular its Recommendation on the European Code of Ethics for Prison Staff³ and its Recommendation (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.⁴

* Document declassifié par le Comité le 13 décembre 2016.

¹ *Imbrioscia v. Switzerland* [GC], ([Application No. 13972/88](#)), 24.11.1993, § 36.

² *Salduz v. Turkey*, [GC], 27.11.2008, § 55.

³ [CM/Rec\(2012\)5](#) on the European Code of Ethics for Prison Staff.

⁴ [CM/Rec\(2006\)13](#) on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

4. During the visits it undertakes to Council of Europe member States, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) systematically verifies detainees' access to a lawyer to see if it complies with its Standards, which define access to a lawyer as one of the means of preventing ill-treatment.⁵ The CPT considers that "the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest".⁶

2.2. European Union

5. Detainees' right of access to a lawyer is currently also enshrined in EU law in Articles 47 (Right to an effective remedy and a fair trial) and 48 (Presumption of innocence and right of defence) of the Charter of Fundamental Rights of the European Union.⁷

6. A recent directive of the European Parliament and the Council specifically concerns the right of access to a lawyer during criminal proceedings and proceedings relating to a European arrest warrant.⁸ The directive sees the lawyer as the immediate point of contact for persons deprived of their liberty and accords him or her an active role during questioning. A degree of harmonisation of the rules governing the right of access to a lawyer should take place for EU member States after the transposition of this Directive by the specified deadline (27 November 2016). Two other directives also strengthen the safeguards surrounding the right of access to a lawyer: Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings.

7. On 13 October 2016, the Directive on the right to legal aid for citizens who are suspected of committing or are being prosecuted for a criminal offence and for those subject to a European arrest warrant was adopted.⁹ This Directive will complement the aforementioned Directives and is the last planned legal instrument to strengthen the procedural rights of suspects or persons prosecuted for criminal offences.

2.3. United Nations

8. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) establishes the right to a fair trial. Article 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance also provides for this guarantee.¹⁰ Articles 2 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment require the States Parties to take preventive measures, and the United Nations Committee against Torture (CAT), which is tasked with overseeing the implementation of that convention, has recognised the specific importance of this guarantee of access to a lawyer as an effective preventive measure.¹¹ In addition, the International Convention on the Rights of the Child provides in Article 37(d) that the States Parties shall ensure that "*every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action*".¹²

9. Non-binding rules ("soft law") developed by the United Nations mention this right of access to a lawyer in more precise and more detailed terms. Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establishes the right of any detained person "to be assisted by counsel as prescribed by law".¹³

⁵ [CPT/Inf/E \(2002\) 1](#) [Rev. 2015], paragraphs 18-25.

⁶ CPT's 12th General Report (CPT/Inf (92)3), paragraphs. 40-43.

⁷ [Charter of Fundamental Rights of the European Union](#) (2000/C 364/01).

⁸ [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 party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

⁹ [EU adopts rules to guarantee legal aid in criminal proceedings](#), 30/10/2016, Press Release 564/16.

¹⁰ [International Convention for the Protection of All Persons from Enforced Disappearance](#).

¹¹ See General Comment No. 2 of the Committee against Torture of 24 January 2008, paragraph 13.

¹² [International Convention on the Rights of the Child](#).

¹³ [A/RES/43/173](#), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its Resolution 43/173 of 9 December 1988.

10. The United Nations also adopted in 1990 the Basic Principles on the Role of Lawyers, which are designed to help States promote and ensure the proper role of lawyers in society. Principles 5 to 9 cover more specifically safeguards in criminal justice matters.¹⁴ Principle 5, for example, states:

“Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.”

3. Various aspects of the right of access to a lawyer

11. Access to and assistance from a lawyer must be effective. The Court has stipulated that the mere appointment of a lawyer without guaranteeing his or her presence (especially at the court hearing) does not meet the requirements of Article 6.3.b and c. of the Convention.¹⁵ However, the Court has ruled that a State cannot be held responsible for every shortcoming on the part of a court-appointed lawyer. To ensure that the right of access to a lawyer is effective, other aspects are essential: the choice of lawyer, access to the case files, legal aid, access to an interpreter, and the confidentiality of communications with the lawyer. Furthermore, there must be legal provisions on waiving this right of access to a lawyer.

3.1. Lawyer of one's choice

12. The Court reaffirmed in its recent *Dvorski v. Croatia* judgment that *“the right of access to a lawyer does entail a right to have recourse to legal assistance of one's own choosing from the initial stages of the proceedings”*.¹⁶ It held that the impossibility of choosing a lawyer had prejudiced the applicant's defence rights and the fairness of the proceedings as a whole and that there had accordingly been a violation of Article 6.1 and 3.c of the Convention.

13. For example, in its 2015/2016 report, Amnesty International noted that the right to be represented by a lawyer of one's choice was not always respected.¹⁷

3.2. Right of access to case files

14. Article 6.3.a of the Convention does not guarantee unlimited access to case files. In line with the case law in *Danayan v. Turkey*,¹⁸ Article 7 of Directive 2012/13/EU requires that *“access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence”*.

15. Article 7 of Directive 2012/13/EU¹⁹ specifies the arrangements for accessing case files in connection with criminal proceedings. It states that the EU member States *“shall ensure that documents [...] which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers”*.

16. In Turkey, for example, Article 153 of the Code of Criminal Procedure (TCCP) authorises restriction of access to the case file by the suspect and his or her lawyer before the trial if such access could jeopardise the aim of the initial investigation. Moreover, Section 10 of the Anti-Terrorism Act authorises the judge to issue an order that partially or totally restricts the defence counsel's access to the case file.²⁰ The prosecutor can apply to the court for a “secrecy order”.

¹⁴ [Basic Principles on the Role of Lawyers](#), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana (Cuba) from 27 August to 7 September 1990.

¹⁵ Article 6.3.b and c: “Everyone charged with a criminal offence has the following minimum rights [...] b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” See *Katritsch v. France*, Application No. 22575/08, judgment of 4 November 2010.

¹⁶ *Dvorski v. Croatia*, Application No. 25703/11, judgment of 20 October 2015, paragraph 78. See also paragraph 21: *“the right of access to a lawyer does entail a right to have recourse to legal assistance of one's own choosing from the initial stages of the proceedings, which implies the right to an informed and free choice”*.

¹⁷ Amnesty International, [Annual report 2015/2016](#) on the situation of human rights worldwide, p. 387.

¹⁸ *Dayanan v. Turkey*, Second Section, Application No. 7377/03, judgment of 13 October 2009.

¹⁹ [Directive 2012/13/EU](#) of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

²⁰ [CommDH \(2012\)2](#), Commissioner for Human Rights, Administration of justice and protection of human rights in Turkey, paragraph 75.

3.3. *Right to legal aid*

17. Article 6.3.c of the Convention clearly states that everyone charged with a criminal offence has the right to legal assistance free of charge by an officially-appointed lawyer if his/she does not have sufficient means to pay for a defence counsel and “when the interests of justice so require”. In the case of officially-appointed lawyers, the European Court of Human Rights has pointed out that their appointment alone is not sufficient to meet the requirements of Article 6.3.c of the ECHR. In the *Sabirov v. Russia* case, the officially-appointed lawyer did not attend his client’s hearing before the Court of Cassation. The Strasbourg Court held in that case that the authorities should either have replaced the lawyer who did not fulfil his obligations or have obliged him to fulfil them.²¹ Moreover, the refusal to grant legal aid in cases in which the assistance of a lawyer is compulsory in order to be able to appeal to the Court of Cassation was examined from the point of view of Article 6.1 of the Convention. For example, in recent judgments against Armenia, the Court found a violation of Article 6.1 because the applicants had had no effective access to justice. As they did not have legal aid, they were unable to pay for the services of a lawyer to appeal to the Court of Cassation (in this instance in “civil” cases).²²

18. Principle 17.2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides for legal aid to be granted to persons deprived of their liberty who are unable to afford the services of a lawyer.

19. As the CPT member Mark Kelly pointed out during the Committee hearing on 21 June 2016,²³ the CPT’s practice over 25 years has clearly confirmed that the vast majority of detainees are from poor and disadvantaged socioeconomic groups with little education. Few of them can afford the services of a lawyer, and the mere mention by the police of the possible cost can have a significant deterrent effect.

20. The CPT has, for example, reminded the Czech authorities that the right to free legal aid for persons detained by the police who are unable to afford a lawyer applies from the beginning of their deprivation of liberty, irrespective of whether they have been formally charged.²⁴ In its most recent report on the situation in Greece, the CPT also noted the lack of progress on the right of access to a lawyer since its previous visit in 2013. According to the CPT, this right remains “theoretical and illusory” for those without the financial means to pay for the services of a lawyer, especially at the police investigation stage, when legal aid is not available in Greece.²⁵ According to, Mr Kelly that was a classic case in which the right to access a lawyer existed on paper but not in practice, and the Greek situation was one example among others and was, unfortunately, far from being an exception in Council of Europe member States.

21. At the hearing on 21 June 2016, Heather McGill, of Amnesty International referred to the lack of an independent national system for appointing State-funded lawyers in the Russian Federation. The existence of such a system would prevent investigators from “choosing” unconscientious or unscrupulous lawyers who are more inclined to disregard certain signs of torture or ill-treatment.

22. After a visit to Portugal in January 2015, the UN Special Rapporteur on the independence of judges and lawyers voiced her concerns about the rise in court costs and legal fees, which, she said, were obstructing access to justice for the increasing number of people living in poverty as a result of the economic crisis. Some austerity measures affecting economic and social rights have, incidentally, been declared unconstitutional by the Portuguese Constitutional Court.²⁶

3.4. *Right to an interpreter*

23. The right of access to a lawyer would be meaningless if a detained person could not communicate with a lawyer if they had no common language. Many legal instruments provide for the right to an interpreter.

²¹ *Sabirov v. Russia*, Application No. 13465/04, judgment of 11 February 2010.

²² [Ghuyumchyan v. Armenia](#), Application No. 53862/07, and *Tovmasyan v. Armenia*, Application No. 11678/08, judgments of 21 January 2016.

²³ On 21 June 2016, the Committee heard three experts in connection with the preparation of this report: Mr Mark Kelly, a member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on behalf of Ireland, Ms Heather McGill, of Amnesty International, and Ms Marie-Laure Basilien-Gainche, member of the Trans Europe Experts Network and Professor of Public Law at the University Jean Moulin, Lyon 3.

²⁴ CPT/Inf (2015) 18, Czech Republic: Visit 2014, paragraph 14.

²⁵ CPT/Inf (2016) 4, [Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\)](#) from 14 to 23 April 2015, paragraph 47.

²⁶ Amnesty International, [Annual report 2015/2016](#) on the situation of human rights worldwide, p. 360.

Article 14.3.f of the International Covenant on Civil and Political Rights and Article 6.3.e of the Convention guarantee the right to an interpreter during a court hearing.

24. Moreover, Article 5.2 of the Convention states that “(e)veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. Accordingly in its judgment in *Čonka v. Belgium*, concerning the collective expulsion of a group of Roma, the Court concluded, amongst other things, that there had been a violation of this provision as the information on possible remedies given to the applicants on their arrival at the police station was not in a language they understood and only one interpreter was available to translate the written and oral communications for a large number of Roma families.²⁷

3.5. Confidentiality of communications with a lawyer

25. The authorities must respect the confidentiality of detainees’ lawyer-client communications and consultations. Places of detention must be organised in such a way as to ensure the confidentiality of oral and written communications between individuals and their lawyers.²⁸ In the *Modarca v. Moldova* judgment, the Court held that there had been a violation of Article 5.4 owing to the lack of confidentiality of lawyer-client communications because of the systematic use at a remand centre of a glass partition that forced them to shout to communicate with one another and prevented them from exchanging documents.²⁹ The Court has established that “one of the key elements in a lawyer’s effective representation of a client’s interests is the principle that the confidentiality of information exchanged between them must be protected”. This is one of the important safeguards of a person’s right of defence, and the Court considered that the lack of confidentiality would result in the assistance provided by a lawyer losing much of its usefulness.³⁰

26. Principle 22 of the Basic Principles on the Role of Lawyers requires governments to respect the confidentiality of communications and consultations between lawyers and their clients within their professional relationship. Principle 8 specifies the conditions under which consultations between a lawyer and a detainee can take place:

“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

27. For example, the CPT reported in 2013 that five inmates of Imralı prison held on the island at the time of its visit had been refusing to meet their lawyers since 2011 as a means of protesting against the prison administration’s decision to record their conversations with them.³¹

3.6. Waiving the right to a lawyer

28. As the right of access to a lawyer is not absolute, the detainee may waive it. As the Court pointed out in its *Navone v. Monaco* judgment, the defence rights can be exercised without a lawyer being present.³² The principle of, and procedure for, waiving the right to a lawyer are, however, clearly set out in the Court’s case law. The Court has decided, in particular, that “neither the letter nor the spirit of Article 6 prevents a person from waiving of his or her own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial”.³³ In order to be considered effective for the purposes of the Convention, the waiver must be established unequivocally and be attended by minimum safeguards commensurate with its importance.³⁴

²⁷ *Čonka v. Belgium*, Application No. 51564/99, judgment of 5 February 2002.

²⁸ Amnesty International, Fair Trial Manual, chapter 3, p.48.

²⁹ *Modarca v. Moldova*, Application No. 14437/05, judgment of 10 May 2007.

³⁰ *Castravet v. Moldova*, Application No. 23393/05, 13 June 2005, §§ 49-50.

³¹ CPT/Inf (2014) 7, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 17 January 2013, 13 March 2013, paragraph 18.

³² *Navone and Others v. Monaco*, Applications Nos. 62880/11, 62892/11 and 62899/11, judgment of 24 October 2013, paragraph 74 (available in French only), according to which the right to remain silent may be notified at the beginning of the proceedings whether or not the lawyer is present.

³³ Kaltoum Gachi, “[Droit d’accès à un avocat: Un renforcement du socle européen des droits et garanties procéduraux du suspect](#)” [PDF] in [Lettre « Actualités Droits-Libertés » published by the Fundamental Rights Research Centre \(CREDOF\)](#), 27 November 2013. (Available in French only). See also *Dvorski v. Croatia*, Application No. 25703/11, judgment of 20 October 2015, § 100.

³⁴ *Poitrinol v. France*, Application No. 14032/88, judgment of 23 November 1993, paragraph 31; *Colozza v. Italy*, Application No. 9024/80, judgment of 12 February 1985 (in French only), paragraph 28; *Salduz v. Turkey*, Application

29. In its case law, the Court takes account of the vulnerability of the person deprived of his or her liberty and considers that “*persons held in police custody are in a vulnerable position and the authorities have a duty to protect them*”.³⁵ In the case of an accused minor, and taking account of the nature of the criminal proceedings in question, the Court has held that the authorities should take all reasonable measures to ensure that the waiver is expressed unequivocally and that the individual is fully aware of his or her rights and understands the consequences of the waiver.³⁶

30. Article 9 of EU Directive 2013/48/EU of the European Parliament and the Council reiterates the principles governing the waiver of the right of access to a lawyer developed by the Strasbourg Court.

3.7. *Right of access to legal information*

31. In its *Kalda v. Estonia* judgment, the Court held that the refusal to allow an inmate sentenced to life imprisonment to access websites that publish legal information constituted a violation of his right to receive information and therefore of Article 10 of the Convention (freedom of expression). The applicant had complained about the authorities’ refusal to grant him access to three legal information websites operated by the State and by the Council of Europe. He alleged that this refusal had prevented him from carrying out legal research in connection with a number of legal actions he had brought.³⁷

32. This decision shows the potential and growing role of the new technologies in the right of access to a lawyer. Moreover, Directive 2013/48/EU recommends access to a website (or a leaflet) to enable a person deprived of his or her liberty in the context of ongoing criminal proceedings to choose a lawyer.

No. 36391/02, judgment of 27 November 2008, paragraph 59; [Hermi v. Italy](#), Application No. 18114/02, judgment of 10 October 2006 (in French only), paragraph 73.

³⁵ [Stojkovic v. France and Belgium](#), Application No. 25303/08, paragraph 53 (available in French only).

³⁶ [Panovits v. Cyprus](#), Application No. 4268/04, judgment of 11 December 2008.

³⁷ [Kalda v. Estonia](#), Application No. 17429/10, judgment of 19 January 2016.