

# Template Brief Issue #1

## Early Access to Legal Assistance

*Legal Brief prepared by Open Society Justice Initiative to assist legal practitioners to litigate issues of early access to legal assistance for people accused or suspected of crimes.*



**OPEN SOCIETY**  
JUSTICE INITIATIVE

## TABLE OF CONTENTS

<b>HOW TO USE THIS TEMPLATE BRIEF .....</b>	<b>3</b>
<b>I. THE RIGHT OF EARLY ACCESS TO LEGAL ASSISTANCE .....</b>	<b>4</b>
EUROPEAN CONVENTION ON HUMAN RIGHTS .....	4
OTHER INTERNATIONAL AND EUROPEAN STANDARDS .....	6
<i>International Covenant on Civil and Political Rights</i> .....	6
<i>European Committee for the Prevention of Torture</i> .....	7
<i>UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</i> .....	8
<i>Proposal for a Directive on the Right to Access a Lawyer</i> .....	8
<b>II. SCOPE OF THE RIGHT .....</b>	<b>8</b>
A. INFORMATION ABOUT THE RIGHT OF ACCESS TO LEGAL ASSISTANCE.....	9
B. ACTIVITIES INHERENT IN LEGAL ASSISTANCE.....	9
C. ADEQUATE TIME AND CONFIDENTIALITY .....	10
<b>III. RESTRICTIONS ON WAIVER OF RIGHT TO LEGAL ASSISTANCE .....</b>	<b>12</b>
<b>CONCLUSION.....</b>	<b>12</b>
<b>ANNEX.....</b>	<b>13</b>

## **HOW TO USE THIS TEMPLATE BRIEF**

1. In most European countries, criminal suspects do not enjoy full and unrestricted access to legal assistance during the initial stages of a criminal investigation. In some countries, there are clear legislative limitations on the timing of access, duration of the consultation with the lawyer and the activities that a lawyer can undertake. Equally concerning are those countries where suspects technically have a right to legal assistance, but it is not implemented in practice.
2. Despite these limitations, there have been significant developments throughout Europe in recent years towards clear international standards protecting the rights of suspects and accused persons in criminal proceedings. The Justice Initiative is supporting these developments through advocacy, networking and lobbying, and through the publication of a series of template briefs providing technical assistance to lawyers conducting litigation on arrest rights in domestic courts.
3. This brief provides the current regional and international legal standards on the right of early access to legal assistance to people accused or suspected of crimes. It presents the legal standards from the European Convention on Human Rights and the case law of the European Court of Human Rights, supported by principles and standards from the International Covenant on Civil and Political Rights, the UN Human Rights Committee, and other European and UN bodies.
4. The Justice Initiative encourages lawyers to use the research and arguments in this brief to support domestic litigation. Litigation can be an effective tool to modify a national criminal justice system that fails to adequately provide for the full and unrestricted right to legal assistance. The Justice Initiative is monitoring developments in countries that have successfully reformed their laws on early access to legal assistance, including through litigation. If you are planning or are engaged in a case with this aim, please contact us. We may be able to provide information on reforms which have already been implemented in similar legal systems which could support your case, or connect you with other lawyers or organizations who have successfully litigated this issue.
5. The Justice Initiative has gone to every effort to ensure our information is accurate. However, this brief is provided for information purposes only and does not constitute legal advice. The way you use this brief will depend on the details of your case, your client's situation, and specificities of your domestic legal framework.
6. If you have any questions or feedback about the brief, would like a translated version of the brief in another language, or would like to keep the Justice Initiative informed about cases in your country that deal with access to legal assistance, please contact:

**Marion Isobel**

Associate Legal Officer  
National Criminal Justice Reform  
Open Society Justice Initiative  
[misobel@osieurope.org](mailto:misobel@osieurope.org)  
Tel: +36 1 882 3154

[www.justiceinitiative.org](http://www.justiceinitiative.org)  
[www.legalaidreform.org](http://www.legalaidreform.org)

## I. THE RIGHT OF EARLY ACCESS TO LEGAL ASSISTANCE

1. Suspects in criminal proceedings have the right to access legal assistance, at the latest, when they are arrested, placed in custody, or their position is significantly affected by the circumstances they find themselves in. This is established in a clear and consistent line of jurisprudence from the European Court of Human Rights (“ECtHR”) which specifies that this right includes having legal assistance during any interrogations or questioning by the police. It has also been affirmed by the UN Human Rights Committee, and other European and UN standards and mechanisms have emphasized the fundamental importance of early access to legal assistance.

### European Convention on Human Rights

2. The ECtHR has for many years taken the view that the right to legal assistance arises immediately on arrest.<sup>1</sup> Since 2008 a series of judgments from the ECtHR have developed and clarified the scope of this right. Under this recent jurisprudence, described in detail below, a person must have access to legal assistance when they are placed in custody or their position is significantly affected by the circumstances, which may even be before a formal arrest takes place. In particular, nobody should be interrogated or required or invited to participate in investigative or procedural acts without the right to access legal assistance.
3. Article 6(1) of the European Convention on Human Rights (“ECHR”) contains the general principle of the right to a fair trial. It states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
4. Articles 6(3)(b) and (c) of the ECHR which apply to criminal proceedings go on to state that:

“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.”
5. The recent clarification of the scope of these rights started with the 2008 case of *Salduz v Turkey*.<sup>2</sup> This case concerned a minor who was arrested, made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber of the ECtHR found that the applicant’s lack of access to legal assistance while he was in police custody violated Article 6(1) and 6(3)(c) of the ECHR. Neither the subsequent assistance of a lawyer nor the ability to challenge the statement during the following proceedings could cure the defects which had occurred during police custody.<sup>3</sup> The ECtHR underlined the importance of the investigation stage for the preparation of the criminal proceedings and observed that “in 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”.<sup>4</sup>

---

<sup>1</sup> *John Murray v United Kingdom*, ECtHR, Judgment of 8 February 1996; *Magee v United Kingdom*, ECtHR, Judgment of 6 June 2000.

<sup>2</sup> *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008.

<sup>3</sup> *Ibid*, para. 58.

<sup>4</sup> *Ibid*, para. 54-55.

6. *Salduz* has been followed in over 100 subsequent rulings by the ECtHR, which form a clear and consistent line of jurisprudence that the use of evidence obtained from a suspect through interrogation or other investigative measures when the suspect does not have legal assistance will breach Article 6 of the ECHR.<sup>5</sup> This series of decisions have also clarified the details of when exactly the right to access counsel arises and when it can be denied.
7. *During Interrogations.* In *Brusco v France* the ECtHR confirmed that the right to legal assistance includes having a lawyer during any interrogations.<sup>6</sup> In that case, the ECtHR found that even though the adult applicant was permitted to see his lawyer directly after the interrogation, preventing the lawyer from being present during police questioning was a breach of Article 6(3)(c). In 2011 the Court made similar rulings against Croatia.<sup>7</sup> In *Pishchalnikov v Russia* the ECtHR explained why it is fundamental that a suspect be provided with a lawyer during the initial investigation stage of the proceedings, and especially during any questioning or interrogations by the police:
 

“[A]n accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself”.<sup>8</sup>
8. *Whether or Not Questioned.* In *Dayanan v Turkey*, the ECtHR stated that suspects must have the opportunity to obtain legal assistance as soon as they are taken into custody, whether or not they are questioned by the police.<sup>9</sup> In this case the applicant was not a minor and had no particular vulnerability other than his involvement in the criminal justice system.
9. *When Significantly Affected.* In *Shabelnik v Ukraine*, the ECtHR held that the right to legal assistance arises at the point that the person’s position is significantly affected, even if they are not formally placed in custody as a suspect.<sup>10</sup> The ECtHR explained that a person’s position will be significantly affected as soon as the suspicion against him is seriously investigated and the prosecution case is compiled. In this case, the applicant was questioned as a witness, not as a suspect or accused person. The ECtHR found a violation of Articles 6(1) and (3) of the ECHR on the grounds that the point at which the right to legal assistance arises does not depend on the formal designation of the person.<sup>11</sup> The Court similarly found violations in *Brusco v France*, in which a person who was interviewed as a witness confessed to a crime.<sup>12</sup>
10. In *Nechiporuk and Yonkalo v Ukraine*, the applicant had been suspected of murder, although the police arrested him for a lesser drug offence and formally placed him in “administrative detention,” depriving him of counsel. The Court held that despite his formal designation, he had in fact been treated as a criminal suspect and should have

---

<sup>5</sup> See the Annex for a list of these rulings up to March 2012.

<sup>6</sup> *Brusco v France*, ECtHR, Judgment of 14 October 2010 at 44-45.

<sup>7</sup> *Mader v Croatia*, ECtHR, Judgment of 21 June 2011, para. 153. *Sebalj v Croatia*, ECtHR, Judgment of 28 June 2011, para. 256. See also *Demirkaya v Turkey*, ECtHR, Judgment of 13 October 2009.

<sup>8</sup> *Pishchalnikov v Russia*, ECtHR, Judgment of 24 September 2009, at para. 69. See also *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at para 263.

<sup>9</sup> *Dayanan v Turkey*, ECtHR, Judgment of 13 October 2009, at para. 32.

<sup>10</sup> *Shabelnik v Ukraine*, ECtHR, Judgment of 17 February 2009, at para.57.

<sup>11</sup> *Shabelnik v Ukraine*, ECtHR, Judgment of 17 February 2009, at para.57.

<sup>12</sup> *Brusco v France*, ECtHR, Judgment of 14 October 2010.

been given the rights under Article 6 of the ECHR, including unimpeded access to legal representation.<sup>13</sup>

11. *Investigative Acts*. It is also clear that a person has a right to legal assistance not only during any police interrogation but also in the course of other investigative acts. Thus the ECtHR found a violation of Article 6(1) of the ECHR in *Laska and Lika v Albania* when an identification parade was held in the absence of the applicants' lawyers.<sup>14</sup>
12. *Unofficial Custody*. The ECtHR has also considered the issue of whether a person who is not technically in police custody has the right to legal assistance. In *Zaichenko v Russia*, the applicant was not formally arrested or interrogated in police custody but was simply stopped for a road check and answered questions relating to the search of his car.<sup>15</sup> Since the applicant's freedom of action was not significantly curtailed, the ECtHR held that the absence of legal assistance at that point did not violate the applicant's right under Article 6(3)(c) of the ECHR. Nevertheless, even in that case, the subsequent use at trial of his answers to these questions violated the privilege against self-incrimination and the right to remain silent contained in Article 6.
13. *Denial of Legal Assistance*. The ECtHR has theoretically allowed for the possibility that early access to legal assistance could be denied in exceptional circumstances. However, even where compelling reasons might exceptionally justify denial of access to a lawyer, any incriminating statements made by an accused without a lawyer cannot be used to obtain a conviction.<sup>16</sup> Furthermore, it has held that:

“Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies”.<sup>17</sup>

### **Other International and European Standards**

14. A number of other international and European bodies have reiterated the fundamental importance of early access to legal assistance. The UN Human Rights Committee, applying the International Covenant on Civil and Political Rights (“ICCPR”), has established that the right to early access is a universal standard afforded to all people accused or suspected of crimes. The European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have emphasized that early access is also a fundamental safeguard against ill-treatment. In addition, the Council of the European Union has identified it as a key component of a long-term plan to strengthen and protect the rights of suspects in criminal proceedings throughout the European Union.

#### International Covenant on Civil and Political Rights

15. The UN Human Rights Committee has affirmed the importance of early access to legal assistance under Article 14 of the ICCPR, pursuant to which all people suspected or accused of criminal offences must be able to access counsel during the initial period of detention, throughout the investigative stage of criminal proceedings, and during any interrogation, questioning or other investigatory act. Articles 14(3)(b) and (d) of the ICCPR state:

---

<sup>13</sup> *Brusco v France*, ECtHR, Judgment of 14 October 2010, at para. 52-54; *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at paras. 264-65.

<sup>14</sup> *Laska and Lika v Albania*, ECtHR, Judgment of 20 April 2010.

<sup>15</sup> *Zaichenko v Russia*, ECtHR, Judgment of 18 February 2010.

<sup>16</sup> *Ibid*, para. 55.

<sup>17</sup> *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, para. 54; see also *Nechiporuk and Yonkalo v. Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 263.

“In the determination of any criminal charge against him, everyone shall be entitled ... (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing

... (d) to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right”.

16. In General Comment No. 32, the Human Rights Committee emphasized that access to legal assistance is “an important element of the guarantee of a fair trial and an application of the principle of the equality of arms ... The right to communicate with counsel requires that the accused is granted prompt access to counsel”.<sup>18</sup>
17. When examining individual communications, the Human Rights Committee has consistently held that people accused of criminal offences must be effectively assisted by a lawyer at all stages of criminal proceedings,<sup>19</sup> and that a failure to allow a lawyer during the initial period of detention and during any interrogations will breach both Article 14(3)(b) and Article 14(3)(d) of the ICCPR.<sup>20</sup> In *Lyashkevich v Uzbekistan*, the Committee found a breach on the grounds that the accused was denied access to the legal counsel of his choice for one day and that interrogations and other investigative acts were conducted during that time, despite the fact that the accused had been assigned a state-appointed lawyer who was present throughout the day.<sup>21</sup>

#### European Committee for the Prevention of Torture

18. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) has for many years stressed the importance of early access to legal assistance as a safeguard to torture. The CPT has issued a number of General Reports designed to assist states parties by providing a measure of acceptable standards, conditions and practices. In its Second General Report, it stated that access to legal assistance was a fundamental safeguard against the ill-treatment of detained persons which should apply from the very outset of deprivation of liberty and should include the right to contact and be visited by the lawyer as well as, in principle, to have the lawyer present during interrogation.<sup>22</sup>
19. The importance of these requirements has been reiterated by the CPT in subsequent country and general reports. In its 2002 Report the CPT observed there continued to be states who failed to observe them and explained that:

“The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police

---

<sup>18</sup> UNHRC, General Comment No. 32, *Right to equality before the courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 32, 34.

<sup>19</sup> *Barno Saidova v. Tajikistan*, UNHRC, Decision of 20 August 2004, UN Doc. CCPR/C/81/D/964/2001 at para. 6.8; *Borisenco v Hungary*, UNHRC, Decision of 14 October 2002, UN Doc. CCPR/C/76/D/852/1999, at para. 7.5; *Aliiev v Ukraine*, UNHCR, Decision of 7 August 2003, UN Doc CCPR/C/78/D/781/1997, at para. 7.2

<sup>20</sup> *Kelly v. Jamaica*, UNHRC, Decision of 29 July 1996, UN Doc. CCPR/C/57/D/537/1993, at para. 9.2; *Gridin v. Russian Federation*, UNHRC, Decision of 18 July 2000, UN Doc.

CCPR/C/69/D/770/1997, at para. 8.5; *Tamara Chikunova v Uzbekistan*, UNCHR, Decision of 16 March 2007, UN Doc. CCPR/C/89/D/1043/2002, at para.7.4; *Marlem Carranza Alegre v. Peru*, UNHRC, Decision of 17 November 2005, UN Doc. CCPR/C/85/D/1126/2002, at para. 7.

<sup>21</sup> *Lyashkevich v. Uzbekistan*, UNHRC, Decision of 11 May 2010, UN Doc. CCPR/C/98/D/1552/2007, at para. 9.4. See also *Kasimov v. Uzbekistan*, UNHRC, Decision of 30 July 2009, UN Doc. CCPR/C/96/D/1378/2005, at para. 9.6.

<sup>22</sup> Committee for the Prevention of Torture, 2<sup>nd</sup> General Report, CPT/Inf (92) 3, 36, available at <http://www.cpt.coe.int/en/annual/rep-02.htm>. See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2010 at 41, available at [www.cpt.coe.int/en/documents/eng-standards.doc](http://www.cpt.coe.int/en/documents/eng-standards.doc)

custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs".<sup>23</sup>

UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

20. The UN Subcommittee on Prevention of Torture has also reaffirmed that the requirement of early access to legal assistance is an important safeguard against torture:

“From a preventive point of view, access to a lawyer is an important safeguard against ill-treatment which is a broader concept than providing legal assistance solely for conducting one’s defense. The presence of a lawyer during police questioning may not only deter the police from resorting to ill-treatment or other abuses, but may also work as a protection for police officers in case they face unfounded allegations of ill-treatment”.<sup>24</sup>

Proposal for a Directive on the Right to Access a Lawyer

21. The Council of the European Union’s *Resolution on a Roadmap for Strengthening Procedural Rights of Suspected and Accused Persons in Criminal Proceedings*<sup>25</sup> aims to ensure full implementation and respect of the ECHR standards across the EU on the rights of accused persons and suspects.
22. As part of this Roadmap, in June 2011, the European Commission released their Proposal for a Directive on the right to access a lawyer in criminal proceedings.<sup>26</sup> Article 3 of the draft Directive requires that Member States ensure that suspects and accused persons are granted access to a lawyer as soon as possible and, in any event, from the outset of deprivation of liberty and before the start of any questioning by the police or other law enforcement authorities. Article 4(2) of the draft Directive also explicitly provides for a right to legal assistance during police interrogations.
23. If adopted by the EU Parliament and Council, the Directive will become binding and enforceable and all Member States will be required to bring into force the laws, regulations, and administrative provisions necessary to comply with the Directive. However, even if it is not ultimately adopted, this proposal represents the Commission’s understanding of the current minimum standards on the right to access a lawyer, and is based on an analysis of the jurisprudence of the ECtHR.<sup>27</sup>

**II. SCOPE OF THE RIGHT**

24. The ECtHR has specified that the ECHR is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective, and that this is particularly important for the rights of the defence, in view of the prominent place held in a democratic society by the right to a fair trial.<sup>28</sup> Applying this principle, the right to

---

<sup>23</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 12th General Report on the CPT's activities, 2002, para. 41

<sup>24</sup> Report on the Visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, of 26 February 2009, CAT/OP/MDV/1, at para 62

<sup>25</sup> Resolution of the Council of 30 November 1999, (2009/C 295/01).

<sup>26</sup> European Commission, *Proposal for a Directive on the right to access a lawyer in criminal proceedings*, COM(2011) 326/3. This proposal addresses Measure C of the Roadmap.

<sup>27</sup> *Ibid.*, at para. 13, 14, 18-21.

<sup>28</sup> *Airey v Ireland*, ECtHR, Judgment of 9 October 1979, para. 24; *Artico v Italy*, ECtHR, Judgment of 13 May 1980, para. 33; *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008 paras. 51, 55.



early access to legal assistance can only be realized in a practical and effective manner if a number of elements are fulfilled.

- *A. Providing Information.* The provision of information to a suspect is critical, as a person who is not aware of their right to legal assistance will be unable to exercise it.
- *B. Activities Included.* The ECtHR has stated that a suspect should be able to access the whole range of services and activities specifically associated with legal assistance.
- *C. Adequate Time and Confidentiality.* An essential condition for effective legal assistance is the confidentiality of communications and adequate time to prepare a defence.

#### **A. Information about the right of access to legal assistance**

25. The right to be informed of your right to access legal assistance is not explicitly mentioned in the ECHR. However, the ECtHR has repeatedly held that authorities are required to take positive measures in order to comply with the fair trial requirements of Article 6 of the ECHR, including by actively ensuring that suspects are aware of their rights. In *Panovits v Cyprus*, the ECtHR held that authorities should have “actively ensured” that the applicant understood his right to legal assistance and legal aid. The Government submitted that the authorities would have been willing to allow the applicant to exercise his right to obtain legal assistance at any time, if he so requested. The ECtHR held that there was a positive obligation to furnish the applicant with the necessary information enabling him to access legal representation, and that this passive approach violated Article 6.<sup>29</sup> The ECtHR also found violations of Article 6 in similar circumstances in *Talat Tunc v Turkey*<sup>30</sup> and *Padalov v Bulgaria*.<sup>31</sup>
26. Following similar reasoning, in *Barno Saidova v Tajikistan* and *Rolando v Philippines*, the UN Human Rights Committee found breaches of Article 14(3)(d) because the suspects were not informed of their right to legal assistance upon their arrest.<sup>32</sup>
27. On 16 November 2011, EU Member States approved a draft directive as part of the Council of the European Union’s *Resolution on a Roadmap for Strengthening Procedural Rights of Suspected and Accused Persons in Criminal Proceedings* to protect people’s right to information in criminal proceedings.<sup>33</sup> Under the new directive, every person who is arrested in any EU country must be informed of their rights in a language they understand. Authorities must give people a “letter of rights” to everybody who is arrested, written in simple, everyday language, listing their basic rights during criminal proceedings. These rights include, among others, the right to a lawyer.

#### **B. Activities inherent in legal assistance**

28. There are a number of different activities that are included in the concept of legal assistance. In *Dayanan v Turkey*<sup>34</sup>, the ECtHR applied *Salduz* and held that an accused is entitled to legal assistance as soon as he or she is taken into custody. In doing so, the

---

<sup>29</sup> *Panovits v. Cyprus*, ECtHR, Judgment of 11 December 2008, para. 72.

<sup>30</sup> *Talat Tunc v Turkey*, ECtHR, Judgment of 27 March 2007.

<sup>31</sup> *Padalov v Bulgaria*, ECtHR, Judgment of 10 August 2006.

<sup>32</sup> *Barno Saidova v. Tajikistan*, UNHRC, Decision of 20 August 2004, UN Doc.

CCPR/C/81/D/964/2001, at para. 6.8. *Rolando v. Philippines*, UNHRC, Decision of 8 December 2004, UN Doc. CCPR/C/82/D/1110/2002, at para. 5.6.

<sup>33</sup> Resolution of the Council of 30 November 1999, (2009/C 295/01). This forms Measure B of the Roadmap.

<sup>34</sup> *Dayanan v Turkey*, ECtHR, Judgment of 13 October 2009.

ECtHR both clarified the reasons behind early access to legal assistance and also clarified the scope of activities that must be permitted:

“Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, 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”.<sup>35</sup>

The ECtHR also recognized in *Ocalan v Turkey* that early access to legal assistance, and the ability to meet with and give instructions to a lawyer, is necessary to allow people to challenge the lawfulness and length of their detention.<sup>36</sup>

29. The range and objective of legal assistance which the ECtHR recognised in these cases essentially reflect the duties set out in the UN Basic Principles on the Role of Lawyers, which include “Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients” and “Assisting clients in every appropriate way, and taking legal action to protect their interests”.<sup>37</sup>

### C. Adequate time and confidentiality

30. A lawyer’s ability to effectively provide legal assistance is dependent upon the circumstances in which they can meet or communicate with accused persons. Suspects and accused persons must therefore be able to meet with their lawyer in private, and for an adequate period of time, in order for this right to be meaningful.
31. With respect to the issue of confidentiality, the ECtHR has stated that “an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial”.<sup>38</sup> In the case of *Brennan v UK*, the ECtHR held that the presence of a police officer within hearing during the applicant’s first consultation with his solicitor infringed his right to an effective exercise of his defense rights. The ECtHR explained that “If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness”.<sup>39</sup>
32. The need for confidentiality has also been emphasized by the Human Rights Committee, which stated in General Comment No. 32 that “Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications”.<sup>40</sup> The Committee held in *Nazira Sirageva v Uzbekistan* that Article 14(3)(b) of the ICCPR had been violated because the suspect and his lawyer were only permitted to meet in the presence of an investigator during the preliminary investigations.<sup>41</sup>
33. With respect to the issue of adequate time, the ECtHR has held that a determination of what is adequate time to obtain legal assistance during the pretrial proceedings must be made on the basis of the individual circumstances of the case. In *Bogumil v Portugal*

<sup>35</sup> *Dayanan v Turkey*, ECtHR, Judgment of 13 October 2009, para. 32

<sup>36</sup> *Ocalan v Turkey*, ECtHR, Judgment of 12 May 2005, paras. 66, 70.

<sup>37</sup> *Basic Principles on the Role of Lawyers*, Principle 13.

<sup>38</sup> *Brennan v. the United Kingdom*, ECtHR, Judgment of 16 October 2001, at para. 58; *S v. Switzerland*, ECtHR, Judgment of 28 November 1991 at para. 48

<sup>39</sup> *Brennan v. the United Kingdom*, ECtHR, Judgment of 16 October 2001, at para. 58

<sup>40</sup> General Comment No. 32, *Right to equality before the courts and tribunals and to a fair trial*, UNHRC, UN Doc. CCPR/C/GC/32, 23 August 2007, at para. 32

<sup>41</sup> *Nazira Sirageva v. Uzbekistan*, UNHRC, Decision of 18 November 2005, UN Doc. CCPR/C/85/D/907/2000, at para. 6.3. See also *Gridin v. Russian Federation*, UNHRC, Decision of 18 July 2000, UN Doc. CCPR/C/69/D/770/1997, at para 8.5.

the ECtHR stated that these circumstances include the complexity of the case and the severity of the possible sentence.<sup>42</sup> In *Fatma Tunc v Turkey (No. 2)*, the ECtHR did not hesitate to find that a five minute consultation with a lawyer during the initial period of police custody was not sufficient by Convention standards.<sup>43</sup>

34. The Human Rights Committee has affirmed the ECtHR's view that people accused of crimes are entitled to adequate time to prepare their defense, and that "what counts as 'adequate time' depends on the circumstances of each case".<sup>44</sup> Applying this principle in a capital punishment case, in *Aston Little v Jamaica* the Committee found a breach of Article 14(3)(b) on the grounds that the accused was only permitted half an hour for consultation with counsel prior to the trial.<sup>45</sup> Similar decisions were made in the cases of *Ramil Rayos v Philippines*, in which the accused was only granted a short time each day during his trial to communicate with his counsel,<sup>46</sup> and *Reid v Jamaica*, in which the accused only met with his counsel ten minutes before the start of the trial.<sup>47</sup>
35. The principles of confidentiality and adequate time have been verified by various organs of the United Nations. In rule 93 of the *Standard Minimum Rules for the Treatment of Prisoners*, the UN stressed that a person accused of a crime should have access to counsel and that their communications should be held out of hearing range from the authorities:

"For the purposes of his defense, an untried prisoner shall be allowed to ... receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official".<sup>48</sup>

36. The *UN Basic Principles on the Role of Lawyers* also reiterate the right to adequate time with a lawyer and confidential communications. Principles 8 and 22 state:

"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".

"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential".<sup>49</sup>

---

<sup>42</sup> *Bogumil v Portugal*, ECtHR, Judgment of 7 October 2008, paras. 48-49

<sup>43</sup> *Fatma Tunc v Turkey (2)*, ECtHR, Judgment of 13 October 2009, para. 14

<sup>44</sup> General Comment No. 32, *Right to equality before the courts and tribunals and to a fair trial*, UNHRC, UN Doc. CCPR/C/GC/32, 23 August 2007, at para. 34

<sup>45</sup> *Aston Little v Jamaica*, UNHRC, Decision of 1 November 1991, UN Doc. CCPR/C/43/D/283/1988, at para. 8.4; See also *Glenford Campbell v Jamaica*, UNHRC, Decision of 7 April 1992, UN Doc. CCPR/C/44/D/248/1987, at para 6.5

<sup>46</sup> *Ramil Rayos v. Philippines*, UNHRC, Decision of 7 August 2004, UN Doc. CCPR/C/81/D/1167/2003, at para 7.3

<sup>47</sup> *George Winston Reid v Jamaica*, UNHRC, Decision of 14 July 1994, UN Doc. CCPR/C/51/D/355/1989, at para 14.2

<sup>48</sup> See <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf>. The Rules were Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Pursuant to rule 95, these rules apply not only to prisoners but also to those on remand and other untried detainees.

<sup>49</sup> *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

### III. RESTRICTIONS ON WAIVER OF RIGHT TO LEGAL ASSISTANCE

37. Given the fundamental importance of the right to legal assistance, it may only be waived by the suspected or accused person in limited circumstances. The ECtHR has drawn tight restrictions around what will be considered to be an effective waiver, and has emphasized the provision of safeguards in respect of waiver.
38. The ECtHR has held that a waiver of the right to legal assistance “must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to its importance”.<sup>50</sup> The ECtHR has explained that because the right to counsel is a fundamental right which underpins the notion of a fair trial, it is a “prime example” of a right that requires the special protection of the knowing and intelligent waiver standard.<sup>51</sup> As a result, it has emphasized that any waiver:
- “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be”.<sup>52</sup>
39. A valid waiver cannot be established by showing only that a suspect responded to further police-initiated interrogations even if he has been advised of his rights. An accused who has requested legal assistance should not be subject to any further interrogation by the authorities until he received legal assistance, unless the accused himself initiates further communication or conversations with the police or prosecution.<sup>53</sup>

### CONCLUSION

40. As set out above, the ECtHR has recently clarified that Articles 6(1) and 6(3) of the ECHR require that, as a rule, suspects in criminal proceedings have the right to access legal assistance at the latest when they are arrested, placed in custody, or their position is significantly affected by the circumstances. This right includes having legal assistance during any interrogations or questioning by the police, and can apply regardless of their formal legal status. Suspects have the right to communicate confidentially with their legal representatives, to have adequate time to prepare their defence, and to access the full range of services inherent in legal advice. Given the fundamental importance of the right to legal assistance, any waiver must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right.
41. The UN Human Rights Committee, applying the ICCPR, has affirmed that the right of early access to legal assistance is a universal standard afforded to all people accused or suspected of crimes. The European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have both repeatedly emphasized that early access is a fundamental safeguard against ill-treatment and torture. In addition, the Council of the European Union has identified it as a key component of a long-term plan to strengthen and protect the rights of suspects in criminal proceedings throughout the European Union.

---

<sup>50</sup> *Pishchalnikov v. Russia*, ECtHR, Judgment of 24 September 2009, at para. 77; See also *Pfeifer and Plankl v Austria*, ECtHR, Judgment of 22 April 1998, para. 37; *Neumeister v. Austria*, ECtHR, Judgment of 7 May 1974, para. 36; *Poitrimol v. France*, ECtHR, Judgment of 23 November 1993; *Šebalj v. Croatia*, (Application no. 4429/09) 28 June 2011;

<sup>51</sup> *Pishchalnikov v. Russia*, ECtHR, Judgment of 24 September 2009, at para. 77.

<sup>52</sup> *Pishchalnikov v. Russia*, ECtHR, 2 Judgment of 4 September 2009, at para. 77. See also *Sejdovic v Italy*, ECtHR, Grand Chamber Judgment of 1 March 2006 at para 86; *Pavlenko v. Russia*, ECtHR, Judgment of 1 April 2010 at para. 102.

<sup>53</sup> *Pishchalnikov v. Russia*, ECtHR, Judgment of 24 September 2009, at para. 79.

## ANNEX

### European Court of Human Rights Cases Applying *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008

---

1. *Aba v. Turkey*, ECtHR, Judgment of 3 March 2009 at para. 9
2. *Adalmis and Kilic v. Turkey*, ECtHR, Judgment of 1 December 2009, at paras. 22, 26
3. *Adamkiewicz v. Poland*, ECtHR, Judgment of 2 March 2010, at paras. 82, 90-91
4. *Aleksandr Zaichenko v. Russia*, ECtHR, Judgment of 18 February 2010, at paras. 37, 47
5. *Amutgan v. Turkey*, ECtHR, Judgment of 3 February 2009, at paras. 12, 17, 25
6. *Arslan Ahmet v. Turkey*, ECtHR, Judgment of 22 September 2009, at paras. 37, 43
7. *Arzu v. Turkey*, ECtHR, Judgment of 15 September 2009, at paras. 46, 62
8. *Aslan and Demir v. Turkey*, ECtHR, Judgment of 17 February 2009, at paras. 9, 10, 14
9. *Aslan Güllabi v. Turkey*, ECtHR, Judgment of 16 June 2009, at paras. 35, 41
10. *Attı and Tedik v. Turkey*, ECtHR, Judgment of 20 October 2009, at paras. 39-41, 53
11. *Ayhan Işık v. Turkey*, ECtHR, Judgment of 30 March 2010, at paras. 33-34, 43
12. *Ayhan Mehmet Ali v. Turkey*, ECtHR, Judgment of 3 November 2009, at paras. 20, 26-28
13. *Balitskiy v. Ukraine*, ECtHR, Judgment of 3 November 2011, at para. 37
14. *Ballıktaş v. Turkey*, ECtHR, Judgment of 20 October 2009, at paras. 42, 54
15. *Baran and Hun v. Turkey*, ECtHR, Judgment of 20 May 2010, at paras. 39, 68, 71, 85
16. *Baran Ihsan v. Turkey*, ECtHR, Judgment of 15 September 2009, at paras. 25, 31
17. *Bayhan Zeki v. Turkey*, ECtHR, Judgment of 28 July 2009, at paras. 26, 48
18. *Berber Ömer v. Turkey*, ECtHR, Judgment of 26 January 2010, at paras. 33, 49
19. *Bielaj v. Poland*, ECtHR, Judgment of 27 April 2010, at para. 72
20. *Bilgin et Bulga v. Turkey*, ECtHR, Judgment of 16 June 2009, at paras. 8, 15, 19
21. *Böke and Kandemir v. Turkey*, ECtHR, Judgment of 10 March 2009, at paras. 71, 80
22. *Bolukoç and Others v. Turkey*, ECtHR, Judgment of 10 November 2009, at paras. 34-35, 44
23. *Borotyuk v. Ukraine*, ECtHR, Judgment of 16 December 2010, at paras. 79, 92
24. *Bortnik v. Ukraine*, ECtHR, Judgment of 27 January 2011, at paras. 39, 47
25. *Boz v. Turkey*, ECtHR, Judgment of 9 February 2010, at paras. 20, 24, 33-34
26. *Brusco v. France*, ECtHR, Judgment of 14 October 2010, at para. 45
27. *Caka v. Albania*, ECtHR, Judgment of 8 December 2009, para. at 122
28. *Celebi and Others v. Turkey*, ECtHR, Judgment of 22 September 2009, at paras. 24, 29
29. *Celik Gürsel v. Turkey*, ECtHR, Judgment of 5 May 2009, at paras. 22, 24
30. *Çimen v. Turkey*, ECtHR, Judgment of 3 February 2009, at paras. 12, 25-26, 32

31. *Ciupercescu v. Romania*, ECtHR, Judgment of 15 June 2010, at para. 149
32. *Coban (No. 2.) v. Turkey*, ECtHR, Judgment of 26 January 2010, at paras. 20, 25
33. *Çolakoğlu v. Turkey*, ECtHR, Judgment of 20 October 2009, at paras. 34-39
34. *Dayanan v Turkey*, ECtHR, Judgment of 13 October 2009, at paras. 30-33
35. *Demirkaya v. Turkey*, ECtHR, Judgment of 13 October 2009, at paras. 16-7
36. *Desde v. Turkey*, ECtHR, Judgment of 1 February 2011, at paras. 127, 131-132
37. *Ditaban v. Turkey*, ECtHR, Judgment of 14 April 2009, at paras. 51, 52, 56
38. *Ek and Şıktaş v. Turkey*, ECtHR, Judgment of 17 February 2009, at paras. 11-12, 16
39. *Elawa v. Turkey*, ECtHR, Judgment of 25 January 2011, at paras. 38-39, 51
40. *Elcicek and Others v. Turkey*, ECtHR, Judgment of 16 July 2009, at paras. 15, 19
41. *Eraslan and Others v. Turkey*, ECtHR, Judgment of 6 October 2009, at paras. 12, 13, 23
42. *Fatma Tunç v. Turkey (No. 2)*, ECtHR, Judgment of 13 October 2009, at para. 15
43. *Feti Ateş and Others v. Turkey*, ECtHR, Judgment of 21 December 2010, at paras. 23-24, 35
44. *Fidanci v Turkey*, ECtHR, Judgment of 17 January 2012, at paras. 37-38, 45
45. *Fikret Çetin v. Turkey*, ECtHR, Judgment of 13 October 2009, at paras. 35-38, 49
46. *Gäfgen v. Germany*, ECtHR, Judgment of 1 June 2010, at paras. 5, 177
47. *Geçgel and Çelik v. Turkey*, ECtHR, Judgment of 13 October 2009, at paras. 15-18
48. *Gök and Güler v. Turkey*, ECtHR, Judgment of 28 July 2009, at paras. 55-57, 65
49. *Göliünc v Turkey*, ECtHR, Judgment of 20 September 2011, at paras. 21-22, 35
50. *Gülcer and Aslim v. Turkey*, ECtHR, Judgment of 16 June 2009, at paras. 8, 12
51. *Gülecan v. Turkey*, ECtHR, Judgment of 28 April 2009, at paras. 5, 10
52. *Gürova v. Turkey*, ECtHR, Judgment of 6 October 2009, at paras. 13, 14, 20
53. *Güveç v. Turkey*, ECtHR, Judgment of 20 January 2009, at para. 126
54. *Hakan Duman v. Turkey*, ECtHR, Judgment of 23 March 2010, at paras. 46-47, 63
55. *Halil Kaya v. Turkey*, ECtHR, Judgment of 22 September 2009 at paras. 18-19, 23
56. *Hovanesian v. Bulgaria*, ECtHR, Judgment of 21 December 2010, at paras. 32-33, 37
57. *Hüseyin Habip Taşkin v. Turkey*, ECtHR, Judgment of 1 February 2011, at paras. 21-22, 30
58. *Huseyn and Others v. Azerbaijan*, ECtHR, Judgment of 26 July 2011, at para. 171
59. *Ibrahim Oztürk v. Turkey*, ECtHR, Judgment of 17 February 2009, at paras. 45, 47, 57
60. *Jamrozny v. Poland*, ECtHR, Judgment of 15 September 2009, at para. 47
61. *Kenan Engin v. Turkey*, ECtHR, Judgment of 8 December 2009, at paras. 14, 24
62. *Kuralić v. Croatia*, ECtHR, Judgment of 15 October 2009, at paras. 44, 47
63. *Laska and Lika v. Albania*, ECtHR, Judgment of 20 April 2010, at paras. 68, 74
64. *Leonid Lazarenko v. Ukraine*, ECtHR, Judgment of 28 October 2010, at paras. 49-51, 57
65. *Leva v. Moldova*, ECtHR, Judgment of 15 December 2009, at para. 71.

66. *Lisica v. Croatia*, ECtHR, Judgment of 25 February 2010, at para. 47
67. *Lopata v. Russia*, ECtHR, Judgment of 13 July 2010, at paras. 130-131
68. *Luchaninova v. Ukraine*, ECtHR, Judgment of 9 June 2011, at para. 63
69. *Mađer v. Croatia*, ECtHR, Judgment of 21 June 2011, at paras. 149, 154
70. *Mehmet Şerif Öner v. Turkey*, ECtHR, Judgment of 13 September 2011, at paras. 21-22, 27
71. *Mehmet Zeki Doğan v. Turkey*, ECtHR, Judgment of 6 October 2009, at paras. 13, 15
72. *Melnikov v. Russia*, ECtHR, Judgment of 14 January 2010, at para. 79
73. *Musa Karataş v. Turkey*, ECtHR, Judgment of 5 January 2010, at paras. 90, 102
74. *Nechiporuk and Yonkalo v. Ukraine*, ECtHR, Judgment of 21 April 2011, at paras. 262-265
75. *Nechto v. Russia*, ECtHR, Judgment of 24 January 2012, at paras. 102-103
76. *Nevruz Bozkurt v Turkey*, ECtHR, Judgment of 01 March 2011, at paras. 43, 73
77. *Oğraş v. Turkey*, ECtHR, Judgment of 13 October 2009, at paras. 19-20, 27
78. *Oleg Kolesnik v. Ukraine*, ECtHR, Judgment of 19 November 2009, at paras. 35
79. *Öngün v. Turkey*, ECtHR, Judgment of 23 June 2009, at paras. 31, 33-34, 39
80. *Özcan Çolak v. Turkey*, ECtHR, Judgment of 6 October 2009, at paras. 44, 46, 59
81. *Paskal v. Ukraine*, ECtHR, Judgment of 15 September 2011, at para. 76
82. *Pavlenko v. Russia*, ECtHR, Judgment of 1 April 2010, at paras. 97, 101
83. *Pishchalnikov v. Russia*, ECtHR, Judgment of 24 September 2009, at paras. 70, 73, 76, 79, 93
84. *Plonka v. Poland*, ECtHR, Judgment of 31 March 2009, at paras. 35, 37, 40
85. *Şaman v. Turkey*, ECtHR, Judgment of 5 April 2011, at paras. 30, 3, 44
86. *Sapan v Turkey*, ECtHR, Judgment of 20 September 2011, at paras. 21-,23, 38
87. *Savaş v. Turkey*, ECtHR, Judgment of 8 December 2009, at paras. 63, 90
88. *Šebalj v. Croatia*, ECtHR, Judgment of 28 June 2011, at paras. 250, 263
89. *Shabelnik v. Ukraine*, ECtHR, Judgment of 19 February 2009, at para. 53
90. *Sharkunov and Mezentsev v. Russia*, ECtHR, Judgment of 10 June 2010, at para. 97
91. *Shishkin v. Russia*, ECtHR, Judgment of 7 July 2011, at paras 140-141.
92. *Smolik v. Ukraine*, ECtHR, Judgment of 19 January 2012, at para. 53
93. *Soykan v. Turkey*, ECtHR, Judgment of 21 April 2009, at paras. 50, 51, 57, 62
94. *Stojkovic v. France and Belgium*, ECtHR, Judgment of 27 October 2011, at paras. 50, 53-54
95. *Tağaç and Others v. Turkey*, ECtHR, Judgment of 7 July 2009, at paras. 35-36
96. *Taşçıgil v. Turkey*, ECtHR, Judgment of 3 March 2009 at paras. 36, 41
97. *Trymbach v. Ukraine*, ECtHR, Judgment of 12 January 2012 at para. 60
98. *Ümit Aydın v. Turkey*, ECtHR, Judgment of 5 January 2010, at paras. 46-48, 58
99. *Vanfuli v. Russia*, ECtHR, Judgment of 3 November 2011, at paras. 94-95
100. *Vladimir Krivonosov v. Russia*, ECtHR, Judgment of 15 July 2010, at paras. 161-162

101. *Yunus Aktaş and Others v. Turkey*, ECtHR, Judgment of 20 October 2009, at paras. 42, 44-45, 62
102. *Zdravko Petrov v. Bulgaria*, ECtHR, Judgment of 23 June 2011, at para. 47