

# Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them

[www.lrwc.org](http://www.lrwc.org) – [lrwc@portal.ca](mailto:lrwc@portal.ca) – Tel: +1 604 736 1175 – Fax: +1 604 736 1170  
3220 West 13<sup>th</sup> Avenue, Vancouver, B.C. CANADA V6K 2V5

## International Law Right to Timely and Confidential Access to Counsel by Samantha Black

Many international and regional instruments recognize the right to counsel, the characteristics of which have been defined through the jurisprudence of regional and national courts, treaty bodies, and additional interpretive documents.

This memo examines the current state of international human rights law regarding the right to timely and confidential access to legal counsel following arrest. The memo reviews instruments in the United Nations, Organization of American States, African Union, and European human rights systems, which establish the right to legal counsel and a fair trial. The memo will address:

1. when there is a right to counsel;
2. what timely access to counsel means, when delay constitutes denial, and when denial violates fair trial rights; and
3. what confidentiality entails and how lack of confidentiality violates fair trial rights.

This memo does not evaluate states' compliance with the right to timely and confidential access to counsel. Nevertheless, there is a strong interest in the formation of an international system of monitoring that would evaluate the status and progress of state practices regarding judicial independence and related issues in relation to international standards.<sup>1</sup>

### I. United Nations Instruments

#### **A. When There Is a Right to Counsel**

Many UN instruments provide that a fair trial in the criminal context requires that the accused have the right to counsel.<sup>2</sup> This has been extended to civil proceedings. Two

---

<sup>1</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Mónica Pinto*, 5 April 2016, A/HRC/32/34 at paras 64–65, online: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/34](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/34). □

<sup>2</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Article 18; *Basic Principles on the Role of Lawyers*, para. 6; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, para. 17(2); *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline □5, para. 45(c); *Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, □para. 15.1 (right to apply for free legal aid where there is provision for such aid in the □country); *Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules)*, para. 18(a) (right to apply for free legal aid “where such aid is available”); and *UN Standard Minimum Rules for the Treatment of Prisoners*, para. 93 (right to apply for free legal aid “where such aid is available”).

instruments will be examined in detail: the *International Covenant on Civil and Political Rights*<sup>3</sup> (ICCPR) and the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*<sup>4</sup> (*Principles and Guidelines*).

First, Article 14 of the ICCPR recognizes the right of an accused in criminal proceedings to a fair trial. An element of this right, set out in subsection (3)(d), is the right of the accused to be represented by legal counsel of his or her choice.

Article 14(3)(d) provides:

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

[...]

(d) To be tried in his presence, and 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; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

The UN Human Rights Committee (HR Committee) has confirmed that Article 14 extends beyond criminal proceedings to “rights and obligations” in civil proceedings.<sup>5</sup> It stated in *CCPR General Comment No. 32*:

While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.<sup>6</sup>

Second, the *Principles and Guidelines* affirm the right of an accused to legal counsel as a key procedural right in criminal law. It provides:

Principle 3. *Legal aid for persons suspected of or charged with a criminal offence*

20. States should ensure that anyone who is detained, arrested, suspected of, or

---

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 [ICCPR], available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 19 August 2015].

<sup>4</sup> *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, A/RES/67/187, annex (28 March 2013) [*Principles and Guidelines*], online: [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).

<sup>5</sup> *CCPR General Comment No 32, Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 23 August 2007, CCPR/C/GC/32 at para 10, online: <http://ccprcentre.org/doc/ICCPR/GeneralComments/CCPR.C.GC.32.En.pdf>.

<sup>6</sup> *Ibid* [footnotes omitted].

charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.

21. Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty.

22. Children should have access to legal aid under the same conditions as or more lenient conditions than adults.

23. It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.

The *Principles and Guidelines* have been read as applicable to civil and administrative proceedings.<sup>7</sup> Indeed, the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, encouraged the application of legal aid to “any judicial or extrajudicial procedure aimed at determining rights and obligations.”<sup>8</sup> She further advised that the *Principles and Guidelines* apply to “civil and administrative law cases where free legal assistance is indispensable for effective access to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute resolution.”<sup>9</sup>

## **B. Defining and Examining Timely Access**

The HR Committee has consistently held that ICCPR Article 14(3)(d) requires that the accused be granted timely access to counsel, unless it can be shown that there are compelling reasons to restrict access. This right requires the accused to have access to a lawyer at all stages of criminal proceedings, including the initial period of police detention, questioning, and investigation.<sup>10</sup> As the right to counsel is “an important element of the guarantee of a fair trial and an application of the principle of the equality of arms”,<sup>11</sup> its denial may, in the context of the wider proceedings, constitute a violation of the right to a fair trial.

### *Jurisprudence*

#### *Robinson v. Jamaica*

The complainant, Frank Robinson, was charged and convicted for murder. His sentence, the death penalty, was commuted to life imprisonment. The complainant was tried without legal representation as his legal counsel had withdrawn from the proceedings and the sitting judge did not allow an adjournment to allow the complainant to make alternative arrangements. The Committee stated, “...it is axiomatic that legal assistance be available in capital cases. This is so even if, the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings.”<sup>12</sup> The Committee found that the absence of counsel constituted an unfair trial.

---

<sup>7</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 15 March 2013, A/HRC/23/43, at para 25, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement>>

<sup>8</sup> *Ibid* at para 27.

<sup>9</sup> *Ibid* at paras 27, 48.

<sup>10</sup> CCPR General Comment No. 32, *supra* note 5.

<sup>11</sup> *Ibid* at para 32.

<sup>12</sup> *Robinson v Jamaica*, No 223/1987, (5 February 1987) at para 10.3.

Additional case law: *Carranza Alegre v. Peru*, *Chikunova v Uzbekistan*, *Toshev v. Tajikistan*, *El Hagog v. Libya*, *Levy v Jamaica*, *Johnson v. Jamaica*, *Thomas v. Jamaica*, *Krasnova v. Kyrgyzstan*, *Borisenko v Hungary*, *Butovenko v Ukraine*, *Gunan v Kyrgyzstan*, *Saidova v. Tajikistan*, *Pagdayawon Rolando v Philippines*, *Lyashkevich v Uzbekistan*.

### **C. Confidentiality**

The right of accused individuals to private and confidential communication with counsel is implied in Article 14(3)(b) of the ICCPR, under which an accused is “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. This reading of Article 14(3)(b) is confirmed by case law and was explicitly confirmed in *CCPR General Comment No. 32*. Referencing Article 14(3)(b), the HR Committee states:

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. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.<sup>13</sup>

The HR Committee has found a violation of Article 14(3)(b) where discussions between an accused and his or her counsel are conducted within the presence of a third party.<sup>14</sup>

#### *Jurisprudence*

##### *Nazira Sirageva v. Uzbekistan*

The author brought the action on behalf of her son, who was under sentence of death, detained and awaiting execution in Tashkent at the time of the communication. The HR Committee found violations by Uzbekistan of Articles 6, 7, and 14(3)(b) of the ICCPR. Article 14(3)(b) was violated as the suspect and his lawyer were only permitted to meet in the presence of an investigator during the preliminary investigations.

Additional case law: *Karina Arutyunyan v. Uzbekistan*.

## **II. Organization of American States**

### **A. Right to Counsel**

The *American Declaration of the Rights and Duties of Man (American Declaration)* and the *Charter of American States* were adopted at the ninth International Conference of American States in April 1948. Many of the provisions in the *American Declaration* were included in the *American Convention on Human Rights (ACHR)*, which was adopted in November 1969. However, the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights hold the provisions of the *American Declaration* as legally binding on OAS member states, particularly those nations that have not ratified the *ACHR*. Article XVIII provides:

Every person may resort to the courts to ensure respect for his legal rights. There

---

<sup>13</sup> *CCPR General Comment 32*, *supra* note 5 at para 34.

<sup>14</sup> *Nazira Sirageva v Uzbekistan*, No 907/2000 (12 December 1999).

should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

The *ACHR* is the treaty that principally binds the IACtHR. It recognizes the right to counsel for individuals accused of criminal offenses in Articles 8(2)(d) and (e) as follows:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

d. The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. The inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

The IACtHR has recognized that the right to a free trial, protected by the *American Declaration* and the *ACHR*, can be violated by denial of access to counsel in certain civil matters. In *Advisory Opinion OC-11/90*, the IACtHR noted that “in criminal proceedings and those relating to rights and obligations of a civil, labor, fiscal or any other nature, an indigent has the right to legal counsel free of charge where such assistance is necessary for a fair hearing....”

The *Charter of the Organization of American States* contains an explicit right to counsel in both criminal and civil proceedings. Under Article 45(i), Member States agree to “dedicate every effort to the application of the following principles and mechanisms ... Adequate provision for all persons to have due legal aid in order to secure their rights.” Although Article 45(i) of the *Charter of the Organization of American States* does not specify minimum guarantees similar to those provided in Article 8(2) of the *ACHR*, it does provide for due guarantees.

## **B. Timely Counsel**

The guarantees set out in Article 8(2) of the *ACHR* are separate and autonomous. As such, a violation of any constitutes a violation of the right to a fair trial.<sup>15</sup> Case law holds that Article 8(2)(d) implicitly recognizes that access to counsel must be prompt; it must be available to an individual at the start of a criminal investigation.<sup>16</sup> This was succinctly put in *Barreto Leiva v. Venezuela*, where the Court stated:

If the right to defense arises as of the moment in which an investigation into an individual is ordered, the accused must have access to a legal representation from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from being advised by a counsel means to strictly

---

<sup>15</sup> *Case of Almonacid Avellano et al v Chile* (2006), Inter-Am Ct HR (Ser C) No 154, at para 48.

<sup>16</sup> *Case of Bulacio v Argentina* (2003), Inter-Am Ct HR (Ser C) No 100.

limit the right to defense, which leads to a procedural unbalance and leaves the individual unprotected before the punishing authority.<sup>17</sup>

### Jurisprudence

#### *Acosta Calderón v. Ecuador*

The complainant was arrested for suspected drug trafficking and held in preventative detention for seven years. The complainant did not have a defense counsel present when answering his initial questioning before the police. The Court held, “the foreign detainee, when arrested and before offering his first statement before the authorities, must be notified of his right to establish contact with a third party, for example, a family member, a lawyer or a consular official, as corresponds, to inform them that he is in the State’s custody.” The Court found that the State violated Articles 8(2)(e) and (d) of the *ACHR*, in addition to Articles 1(1), 2, 7(1), 7(3), 7(5), 7(6), 8(1), 8(2), 8(2)(b), and 25.

Additional case law: *Chaparro Álvarez and Lapo Ñíguez v. Ecuador, Tibi v. Ecuador, Palamara Iribarne v Chile, López Álvarez v. Honduras, Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Vélez Loor v. Panama, Barreto Leiva v. Venezuela.*

### **C. Confidentiality**

Of the human rights treaties herein discussed, the *ACHR* is the only one that contains an explicit guarantee to private and confidential counsel. This right is defeated if communication between the accused and his or her counsel is supervised. In such cases, the IACtHR has ruled that Article 8(2)(d) of the *ACHR* had been violated.<sup>18</sup>

### Jurisprudence

#### *Castillo Petruzzi et al. v. Peru*

The four claimants were members of the Tupac Amaru terrorist organization. A military tribunal tried the claimants and sentenced each to life in prison. The IACtHR found a violation of 8(2)(d) of the *ACHR* as each defendant was unable to confer with his counsel in private prior to the preliminary hearing and prior to the reading of the finding of the court of first instance. The IACtHR also found violations of Articles 1(1), 2, 5, 7, 7(5), 7(6), 8, 8(1), 8(2), 8(2)(b), 8(2)(c), 8(2)(f), 8(2)(h), 8(5), 9, and 25 of the *ACHR*.

Additional case law: *Suárez Rosero v. Ecuador, Cantoral Benavides v. Peru, Vélez Loor v. Panama, Bulacio v. Argentina.*

## **III. African Union**

### **A. Right to Counsel**

The African Commission on Human Rights has recognized that the right to counsel is one of the “basic procedural safeguards for those deprived of their liberty” and is critical to preventing the ill treatment of individuals in the early stage of detention.<sup>19</sup> This right is guaranteed in criminal proceedings under Article 7(1)(c) of the African Charter on Human

<sup>17</sup> *Case of Barreto Leiva v Venezuela* (2009) Inter-Am Ct HR (Ser C) No 206.

<sup>18</sup> *Case of Suárez-Rosero v Ecuador* (1997), Inter-Am Ct HR (Ser C) No 35.

<sup>19</sup> *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, No 334/06 (2004).

and Peoples' Rights (Banjul Charter), which provides:

1. Every individual shall have the right to have his cause heard. This comprises:

...

(c) the right to defence, including the right to be defended by counsel of his choice

The African Commission reaffirmed its commitment to this right, and extended its application, in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Guidelines)*, which provide a right to free legal assistance to "the accused or a party to a civil case."

## **B. Timely Access to Counsel**

The African Commission recognizes that "the efficiency of justice is a major component of fair trial and of [e]ffective remedies."<sup>20</sup> The right to timely access to counsel is implied in Article 7(1)(c) of the Banjul Charter and was confirmed by the *African Guidelines*, which states:

Recalling Articles 5, 6, 7 and 26 of the Charter, which contain provisions relevant to the right to a fair trial;

[...]

N. Provisions applicable to proceedings relating to criminal charges:

1. The right to counsel:

[...]

(c) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.

(d) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

It is unclear from the case law, illustrated below, whether the denial of timely access to counsel will constitute a violation of the right to a fair trial.

### *Jurisprudence*

*Abdel Hadi, Ali Radi & Others v. Republic of Sudan*

The complainants fled Darfur in 2005 due to the war. They settled in a refugee camp outside of Khartoum, where they were arrested by police officers. The victims were denied access to lawyers, family, and medical care. They were subjected to physical and psychological torture. They were released approximately one year from the day of their arrest. The

---

<sup>20</sup> *Gabriel Shumba v Zimbabwe*, No 288/04 (2012).

Commission found violations of Articles 1, 5, 6 and 7 of the Banjul Charter.

*Gabriel Shumba v. Republic of Zimbabwe*

Officials of the Central Intelligence Agency arrested the complainant, a Zimbabwean human rights lawyer. During his detention, he was subjected to physical and psychological torture, and deprived of access to counsel. The Court found no violation of Article 7(1)(c) of the Banjul Charter, stating, “In the instant matter, the African Commission is aware that the Victim did not immediately have legal representation following his arrest, but such a representation came at least two days later.”<sup>21</sup>

Additional case law: *Gabriel Shumba v. Zimbabwe, Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi, Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt, Abdel Hadi, Ali Radi & Others v. Republic of Sudan, Jean-Marie Atangana Mebara v. Cameroon.*

### **C. Confidentiality**

Although the scope and nature of the right to confidential communication with legal counsel has not been extensively addressed by African Commission case law, the Commission has held that such a right is required by Article 7(1)(c) of the Banjul Charter. This was confirmed by the *Resolution on the Right to Recourse and Fair Trial*, which states:

Bearing in mind that article 7 of the African Charter on Human and Peoples’ Rights:

[...]

2. Considers further that the right to fair trial includes, among other things, the following:

[...]

e. In the determination of charges against individuals, the individual shall be entitled in particular to:

i). Have adequate time and facilities for the preparation of their defense and to communicate in confidence with counsel of their choice

#### *Jurisprudence*

*Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*

The complaint was brought on the behalf of three individuals: Mohamed Gayez Sabbah, Mohamed Abdalla Abu-Gareer, and Ossama Mohamed Al-Nakhlawy. The victims were accused of carrying out two bombing incidents. They were detained, tried, and sentenced to death. They were not provided with timely access to a lawyer. When counsel was later provided, communication took place through bars of the courtroom, in the presence of and within earshot of security officials. The Committee found violations of Articles 5, 7, and 26, but no violation of Article 4.

---

<sup>21</sup> *Ibid* at para 178.

Additional case law: *Malawi African Association and Others v. Mauritania*.

## **IV. European Union**

### **A. Right to Counsel**

Article 6(3)(c) of the European Convention on Human Rights (ECHR) recognizes an explicit right to legal counsel for persons charged with a criminal offence. It provides:

3. Everyone charged with a criminal offence has the following minimum rights:

[...]

(c) To defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

This right is not absolute. It may be restricted for “good cause”. In such circumstances, the court must ask whether “the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”<sup>22</sup> Moreover, an entitlement to free legal aid is dependent on a demonstration of lack of financial means to pay a lawyer and that it is in the “interests of justice” to provide such aid. Regardless, the ECHR recognizes that the right to counsel in criminal proceedings is an essential feature of a fair trial.<sup>23</sup> Indeed, according to the European Commission, access to legal representation and assistance places an accused in a far better position as regards enforcement of all his or her other rights. This owes to the simple fact that the accused’s chance of being informed of those rights is greater and because a lawyer will assist the accused in having his or her rights respected.<sup>24</sup>

Despite the absence of an article in the ECHR for legal assistance in civil disputes, Article 6(1) may require its provision. Article 6(1) states:

1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The following factors have been considered in the application of Article 6(1):

- the importance of what is at stake for the applicant;<sup>25</sup> □
- the complexity of the relevant law or procedure;<sup>26</sup>

---

<sup>22</sup> *Murray v United Kingdom* [GC], No 18731/91 (8 January 1996) at para 131.

<sup>23</sup> *Krombach v France*, No 29731/96, (13 February 2001) at para 89.

<sup>24</sup> EC, Commission, *Green Paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* (Brussels: EC, 2003), online: <<http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52003DC0075>>.

<sup>25</sup> *Steel and Morris v United Kingdom*, No 68416/01 (5 May 2005) at para 61.

<sup>26</sup> *Airey v Ireland* (1979), 2 EHRR 305 at para 24.

- the applicant’s capacity to represent him or herself effectively;<sup>27</sup> and
- the existence of a statutory requirement to have legal representation.<sup>28</sup>

In short, the circumstances of a case will determine whether a litigant is entitled to legal representation.<sup>29</sup> Nevertheless, the ECtHR has suggested that the scope for legal aid in civil disputes is too limited still and has encouraged the adoption of a system of civil legal aid.<sup>30</sup>

## B. Right to Timely Access to Counsel

ECtHR case law has consistently held that timely or prompt access to legal counsel requires that individuals be informed of this right prior to being questioned, immediately on arrest, during investigative acts,<sup>31</sup> or when their position is significantly affected (e.g., they become a suspect in a case), which may occur prior to a formal arrest.<sup>32</sup> When denied in such circumstances, several foundational elements of the right to a fair trial, such as the right to defence and equality of arms, are impaired. Accordingly, the ECtHR has found a violation of Article 6(3)(c) when the right to timely access to counsel is denied.

### Jurisprudence

#### *Salduz v. Turkey*

A minor was arrested and, in the absence of a lawyer, made admissions during a police interrogation. The applicant later retracted his statement, alleging that it was obtained under duress. The Grand Council held that the rights of the accused were severely and irretrievably prejudiced when the statements made in the interrogation were used for conviction. The Grand Council emphasized, “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.” The Grand Council found a violation of Articles 6(1) and 6(3)(c) of the ECHR.

Additional case law: *Zagaria v. Italy*, *John Murray v. the United Kingdom*, *Shabelnik v. Ukraine*, *Plonka v. Poland*, *Pishchalnikov v. Russia*, *Dayanan v. Turkey*, *Zaichenko v. Russia*, *Brusco v. France*, *Nechiporuk and Yonkalo v. Ukraine*, *Stojkovic v. France and Belgium*, *Demir v. Turkey*, *Titarenko v. Ukraine*.

## C. Confidential Access

Although the right to private and confidential communication with counsel is not expressly guaranteed in the ECHR, the Court has held that:

An accused’s right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such

<sup>27</sup> *McVicar v United Kingdom*, No 46311/99, (7 May 2002) at paras 48-62; *Steel and Morris v United Kingdom*, *supra* note 26 at para 61.

<sup>28</sup> *Airey v Ireland*, *supra* note 27 at para 26; *Gnahoré v France*, No 40031/98 (19 September 2000) at para 41.

<sup>29</sup> *Steel and Morris v the United Kingdom*, *supra* note 26.

<sup>30</sup> *Faulkner v United Kingdom*, No 30308/96, (30 November 1999).

<sup>31</sup> *Laska and Lika v Albania*, Nos 12315/04 and 17605/04, (20 April 2010).

<sup>32</sup> *Salduz v Turkey*, No 36391/02 (27 November 2008) at para 54; *Shabelnik v Ukraine*, No 16404/03 (19 February 2009); *Sobko v Ukraine*, No 15102/10 (17 December 2015).

surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.<sup>33</sup>

In short, the ECtHR has held that confidentiality between a client and his or her lawyer is central to effective legal representation. Its absence impairs the right to defence, which in turn, is a key component to a fair trial.

The following have been held to compromise lawyer-client confidentiality: reading letters sent between the parties,<sup>34</sup> the presence of third parties within sight and hearing of a consultation,<sup>35</sup> the perception—on reasonable grounds—of compromised confidentiality,<sup>36</sup> and communication via video link.<sup>37</sup>

### Jurisprudence

#### *Brennan v. United Kingdom*

The applicant was arrested on terrorism offences. The Court found that the presence of a police officer within hearing of the first consultation between the applicant and his counsel was a violation of Article 6(3)(c) of the ECHR, for which there was no compelling justification. Thus, the applicant's right to an effective defence was impaired as "the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him."<sup>38</sup>

Additional case law: *Urazov v. Russia*, *S. v. Switzerland*, *Öcalan v. Turkey*, *Moiseyev v. Russia*, *Sakhnovskiy v. Russia*, *Lanz v. Austria*.

---

<sup>33</sup> *S v Switzerland*, Nos 12629/87; 13965/88 (28 November 1991) at para 48.

<sup>34</sup> *Campbell v United Kingdom*, No 13590/88 (25 March 1992).

<sup>35</sup> *Brennan v United Kingdom*, No 39846/98, (16 October 2001).

<sup>36</sup> *Khodorkovskiy v Russia*, No 5829/04, (31 May 2011).

<sup>37</sup> *Gorbunov and Gorbachev v Russia*, Nos 43183/06 and 27412/07, (1 March 2016); *Sakhnovsky v Russia*, No 21272/03, (2 November 2010).

<sup>38</sup> *Brennan v United Kingdom*, *supra* note 36 at para 63.