

The Right to Legal Aid

*A Guide to International
Law Rights to Legal Aid*

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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ACRONYMS or ABBREVIATIONS

ACHR:	American Convention on Human Rights
ACHPR:	African Commission on Human and Peoples' Rights
AU:	African Union
Banjul Charter:	African Charter on Human and Peoples' Rights
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women UN Committee on the Elimination of All Forms of Discrimination against Women
CERD:	Committee on the Elimination of Racial Discrimination
CMW:	UN Committee on the Protection of Migrant Workers and Members of their Families
COE:	Council of Europe
CPT:	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC:	Convention on the Rights of the Child UN Committee on the Rights of the Child
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
HRC:	UN Human Rights Council
HR Committee:	UN Human Rights Committee
IACHR:	Inter-American Commission on Human Rights
IACtHR:	Inter-American Court of Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICRMW:	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
OAS:	Organization of American States
OP-ICCPR:	Optional Protocol to the International Covenant on Civil and Political Rights
SPT:	UN Subcommittee on Prevention of Torture
SR:	Special Rapporteur
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
WGAD:	UN Working Group on Arbitrary Detention

The Right to Legal Aid: A Guide to International Law Rights to Legal Aid

I. INTRODUCTION

Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice. – *Report of the United Nations Special Rapporteur on the Independence of judges and lawyers, Gabriela Knaul*, 15 March 2013.

Effective access to States' courts and administrative tribunals is essential for protection of the rights of individuals to a fair trial and due process, the right to equality before the law and the right to seek a remedy for a grievance.¹ These are fundamental principles guaranteed under international human rights law. Such access is meaningless for many of the world's citizens,² who are denied access to justice due to poverty, a lack of access to or control over financial resources, physical barriers, legal and institutional discrimination and bias, lack of education or awareness of rights or of the justice system, language barriers, insufficient institutional capacity and support,

¹ The United Nations Development Program (UNDP) defines a grievance, in the context of a right to access to justice, as “a gross injury or loss that constitutes a violation of a country’s civil or criminal law, or international human rights standards.” UNDP, *Access to Justice – Practice Note*, (UNDP, Democratic Governance Group, Bureau for Development Policy, 20 November 2004), at 6, online: <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/access-to-justice-practice-note.html>.

² With respect to access to justice for women, for example, the United Nations organization, UN Women, noted, in *Progress of the World’s Women: In Pursuit of Justice, 2011–2012*, at 8, online, that “[s]ome 600 million women, more than half the world’s working women, are in vulnerable employment, trapped in insecure jobs, often outside the purview of labour legislation. In the developing world, more than one third of women are married before the age of 18, missing out on education and exposed to the risks of early pregnancy. Despite major progress on legal frameworks at national, regional and international levels, millions of women report experiencing violence in their lifetimes, usually at the hands of an intimate partner. Meanwhile, the systematic targeting of women for brutal sexual violence is a hallmark of modern conflicts.” [footnotes omitted]: <<http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>>.

inadequate laws, corruption, and fear of reprisal or stigma.³ Access to legal aid is a critical component in addressing such barriers to access to justice.

Tragically, the availability of State-funded legal assistance is limited or non-existent in many countries.⁴ Where legal aid is available, it is usually restricted to criminal matters. Family, property and other civil disputes are generally not covered, effectively denying access to justice for these matters due to the expense and complexity of such cases.⁵ Inadequate funding and staffing of legal aid systems, restrictive definitions of legal aid or of eligibility criteria, lack of training and awareness among officials, inexperienced legal aid counsel, poor oversight and institutional support limit the availability of legal aid services to many of the world's women, children, rural populations, indigenous peoples and minorities, persons with disabilities, and other disadvantaged groups.

In the criminal law sphere, early access to legal aid for persons who have been arrested or detained in respect of a criminal offence is crucial in protecting an individual's rights to a fair trial and due process and the right not to be arbitrarily detained, to ensure against ill-treatment by authorities, and to assist in navigating the justice system.

As Penal Reform International notes,

Without effective legal aid and advice, the presumption of innocence is lost. A long period of pre-trial detention reduces the chance of receiving a fair trial as time passes, evidence goes stale and witnesses disappear. The pressure to plead guilty increases as people lose confidence in the justice system and wish to end the uncertainty over their future. Without legal aid or advice, they have no help in applying for bail, preparing their case or speeding up the trial process. A high rate of pre-trial detention contributes towards prison overcrowding and poor conditions, impacting on the physical and mental health of detainees. Families also suffer from the loss of an income or career, which may lead to loss of their home and breakdown of family relationships.⁶

Access to legal aid in civil matters is essential in promoting equality of access to economic, social and cultural rights and in seeking effective redress when these rights are violated. Vulnerable groups such as the poor and disadvantaged are more likely to be victims of rights violations and have greater difficulty obtaining redress. For example, inadequate legal aid funding for family

³ See UNDP, *Programming for Justice: Access for All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, 2005, chapters 3-7, for a survey of the obstacles to access to justice, online: <http://www.unrol.org/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf> [*Programming for Justice: Access for All*].

⁴ In most of Africa, for example, legal aid is generally not available at any stage of the criminal justice process, and is rarely available upon arrest or during the investigative stage: United Nations Office on Drugs and Crime (UNODC), *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (2014) at 4, online: <http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf>.

⁵ *Programming for Justice: Access for All*, *supra* note 3 at 87.

⁶ Penal Reform International, *Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (April 2013) at 1, online: <<http://www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidelines-and-Principles-April-20131.pdf>>.

issues mean that women often suffer disproportionately from the high costs of litigation and legal services and have to represent themselves in complex legal matters.⁷

This Guide to international law rights to legal aid has been developed to assist in promoting effective access to legal aid to ensure access to justice for all, by setting out the international legal standards and underlying principles and interpretations of the standards that comprise the international legal framework for the provision of legal aid services. The Handbook includes:

- Observations jurisprudence, comments and recommendations from United Nations (UN) treaty bodies;
- opinions and recommendations of Special Procedures of the UN Human Rights Council; and
- jurisprudence from regional courts and bodies, including the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Inter-American Commission on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR).⁸

A. The Evolving Right to Legal Aid in International Law: Criminal, Civil and Administrative Matters

The right to free legal assistance for persons accused of crimes who cannot afford a lawyer is a widely accepted principle of law. A right to legal aid is expressly stated in a number of international instruments to which States are parties (discussed in Section II). Courts, tribunals and treaty-monitoring bodies have found an implied right to legal aid for criminal, civil and administrative proceedings as an integral part of the rights to a fair trial and due process, the right to equality before the law and in the right to an effective remedy.

The recently adopted *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principles and Guidelines)*,⁹ the first international instrument dedicated exclusively to the provision of legal aid, articulates a developing international consensus on the importance of legal aid as a vital component of a fair and accessible justice system.¹⁰ Drawn from

⁷ *Programming for Justice: Access for All*, *supra* note 3 at 87.

⁸ The following instruments, not included in this Guide, also contain standards relevant to the provision of legal aid: *ASEAN Human Rights Declaration*, Association Of Southeast Asian Nations (Nov. 18, 2012) online: <<http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>>; *League of Arab States, Revised Arab Charter on Human Rights*, May 22, 2004, entered into force March 15, 2008, online: <<http://www1.umn.edu/humanrts/instree/loas2005.html>>; and *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* (“Minsk Convention”), adopted in Minsk on 22 January 1993, entered into force 19 May 1994, amended on 28 March 1997, online: <<http://www.unhcr.org/4de4edc69.html>>.

⁹ General Assembly resolution 67/187, *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: <http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf>.

¹⁰ The adoption of the new principles and guidelines is the culmination of a process that began in Africa, after the adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in

international standards and recognized best practices, the *Principles and Guidelines* provide guidance to States on the “fundamental principles on which a legal aid system in criminal justice should be based” and “outline the specific elements required for an effective and sustainable national legal aid system, in order to strengthen access to legal aid.”¹¹

The introduction to the *Principles and Guidelines* explains that

[a] functioning legal aid system, as part of a functioning criminal justice system may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization. It may also protect and safeguard the rights of victims and witnesses in the criminal justice process. Legal aid can be utilized to contribute to the prevention of crime by increasing awareness of the law.¹²

Principle 1 of the *Principles and Guidelines* calls on States to guarantee the right to legal aid in their national legal systems at the highest level, including, where applicable, in their constitutions.

The *Principles and Guidelines* define legal aid as including:

legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is *provided at no cost for those without sufficient means or when the interests of justice so require*. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes [emphasis added].¹³

The *Principles and Guidelines* specifically focus on the right “legal aid” provided free of charge in particular circumstances, as distinguished from the right to “legal assistance.”¹⁴

The *Principles and Guidelines* establish that States should consider the provision of legal aid as their duty and responsibility and should put in place a comprehensive nationwide legal aid system that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system to ensure that it is available to all without discrimination.¹⁵ “Recognizing that certain groups are entitled to additional protection or are more vulnerable when involved with the criminal justice system,” States should introduce into their legal aid systems special provisions for women, children and groups with special needs.¹⁶

Africa, in 2004, which recognized the importance of legal aid ensuring access to justice and fair trial in criminal cases, later adopted by the UN Economic and Social Council in 2007.

¹¹ *Principles and Guidelines*, *supra* note 9 at para 6.

¹² *Ibid* at para 3.

¹³ *Ibid* at para 8.

¹⁴ *Ibid* at para 13

¹⁵ *Ibid* at paras 15 and 26.

¹⁶ *Ibid* at para 12.

The *Principles and Guidelines* acknowledge that States may employ different models in the provision of legal aid, which may include public defenders, private lawyers, contract lawyers, *pro bono* schemes, bar associations, paralegals and others. No specific model is endorsed, but States should guarantee the basic right to legal aid of persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, while expanding legal aid to include others who come into contact with the criminal justice system and diversifying legal aid delivery schemes. States should, “where appropriate, undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly funded legal aid system may have on a properly functioning criminal justice system and on access to justice.”¹⁷

In a resolution adopted 13 June 2013, the UN Human Rights Council (HRC) recognized “that legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law,” and underscored the importance for States to

develop and implement an effective and sustainable legal aid system that is consistent with their international human rights obligations and takes into account relevant commitments and good practices, and to ensure that legal aid is available at all stages of the criminal justice process, subject to appropriate eligibility criteria and in accordance with international human rights law;...¹⁸

In her June 2013 report to the HRC, the Special Rapporteur on the Independence of judges and lawyers, Gabriela Knaul, included a thematic section on legal aid. The SR called on States to build on the *Principles and Guidelines*, which she described as “the most comprehensive legal instrument to date for the development and strengthening of legal aid systems at the national level.”¹⁹

Noting that the aim of legal aid is “to contribute to the elimination of obstacles and barriers that impair or restrict access to justice,” the SR called for the broadest definition of legal aid possible, which should include

not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.²⁰

The SR advised that the *Principles and Guidelines* “may also be applied, *mutatis mutandis*, in civil and administrative law cases where free legal assistance is indispensable for effective access

¹⁷ *Ibid* at para 11.

¹⁸ U.N. Human Rights Council Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, 7 June 2013, A/HRC/23/L.9 at para 7, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G13/144/57/PDF/G1314457.pdf?OpenElement>>.

¹⁹ U.N. Human Rights Council. 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: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement>>.

²⁰ *Ibid* at para 27.

to the courts and a fair hearing, as well as for access to legal information and counsel and to mechanisms of alternative dispute resolution.”²¹

Consistent with the *Lilongwe Declaration* and the *UN Principles and Guidelines*, legal aid should not be limited to covering only legal assistance and representation in criminal, administrative and civil proceedings, but should include legal education, access to legal information and other services provided through alternative dispute resolution mechanisms and restorative justice processes.²² It must be emphasized that all restorative justice programs should adhere to the *UN Basic principles on the use of restorative justice programmes in criminal matters*.²³

The SR cited a number of international treaty bodies which have acknowledged a right to legal aid in civil as well as criminal matters, including the HR Committee’s *General Comment No. 32* (2007) and *No. 28* (2000), CESCR *General Comment No. 7*, CERD *General Recommendation No. 29* and *No. 31*, CAT *General Comment No. 3*, and ICRMW *General comment No. 1 (on migrant domestic workers)*. She confirmed that the right to legal aid

can be construed as both a right and an essential procedural guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial.²⁴

In accordance with the jurisprudence of the human rights treaty bodies, the SR observed that legal aid should therefore be extended to “any person who comes into contact with the law and does not have the means to pay for counsel,” including “any person whose rights or freedoms have been violated as a result of an act, or a failure to act, perpetrated by a State actor,” and “any person who participates in judicial or extrajudicial procedures aimed at determining rights and obligations “in a suit at law.”²⁵

B. The Duty of States to Implement the Right to Legal Aid

States have an obligation to guarantee the exercise of the rights described under domestic law and in international treaties to which they are parties. The *Vienna Convention on the Law of Treaties* specifies that States parties are bound by their treaty obligations, and all treaty obligations must be performed in good faith (*pacta sunt servanda*).²⁶ Article 27 of the *Vienna Convention* reads:

²¹ *Ibid* at para 48.

²² *Ibid* at para 26. The *Lilongwe Declaration on Accessing Legal Aid in Criminal Justice System in Africa and Plan of Action* states that “[l]egal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.”

²³ *UN Basic principles on the use of restorative justice programmes in criminal matters*, ECOSOC Resolution 2002/12, online: <<http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>>.

²⁴ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, *supra* note 19 at para 28.

²⁵ *Ibid* at para 35.

²⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series,

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Thus, under international human rights law, States have a negative obligation not to obstruct access to judicial and other remedies and a positive duty to organize their domestic law to ensure that all persons can access those remedies.

International human rights treaties contain provisions requiring a State Party: to ensure to all individuals within its territories and subject to its jurisdiction the rights and freedoms set out in the treaty, without distinction of any kind; to take the necessary steps to give full effect to those rights and freedoms; and to ensure the enforcement of appropriate remedies in the event of a treaty violation.²⁷ Where treaty bodies and human rights tribunals have examined alleged violations of specific treaty provisions, the jurisprudence of these bodies provides a rich body of interpretive law and/or persuasive authority concerning States’ obligations under international human rights law.²⁸

As indicated by the HR Committee, States also have a legal interest in the performance by other States Parties of their obligations under human rights treaties. This legal interest flows from the principle that the “rules concerning the basic rights of the human person” are *erga omnes* (owed to all) obligations, and from States’ obligation under the *United Nations Charter* to promote universal respect for, and observance of, human rights and fundamental freedoms for all persons, without distinction.²⁹

Many human rights norms have acquired the force of customary international law. Such norms constitute further binding legal obligations on States. To the extent that internationally protected human rights laws are peremptory norms of general international law (*jus cogens*), no derogation by States is permitted.

Finally, there are numerous other UN and regional human rights instruments relevant to the right to legal aid, including Declarations, Guidelines, Statements of Principle, Resolutions and Recommendations. While not binding as such on States, these secondary instruments provide important sources for interpreting and understanding States’ international legal obligations arising from treaty obligations as well as normative guidance for States in developing domestic public policy that complies with generally accepted international human rights standards and principles.

vol. 1155, 331 [Vienna Convention].

²⁷ See e.g. *ICCPR*, Art 2.

²⁸ In considering the impact of the findings of UN Treaty Bodies, the International Law Association, Berlin Conference (2004) concluded that “treaty body output has become a relevant interpretive source for many national courts in the interpretation of constitutional and statutory guarantees of human rights, as well as in interpreting provisions which form part of domestic law, as well as for international tribunals. While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognized that, as expert bodies entrusted by the States parties with functions under the treaties, the treaty bodies’ interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation” [footnote omitted]: International Law Association, Berlin Conference (2004), *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* at para 175.

²⁹ *CCPR General Comment No. 31[80], Article 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, 29 March 2004, CCPR/C/21/Rev.1/Add.13 at para 2, online: <[ceprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add13_%28GC31%29_En.pdf](http://www.ceprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.21.Rev1.Add13_%28GC31%29_En.pdf)>.

States' obligations under international law to guarantee effective access to legal aid entail comprehensive approaches that address systemic barriers to access to justice. In his 2008 report to the Human Rights Council, Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, stated that

[a]ccess to justice requires the establishment of a judicial system that guarantees rights, and of parallel measures such as mechanisms and programmes to facilitate free legal assistance, in both criminal and civil cases. This positive aspect of the State's obligations, likewise firmly established in both the European and the inter-American systems, must be considered in relation to socio-economic factors and others such as age, sexual orientation, and people's physical and psychological condition, which have a major bearing on effective access to justice [footnotes omitted].³⁰

II. THE INTERNATIONAL STANDARDS

A. Sources of the Right to Legal Aid

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law... – *Universal Declaration of Human Rights*

A right to legal aid is stated explicitly in a number of international instruments in relation to due process rights for persons facing criminal charges. A right to legal aid, for both civil and criminal matters, is also implicit in the right to effective exercise of due process rights and other internationally protected rights, including the rights to non-discrimination, equality before the law, liberty and security of the person and to an effective remedy for violation of protected rights. A right to legal assistance is an essential component of the rule of law,³¹ and this right necessarily includes legal aid “provided at no cost for those without sufficient means or when the interests of justice so require.”³²

³⁰ UN Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, 13 May 2008, A/HRC/8/4 at para 23, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G0813414.pdf?OpenElement>>.

³¹ The UN Secretary-General defines the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” “Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004) at para. 6, online: <<http://www.unrol.org/files/2004%20report.pdf>>.

³² *Principles and Guidelines*, supra note 9 at para 8.

Right to a Fair Trial

International human rights law guarantees the right to a fair trial for persons involved in criminal proceedings or in the determination of civil rights and obligations. The right to a fair trial includes, among other things, the right to counsel. This right may, in certain circumstances, entail the right to be assisted by free legal aid.

Article 10 of the *Universal Declaration of Human Rights (UDHR)*, states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Similarly, Article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)* provides the following:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

Article 14(3)(d) lists, among the minimum procedural guarantees for persons charged with a criminal offence, the right, in full equality,

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.

As discussed under *Interpretation* below, the HR Committee has made it clear that Article 14 applies to civil as well as criminal proceedings and, although Article 14(3)(d) refers explicitly only to persons charged with a criminal offence, States may also be required, in the interests of fairness, to provide free legal aid in relation to civil matters.

The right of persons charged with criminal offences to have free legal assistance assigned to them is also explicitly stated in Article 18 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)*, as well as in the following UN instruments:

- *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”).

Regional instruments from the human rights systems of the Organization of American States (OAS), the African Union (AU) and the European Union (EU) as well as standards endorsed by the Commonwealth Secretariat contain similar guarantees to fairness, publicity and expeditiousness found in *ICCPR* Article 14(1).

An explicit right to free legal assistance for persons charged with a criminal offence is found in the *European Convention on Human Rights (ECHR)*, Article 6(3)(c). The *Charter of the Organization of American States (OAS Charter)* contains an explicit right to free civil counsel. 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.” Article 8(2)(e) of the *American Convention on Human Rights (ACHR)* provides for “the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides”.

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (African Guidelines) provide a right to free legal assistance to “the accused or a party to a civil case.”

Various Council of Europe recommendations, resolutions and directives (see Standards below) refer to State obligations to provide legal aid for juveniles and minors, persons involved in cross-border disputes and untried prisoners.

The *Hague Convention on Civil Procedure*, Article 20(1), states that “[i]n civil and commercial matters, nationals of the Contracting States shall be granted free legal aid in all the other Contracting States, on the same basis as nationals of these States, upon compliance with the legislation of the State where the free legal aid is sought.”

Right to Non-Discrimination and to Equality before the Law

States are obligated to ensure that internationally protected human rights may be enjoyed by all persons within their jurisdiction without distinction of any kind. This requires that access to justice be equally available to all persons regardless of age, race, colour, sex, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status.³³

Access to justice should be unrestricted and effective. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. The right to equality before the courts and tribunals includes equal access and equality of arms,³⁴ and ensures that the parties to the

³³ The UN Human Rights Committee held in *Toonen vs. Australia* that the references to “sex” in *ICCPR* Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the *ICCPR* should be taken to include sexual orientation. *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994, at para. 8.7, online: <<http://www.refworld.org/docid/48298b8d2.html>>.

³⁴ The ECtHR has said that “the principle of equality of arms - a component of the broader concept of a fair trial - requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”: *ECtHR, Case of De Haas and Gijssels v. Belgium*, (Application no. 19983/92), Judgment of 24 February 1997 at para 53.

proceedings in question are treated without any discrimination. Free legal aid ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied fair trial rights because of financial circumstances.

The UN *Basic Principles on the Role of Lawyers*, Principle 3, requires governments to “ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.”

A formal guarantee of entry to the judicial process is not sufficient – functional equality of access is essential to the entire conduct of that process.³⁵

Right to an Effective Remedy

States have an obligation to guarantee equal access to effective remedies by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law. Equal access to legal aid is an essential precondition for exercising the right to an effective remedy for persons who require legal assistance to pursue such remedies but who lack the financial means to hire legal counsel. UN monitoring bodies have determined that “a remedy must be real, not merely theoretical; be available to the person concerned; be capable of restoring the enjoyment of the impaired right; and ensure the effectiveness of the judgment.”³⁶

Standards

<i>UN Instruments</i>	
UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)	
Preamble	<i>...Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,...</i>
2.	<i>Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.</i>
7.	<i>All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.</i>
8.	<i>Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.</i>

³⁵Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, *supra* note 30 at para 20.

³⁶*Ibid* at para. 19.

10.	<i>Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.</i>
11. (1)	<i>Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.</i>
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	
2. (1)	<i>Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i>
2. (3)	<i>Each State Party to the present Covenant undertakes:</i> <i>(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;</i> <i>(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;</i> <i>(c) To ensure that the competent authorities shall enforce such remedies when granted.</i>
3.	<i>The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.</i>
14.	<i>(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...</i> <i>(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...</i> <i>(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;...</i>
26.	<i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i>
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)	
2.	<i>1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.</i>

	<p>2. <i>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p> <p>3. <i>Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals.</i></p>
3.	<i>The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.</i>

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	
13.	<i>Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.</i>
14.	<i>1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.</i>
CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)	
2.	<p><i>States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:...</i></p> <p><i>(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;</i></p> <p><i>(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;</i></p> <p><i>(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;</i></p> <p><i>(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;</i></p> <p><i>(g) To repeal all national penal provisions which constitute discrimination against women.</i></p>
15. (1)	<i>States Parties shall accord to women equality with men before the law.</i>
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)	
5.	<i>In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national</i>

	<p>or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:</p> <p>(a) The right to equal treatment before the tribunals and all other organs administering justice;...</p>
6.	<p>States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.</p>
INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
7.	<p>States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.</p>
16. (7)	<p>When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:...</p> <p>(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation...</p>
17. (7)	<p>Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.</p>
18.	<p>1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....</p> <p>3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:...</p> <p>(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;...</p>

UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)	
2.	<p>1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion,</p>

	<p><i>political or other opinion, national, ethnic or social origin, property, disability, birth or other status.</i></p> <p><i>2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.</i></p>
12.	<p><i>1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.</i></p> <p><i>2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.</i></p>
37.	<p><i>States Parties shall ensure that: ...</i></p> <p><i>(d) 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.</i></p>
40. (2)	<p><i>To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: ...</i></p> <p><i>(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: ...</i></p> <p><i>(ii) ...to have legal or other appropriate assistance in the preparation and presentation of his or her defence;</i></p> <p><i>(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance...</i></p>
UN CONVENTION RELATING TO THE STATUS OF REFUGEES	
16.	<p><i>1. A refugee shall have free access to the courts of law on the territory of all Contracting States.</i></p> <p><i>2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.</i></p> <p><i>3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.</i></p>
BANGKOK DECLARATION ON SYNERGIES AND RESPONSES: STRATEGIC ALLIANCES IN CRIME PREVENTION AND CRIMINAL JUSTICE	
18.	<p><i>We call upon Member States to take steps, in accordance with their domestic laws, to promote access to justice, to consider the provision of legal aid to those who need it and to enable the effective assertion of their rights in the criminal justice system.</i></p>
UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS	
1.	<p><i>All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.</i></p>

2.	<i>Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.</i>
6.	<i>Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.</i>
7.	<i>Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.</i>
UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT	
11. (1)	<i>...A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.</i>
17.	<p><i>1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.</i></p> <p><i>2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay..</i></p>
UN PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 3.	<p><i>20. States should ensure that anyone who is detained, arrested, suspected of, or 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.</i></p> <p><i>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.</i></p> <p><i>22. Children should have access to legal aid under the same conditions as or more lenient conditions than adults.</i></p> <p><i>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.</i></p>
Principle 4.	<i>24. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.</i>
Principle 5.	<i>25. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to witnesses of crime.</i>
Principle 6.	<i>26. States should ensure the provision of legal aid to all persons regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social</i>

	<i>origin or property, citizenship or domicile, birth, education or social status or other status.</i>
Principle 9.	<i>31. States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.</i>
Guideline 2.	<i>42. In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that: ... (e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation; ...</i>
UN STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (THE BEIJING RULES)	
7.1	<i>Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.</i>
15.1	<i>Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.</i>
UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (HAVANA RULES)	
18.	<i>The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following: (a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers...</i>
78.	<i>Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints.</i>
UN STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS	
93.	<i>For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions...</i>
95.	<i>Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C. Relevant provisions of part II, section A, shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence.</i>

U.N. HUMAN RIGHTS COUNCIL RESOLUTION ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS, AND THE INDEPENDENCE OF LAWYERS, 7 JUNE 2013	
7.	<p><i>...Recognizing that legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law...</i></p> <p><i>7. Underscores the importance for States to develop and implement an effective and sustainable legal aid system that is consistent with their international human rights obligations and takes into account relevant commitments and good practices, and to ensure that legal aid is available at all stages of the criminal justice process, subject to appropriate eligibility criteria and in accordance with international human rights law;</i></p>
SALVADOR DECLARATION ON COMPREHENSIVE STRATEGIES FOR GLOBAL CHALLENGES: CRIME PREVENTION AND CRIMINAL JUSTICE SYSTEMS AND THEIR DEVELOPMENT IN A CHANGING WORLD	
52.	<i>We recommend that Member States endeavour to reduce pretrial detention, where appropriate, and promote increased access to justice and legal defence mechanisms.</i>
Regional Instruments	
AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter)	
2.	<i>Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.</i>
3.	<p><i>1. Every individual shall be equal before the law.</i></p> <p><i>2. Every individual shall be entitled to equal protection of the law.</i></p>
7. (1)	<p><i>1. Every individual shall have the right to have his cause heard. This comprises: ...</i></p> <p><i>(c) the right to defence, including the right to be defended by counsel of his choice; ...</i></p>
19.	<i>All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.</i>
26.	<i>States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.</i>
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD	
3.	<i>Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.</i>
PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (MAPUTO PROTOCOL)	
8.	<p><i>Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:</i></p> <p><i>a) effective access by women to judicial and legal services, including legal aid;</i></p> <p><i>b) support to local, national, regional and continental initiatives directed at providing</i></p>

	<p>women access to legal services, including legal aid;</p> <p>c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;</p> <p>d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;</p> <p>e) that women are represented equally in the judiciary and law enforcement organs;</p> <p>f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.</p>
25.	<p>States Parties shall undertake to:</p> <p>a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated;</p> <p>b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.</p>
PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS	
10. (2)	<p>Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.</p>
AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN	
II.	<p>All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.</p>
XVIII.	<p>Every person may resort to the courts to ensure respect for his legal rights. There 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.</p>
XXVI.	<p>Every accused person is presumed to be innocent until proved guilty.</p> <p>Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.</p>
AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)	
1. (1)	<p>The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.</p>
8.	<p>1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.</p> <p>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:</p> <p>a. the right of the accused to be assisted without charge by a translator or interpreter, if he</p>

	<p><i>does not understand or does not speak the language of the tribunal or court;</i></p> <p><i>b. prior notification in detail to the accused of the charges against him;</i></p> <p><i>c. adequate time and means for the preparation of his defense;</i></p> <p><i>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;</i></p> <p><i>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;</i></p> <p><i>f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;</i></p> <p><i>g. the right not to be compelled to be a witness against himself or to plead guilty; and</i></p> <p><i>h. the right to appeal the judgment to a higher court.</i></p>
10.	<i>Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.</i>
24.	<i>All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.</i>
25.	<p><i>1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.</i></p> <p><i>2. The States Parties undertake:</i></p> <p><i>a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;</i></p> <p><i>b. to develop the possibilities of judicial remedy; and</i></p> <p><i>c. to ensure that the competent authorities shall enforce such remedies when granted.</i></p>
CHARTER OF THE ORGANIZATION OF AMERICAN STATES	
45.	<p><i>The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: ...</i></p> <p><i>i) Adequate provision for all persons to have due legal aid in order to secure their rights ...</i></p>
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2010/C 83/02)	
20.	<i>Everyone is equal before the law.</i>
21.	<p><i>1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.</i></p> <p><i>2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.</i></p>
23.	<i>Equality between women and men must be ensured in all areas, including employment, work</i>

	<p>and pay.</p> <p><i>The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.</i></p>
47.	<p><i>Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</i></p> <p><i>Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.</i></p> <p><i>Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.</i></p>
48. (2)	<p><i>Respect for the rights of the defence of anyone who has been charged shall be guaranteed.</i></p>
EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)	
6.	<p><i>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...</i></p> <p><i>3. Everyone charged with a criminal offence has the following minimum rights:...</i></p> <p><i>(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;...</i></p>
13.	<p><i>Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.</i></p>
14.	<p><i>The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</i></p>
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
A.	<p><i>1. Fair and Public Hearing</i></p> <p><i>In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.</i></p> <p><i>2. Fair Hearing</i></p> <p><i>The essential elements of a fair hearing include:</i></p> <p><i>(a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;</i></p> <p><i>(b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;</i></p> <p><i>(c) equality of access by women and men to judicial bodies and equality before the law in</i></p>

	<p>any legal proceedings;</p> <p>(d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;</p> <p>(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;</p> <p>(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;</p> <p>(g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;</p> <p>(h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;</p> <p>(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and</p> <p>(j) an entitlement to an appeal to a higher judicial body.</p>
C.	<p>(a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.</p> <p>(b) The right to an effective remedy includes:</p> <ol style="list-style-type: none"> 1. access to justice; 2. reparation for the harm suffered; 3. access to the factual information concerning the violations. <p>(c) Every State has an obligation to ensure that:</p> <ol style="list-style-type: none"> 1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body; 2. any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities; 3. any remedy granted shall be enforced by competent authorities; 4. any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy. <p>(d) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.</p>
G.	<p>(a) States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.</p> <p>(b) States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar.</p> <p>(c) States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.</p>

<p>H.</p>	<p>(a) <i>The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.</i></p> <p>(b) <i>The interests of justice should be determined by considering:</i></p> <ol style="list-style-type: none"> 1. <i>in criminal matters:</i> <ol style="list-style-type: none"> i) <i>the seriousness of the offence;</i> ii) <i>the severity of the sentence.</i> 2. <i>in civil cases:</i> <ol style="list-style-type: none"> i) <i>the complexity of the case and the ability of the party to adequately represent himself or herself;</i> ii) <i>the rights that are affected;</i> iii) <i>the likely impact of the outcome of the case on the wider community.</i> <p>(c) <i>The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.</i></p> <p>(d) <i>An accused person or a party to a civil case has the right to an effective defence or representation and has his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.</i></p>
<p>K.</p>	<p>(a) <i>States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.</i></p> <p>(b) <i>States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.</i></p> <p>(c) <i>In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.</i></p> <p>(d) <i>States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.</i></p>
<p>M. (2)</p>	<p><i>Rights upon arrest:...</i></p> <p>f) <i>Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.</i></p>
<p>N. (2)</p>	<p><i>Right to counsel:</i></p> <p>(a) <i>The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.</i></p> <p>(b) <i>The accused has the right to be informed, if he or she does not have legal assistance, of</i></p>

	<p><i>the right to defend him or herself through legal assistance of his or her own choosing.</i></p> <p><i>(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.</i></p> <p><i>(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.</i></p>
O.	<p><i>(b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.</i></p> <p>...</p> <p><i>(l) Every child arrested or detained for having committed a criminal offence shall have the following guarantees: ...</i></p> <p style="padding-left: 40px;"><i>3. to be provided by the State with legal assistance from the moment of arrest; ...</i></p> <p><i>(n) Every child accused of having committed a criminal offence shall have the following additional guarantees: ...</i></p> <p style="padding-left: 40px;"><i>3. to be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;</i></p> <p style="padding-left: 40px;"><i>4. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;</i></p> <p style="padding-left: 40px;"><i>5. to have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings; ...</i></p>
P.	<p><i>a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.</i></p>
Q.	<p><i>a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.</i></p> <p><i>b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:</i></p> <p style="padding-left: 40px;"><i>1. equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances; ...</i></p> <p style="padding-left: 40px;"><i>4. respect for the equality of women and men in all proceedings; ...</i></p> <p style="padding-left: 40px;"><i>8. an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;</i></p>
THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA	
I.	<p><i>All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute</i></p>

	<i>resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.</i>
4.	<i>Human rights are enforced when government officials know that they will be held accountable for violations of the law and of basic human rights. Persons who are abused or injured by law enforcement officials, or who are not afforded proper recognition of their human rights, should have access to the courts and legal representation to redress their injuries and grievances. Governments should provide legal aid to persons who seek compensation for injuries suffered as the result of misconduct by officials and employees of criminal justice systems. This does not exclude other stakeholders from providing legal aid in such cases.</i>
EUROPEAN UNION, DIRECTIVE 2013/32/EU OF 26 JUNE 2013 ON COMMON PROCEDURES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION (RECAST)	
19.	<p><i>Provision of legal and procedural information free of charge in procedures at first instance</i></p> <p><i>1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged.</i></p> <p><i>2. The provision of legal and procedural information free of charge shall be subject to the conditions laid down in Article 21.</i></p>
20.	<p><i>Free legal assistance and representation in appeals procedures</i></p> <p><i>1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.</i></p> <p><i>2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in Chapter III. In such cases, Article 19 shall not apply.</i></p> <p><i>3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.</i></p> <p><i>Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.</i></p> <p><i>In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.</i></p> <p><i>4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.</i></p>
21.	<p><i>Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation</i></p> <p><i>1. Member States may provide that the legal and procedural information free of charge</i></p>

	<p><i>referred to in Article 19 is provided by non-governmental organisations, or by professionals from government authorities or from specialised services of the State.</i></p> <p><i>The free legal assistance and representation referred to in Article 20 shall be provided by such persons as admitted or permitted under national law.</i></p> <p><i>2. Member States may provide that legal and procedural information free of charge referred to in Article 19 and free legal assistance and representation referred to in Article 20 are granted:</i></p> <p><i>(a) only to those who lack sufficient resources; and/or</i></p> <p><i>(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.</i></p> <p><i>Member States may provide that the free legal assistance and representation referred to in Article 20 is granted only for appeals procedures in accordance with Chapter V before a court or tribunal of first instance and not for any further appeals or reviews provided for under national law, including rehearings or reviews of appeals.</i></p> <p><i>Member States may also provide that the free legal assistance and representation referred to in Article 20 is not granted to applicants who are no longer present on their territory in application of Article 41(2)(c).</i></p> <p><i>3. Member States may lay down rules concerning the modalities for filing and processing requests for legal and procedural information free of charge under Article 19 and for free legal assistance and representation under Article 20.</i></p> <p><i>4. Member States may also:</i></p> <p><i>(a) impose monetary and/or time limits on the provision of legal and procedural information free of charge referred to in Article 19 and on the provision of free legal assistance and representation referred to in Article 20, provided that such limits do not arbitrarily restrict access to the provision of legal and procedural information and legal assistance and representation;</i></p> <p><i>(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.</i></p> <p><i>5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.</i></p>
<p>COUNCIL OF EUROPE, DIRECTIVE 2008/115/EC OF 16 DECEMBER 2008 ON COMMON STANDARDS AND PROCEDURES IN MEMBER STATES FOR RETURNING ILLEGALLY STAYING THIRD-COUNTRY NATIONALS</p>	
<p>12.</p>	<p><i>4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.</i></p>
<p>COUNCIL OF EUROPE, DIRECTIVE 2002/8/EC OF 27 JANUARY 2003 TO IMPROVE ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES BY ESTABLISHING MINIMUM COMMON RULES RELATING TO LEGAL AID FOR SUCH DISPUTES</p>	
<p>3.</p>	<p><i>1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.</i></p> <p><i>2. Legal aid is considered to be appropriate when it guarantees:</i></p>

	<p><i>(a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;</i></p> <p><i>(b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.</i></p> <p><i>In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.</i></p> <p><i>3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.</i></p> <p><i>4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.</i></p> <p><i>5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.</i></p>
4.	<i>States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.</i>
5.	<p><i>1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their economic situation, in order to ensure their effective access to justice.</i></p> <p><i>2. The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.</i></p> <p><i>3. Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2 of this Article.</i></p> <p><i>4. Thresholds defined according to paragraph 3 of this Article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.</i></p> <p><i>5. Legal aid does not need to be granted to applicants in so far as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).</i></p>
19.	<i>This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.</i>
21.	<i>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. They shall forthwith inform the Commission thereof.</i>

COUNCIL OF EUROPE, RECOMMENDATION (2008)11	
120.	<p><i>120.1. Juveniles and their parents or legal guardians are entitled to legal advice and assistance in all matters related to the imposition and implementation of sanctions or measures.</i></p> <p><i>120.2. The competent authorities shall provide juveniles with reasonable facilities for gaining effective and confidential access to such advice and assistance, including unrestricted and unsupervised visits by legal advisors.</i></p> <p><i>120.3. The state shall provide free legal aid to juveniles, their parents or legal guardians when the interests of justice so require.</i></p>
COUNCIL OF EUROPE, RECOMMENDATION (2006)2	
23.	<p><i>23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.</i></p> <p><i>23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.</i></p> <p><i>23.3 Where there is a recognised scheme of free legal aid the authorities shall bring it to the attention of all prisoners...</i></p>
70.7	<i>Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.</i>
98.	<p><i>98.1 Untried prisoners shall be informed explicitly of their right to legal advice.</i></p> <p><i>98.2 All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.</i></p>
COUNCIL OF EUROPE, RECOMMENDATION (2003)20	
15.	<i>Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer...</i>
COUNCIL OF EUROPE, RECOMMENDATION NO. R (87) 20 ON SOCIAL REACTIONS TO JUVENILE DELINQUENCY	
8.	<p><i>to reinforcing the legal position of minors throughout the proceedings, including the police investigation, by recognising, inter alia:</i></p> <p><i>- the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state;</i></p>
19.	<i>This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.</i>
21.	<i>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. They shall forthwith inform the Commission thereof.</i>

COUNCIL OF EUROPE, RESOLUTION 1707 (2010) ON DETENTION OF ASYLUM SEEKERS AND IRREGULAR MIGRANTS IN EUROPE	
9.	<i>In view of the above-mentioned considerations, the Assembly calls on member states of the Council of Europe in which asylum seekers and irregular migrants are detained to comply fully with their obligations under international human rights and refugee law, and encourages them to:...</i> <i>9.2. put into law and practice 15 European rules governing minimum standards of conditions of detention for migrants and asylum seekers to ensure that:...</i> <i>9.2.9. detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge;</i>
COUNCIL OF EUROPE, RESOLUTION (78)8 ON LEGAL AID AND ADVICE	
1.	<i>No one should be prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social or fiscal matters. To this end, all persons should have a right to necessary legal aid in court proceedings...</i>
COUNCIL OF EUROPE, RESOLUTION (73)5, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS	
93.	<i>An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representative, or shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the free assistance of an interpreter for all essential contacts with the administration and for his defence. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.</i>
BRASILIA REGULATIONS REGARDING ACCESS TO JUSTICE FOR VULNERABLE PEOPLE	
31.	<i>Actions aimed at guaranteeing the gratuity of quality technical legal assistance to people who are in a position where they are unable to pay the expenses with their own resources and conditions shall be promoted.</i>
HAGUE CONVENTION ON CIVIL PROCEDURE	
20. (1)	<i>In civil and commercial matters, nationals of the Contracting States shall be granted free legal aid in all the other Contracting States, on the same basis as nationals of these States, upon compliance with the legislation of the State where the free legal aid is sought.</i>
KYIV DECLARATION ON THE RIGHT TO LEGAL AID (2007)	
1.	<i>Legal aid is a right and governments are obliged to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all people in their jurisdictions, subject only to a transparent and reviewable assessment of need, and with special attention to women and vulnerable groups, such as indigent people, children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, asylum seekers, refugees, internally displaced persons, stateless persons, foreign nationals, prisoners, and other persons deprived of their liberty.</i>
LATIMER HOUSE GUIDELINES	
VIII.	<i>4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.</i>

Interpretation

Right to Legal Aid to Guarantee a Fair Trial

The courts have found that the right to legal aid for both criminal proceedings and civil matters is an essential aspect in the guarantee of a fair trial. (Legitimate limitations on the right to legal aid are discussed in Section B below.)

Criminal Proceedings

The HR Committee notes, in *CCPR General Comment 32*, at paragraph 2, that under *ICCPR* Article 14, “the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.” Article 14 of the *ICCPR* “aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights”, including procedural guarantees available to persons charged with a criminal offence, such as the right, under Article 14(3)(d), “to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.”

Under the *ECHR*, the right of a person charged with a criminal offence to free legal assistance is one element, amongst others, of the concept of a fair trial in criminal proceedings. It is subject to two conditions: the persons concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that they be granted such assistance.³⁷

The word “charge” in *ECHR* Article 6(1) must be understood within the meaning of the *ECHR*.³⁸ The criteria to be applied in determining whether a matter is criminal in nature within the meaning of *ECHR* Article 6(1) include domestic classification of the offence, the nature of the offence, and the nature and degree of severity of the penalty that may be imposed.³⁹ In *Ezeh and Connors v. United Kingdom*, the ECtHR found that prison disciplinary proceedings for threatening to kill a probation officer and assaulting a prison officer were criminal offences that triggered the protection of Article 6(3)(d).⁴⁰

According to the ECtHR, the imposition of tax surcharges involves the determination of a “criminal charge” within the meaning of *ECHR*, Article 6(1).⁴¹

³⁷ See, among others: *ECtHR, Case of Quaranta v Switzerland*, (Application No 12744/87), Judgment of 24 May 1991 at para 27; *ECtHR, Case of Pham Hoang v France*, (Application No 13191/87), Judgment of 25 September 1992 at para 39; *ECtHR, Tsonyo Tsonev v Bulgaria (No 3)*, Application No. 21124/04), Judgment of 16 January 2013 at para 50.

³⁸ *Case of Engel And Others v The Netherlands*, (Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgment of 8 June 1976 at para 81.

³⁹ *Ibid* at paras 82-83.

⁴⁰ *Case of Ezeh and Connors v the United Kingdom*, (Application Nos 39665/98 and 40086/98), Judgment of 9 October 2003 at para 130.

⁴¹ *Case of Barsom and Varli v Sweden*, (Application No. Application nos. 40766/06 and 40831/06), (dec), Decision of 4 January, at 5.

Civil Proceedings

Although the obligation of States to provide free legal assistance in civil matters is not expressly provided for in the majority of international instruments, treaty bodies have found that the right of access to the courts encompasses the right to legal aid for persons who are unable to finance their own legal representation, when such assistance proves indispensable to effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure of the case.

As the HR Committee reminded States in *CCPR General Comment No. 13* (replaced by *General Comment No. 32*), *ICCPR* Article 14 applies to civil as well as criminal proceedings.⁴² In *CCPR General Comment No. 32*, para. 10, the HR Committee states:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. 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 [footnote omitted].⁴³

At paragraph 16 of *CCPR General Comment No. 32*, the HR Committee notes that the concept of a “suit at law” referred to in *ICCPR* Article 14(1), or its equivalents in other language texts,

is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question. [footnotes omitted]⁴⁴

The CESCR affirmed the right to legal aid in civil or administrative proceedings in its *General Comment No. 7* on the right to adequate housing under *ICESCR* Article 11. The CESCR said that persons subject to forced evictions should be afforded “[a]ppropriate procedural protection and

⁴² United Nations, International Human Rights Instruments, *Human Rights Committee General Comment No 13*, art 14 (21st sess, 1984) at para 2.

⁴³ *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/General%20Comments/CCPR.C.GC.32_En.pdf>.

⁴⁴ *Ibid* at para 16.

due process,” including the “provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”⁴⁵

In *ICRMW General comment No. 1 (on migrant domestic workers)*, the CMW affirmed that States receiving migrant domestic workers have the primary responsibility to protect the workers’ rights. However, the CMW also encouraged sending States’ embassies and consulates to cooperate with authorities in receiving States to ensure adequately trained staff and mechanisms (including telephone hotlines) to receive and address complaints made by migrant domestic workers, including through the provision of legal aid.⁴⁶ The SR on the human rights of migrants recommended in April 2014 that receiving States ensure migrants, “including those in an irregular situation,” access to an effective remedy for human rights violations without fear of being deported by, among other things, providing legal aid, as required. The SR states that courts (in the receiving country) should “effectively apply the international human rights law and international labour law in providing appropriate redress.”⁴⁷

The IACtHR has recognized that the right to a free trial, protected by the *ADHR* 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 the determination of a person’s “rights and obligations of a civil, labor, fiscal, or any other nature” under the *ACHR*,

Article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding -its significance, its legal character, and its context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.⁴⁸

In *Advisory Opinion OC-18/03*, on a petition filed by Mexico on the denial of rights to migrant workers in the USA, the IACtHR found that the prohibition of legal aid for migrants who were not legal permanent residents constitutes a violation of the right to a fair trial and the right to judicial protection:

The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free

⁴⁵ UN Report of the CESCR, *General Comment No 7 (The right to adequate housing (article 11, paragraph 1, of the Covenant: forced evictions)*, 14 May 1997, 16th Sess at para 16, online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1998%2f22&Lang=en>.

⁴⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General comment no. 1 on migrant domestic workers*, 23 February 2011, CMW/C/GC/1 at para 62, online: <<http://www.refworld.org/docid/4ed3553e2.html>>.

⁴⁷ UN Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, 3 April 2014, A/HRC/26/35, para 100, online: <<http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf>>.

⁴⁸ IACtHR, *Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90*, August 10, 1990 at para 28 [*Advisory Opinion OC-11/90*].

public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal.⁴⁹

The ECtHR has interpreted “civil rights and obligations” under *ECHR* Article 6(1) to include areas such as family law, employment law and commercial law.

In *Golder v. United Kingdom*,⁵⁰ the ECtHR considered whether the right to a fair trial in *ECHR* Article 6(1) is limited to legal proceedings which are already pending, or whether it secures a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined. The applicant, a prisoner, had been denied the right to consult a lawyer for the purpose of bringing a civil action for libel concerning an accusation that he assaulted a prison officer during a disturbance in the recreation area of the prison. Applying the *Vienna Convention on the Law of Treaties* and general principles of international law, the ECtHR found that the “right of access constitutes an element which is inherent in the right [to a fair trial] stated by Article 6 para. 1”:

The Court thus reaches the conclusion...that Article 6 para. 1...secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1... as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.⁵¹

In the ECtHR’s view, the procedural guarantees in *ECHR* Article 6(1) would have no value if there were no prior guarantee of access to the court. This right of access is consistent with the rule of law and the avoidance of arbitrary power, principles which elucidate Article 6.⁵² However, the ECtHR has indicated that the *ECHR* Article 6(1) leaves to the State a free choice of the means to be used in guaranteeing litigants the right of access to a court. The institution of a legal aid scheme constitutes one of those means, but there are others, such as a simplification of procedure.⁵³

In *Airey v. Ireland*, the ECtHR ruled that effective access to the courts guaranteed by Article 6(1) also implies the right to free legal assistance in certain civil cases, “when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory...or by reason of the complexity of the procedure or of the case.”⁵⁴ Finding that the applicant, who lacked the resources to engage a solicitor and had no access to legal aid, required a lawyer for the purposes of petitioning for a decree of judicial separation, the Court remarked that

⁴⁹ *IACtHR, Mexico Case, Advisory Opinion OC-18/03* (Sept 17, 2003) at para 126.

⁵⁰ *ECtHR, Case of Golder v the United Kingdom* (Application no. 4451/70) Judgment of 21 February 1975.

⁵¹ *Ibid* at para 36.

⁵² *Ibid* at paras 34-35.

⁵³ *ECtHR, Case of Airey v Ireland* (Application No 6289/73) Judgment of 9 October 1979 at para 26.

⁵⁴ *Ibid*.

fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive...The obligation to secure an effective right of access to the courts falls into this category of duty.⁵⁵

According to the ECtHR, whether or not a right is to be regarded as a “civil right” within the meaning of *ECHR*, Article 6(1) is “to be determined by reference to the substantive content and effects of the right.”⁵⁶ The ECtHR affirmed that “[i]n its practice the Court has expressly recognised that the majority of the Convention rights, including those of non-pecuniary nature, are ‘civil rights’ for the purposes of Article 6 § 1 of the Convention.”⁵⁷

For *ECHR* Article 6(1) to be applicable, there must be a “dispute” over a “right”

which can be said, at least on arguable grounds, to be recognised under domestic law. The ‘dispute’ must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play. Finally, the right must be civil in character⁵⁸

In the *Case of Gutfreund v. France*, the ECtHR considered whether the denial of an appeal from a decision refusing the applicant’s legal aid application constituted denial of a “right” within the meaning of *ECHR* Article 6(1), recognised under national law or the Convention. Having determined that the “interests of justice” did not require the provision of legal aid in this instance and that the denial of legal aid was not a decisive factor in the determination of the criminal charge against the applicant, the Court found that the question of whether a right to legal aid existed, for the purposes of Article 6(1), was therefore to be answered solely by reference to domestic law. The Court found no recognized right to legal aid in French law (the Act provided that persons with insufficient means “may” be granted legal aid) and that no such right of access was pleaded in the instant case. The Court further held that, in view of the “limited amount at stake” and the “simplicity” of the procedure, the decision of the legal-aid office did not affect the applicant’s access to the court. Finding that the applicant did not at the material time possess a right which could arguably be said to be recognised under domestic law, the Court concluded that “the procedure in issue did not concern the “determination of a criminal charge” against the applicant or of “civil rights and obligations” within the meaning of Article 6 § 1”⁵⁹

⁵⁵ *Ibid* at para 25.

⁵⁶ *ECtHR, Case of Shapovalov v Ukraine* (Application No 45835/05) Judgment of 31 October 2012 at para 43. See also *ECtHR, Case of Z and Others v the United Kingdom* (Application No 29392/95) Judgment 10 May 2001 at para 87.

⁵⁷ *Shapovalov, ibid* at para 45.

⁵⁸ *ECtHR, Case of Gutfreund v France* (Application No 45681/99) Judgment of 12 September 2003 at para 38.

⁵⁹ *Ibid*, at paras. 42- 47.

Right to Legal Aid for Review of Detention

Under the *ECHR* a person has a right of access to legal counsel to challenge the legality of detention.⁶⁰ In *Aerts v. Belgium*, the ECtHR held that a denial of legal aid to appeal continued detention in a psychiatric facility and a violation of his right to determination of his civil right to liberty under *ECHR* Article 6(1) was found to be a violation of his right to liberty under Article 5(1).⁶¹

According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), detained “irregular migrants”⁶² are entitled to have access to a lawyer from the very outset of their deprivation for issues related to residence, detention and deportation. “This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid.”⁶³

Right to Equality

The courts have indicated that a right to legal aid is also based on the principle of equality, and the right of everyone to have equal access to the courts in criminal, civil and administrative matters. The failure of States to provide free legal aid has been determined by the courts to constitute real discrimination where a person’s financial situation places them in a position of inequality before the law.

The HR Committee, commenting on the *ICCPR* in *CCPR General Comment No. 32*, paras. 8-9, states

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or

⁶⁰ ECtHR, *Case of Öcalan v Turkey* (Application No 46221/99), Judgment of 12 May 2005 at para 70.

⁶¹ ECtHR, *Case of Aerts v Belgium* (Application No 61/1997/845/1051), Judgment of 30 July 1998 at para 59.

⁶² “Detained irregular migrants” are defined by the CPT as persons who have been deprived of their liberty under aliens legislation either because they have entered a country illegally (or attempted to do so) or because they have overstayed their legal permission to be in the country in question.

⁶³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Safeguards for irregular migrant deprived of their liberty*, Extract from the 19th General Report [CPT/Inf (2009) 27] in *The CPT standards "Substantive" sections of the CPT's General Reports*, CPT/Inf/E (2002) 1 - Rev 2013 at paras 81-82.

other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [footnotes omitted].⁶⁴

In *CCPR General Comment No. 28*, commenting on *ICCPR*, Article 3, the HR Committee requests States parties to provide information on whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men, and whether “measures are taken to ensure women equal access to legal aid, in particular in family matters.”⁶⁵

In *Oló Bahamonde v. Equatorial Guinea*, a case in which the applicant was arbitrarily arrested and detained and was prevented from pursuing domestic remedies, the HR Committee noted generally that “the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1.”⁶⁶

In the view of the HR Committee's findings, the imposition of fees or costs on the parties without consideration of the implications or without providing legal aid may give rise to issues of inequality under Article 14(1) of the *ICCPR*.⁶⁷

The CERD, commenting on *ICERD* Articles 4 and 5 in its *General Recommendation No. 31*, addressed the importance of legal aid to enable victims of acts of racism to seek redress in the courts, at para. 17(b):

In order to make it easier for the victims of acts of racism to bring actions in the courts, the steps to be taken should include the following:...

(b) Granting victims effective judicial cooperation and legal aid, including the assistance of counsel and an interpreter free of charge.⁶⁸

⁶⁴ *CCPR General Comment No 32*, *supra* note 43 at paras 8-9.

⁶⁵ *CCPR General Comment No. 28, Article 3 (The equality of rights between men and women)*, 29 March 2000, HRI/GEN/1/Rev.9 (Vol. I) at para 18, online: http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC28%29_en.pdf.

⁶⁶ HR Committee: Communication No 468/1991, *Oló Bahamonde v Equatorial Guinea* at para 9.4.

⁶⁷ *CCPR General Comment No 32*, *supra* note 43 at para 11.

⁶⁸ UN Report of the CERD, *General Recommendation No 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, UN Comm on the Elimination of Racial Discrimination, 60th Sess, Supp No 18 at para 17(b), online: http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf.

In *CERD General Recommendation No. 29*, addressing “discrimination based on descent,” the CERD recommends, at para. 5(u), that States

[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights;⁶⁹

In the case of *Kell v. Canada*, the CEDAW Committee found, among other things, that the failure of assigned legal aid lawyers to provide effective legal assistance in the complainant’s efforts to regain property rights, and thereby denying her access to an effective remedy, resulted in a violation of *CEDAW*, Articles 2(d) and 2(e).⁷⁰

In Advisory Opinion OC-11/90, the IACtHR was asked to determine, among other things, if the rule of exhaustion of domestic legal remedies prior to appealing to the IACHR applied “to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country.”⁷¹ The IACtHR confirmed the prohibition of discrimination against persons by reason of their economic status under *ACHR* Article 1(1), and found that “...[i]f a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigence) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.”⁷² In Advisory Opinion OC-16/99, the IACtHR found that the presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests.⁷³ A claim of indigence must be substantiated with appropriate evidence.⁷⁴

In its report, “Access to Justice for Women Victims of Violence in the Americas,” the IACHR observed that

[t]he judicial presence and state advocacy services available to women victims nationwide is inadequate, which means that victims have to draw on their own economic and logistical resources to file a complaint and then participate in judicial proceedings. Therefore, the IACHR highlights the importance of community resources such as justices of the peace and community ombudspersons and that these have mechanisms and resources to provide basic services to women victims of violence in rural, marginal and poor areas, as well as

⁶⁹ UN Report of the CERD, *General Recommendation No 29: Discrimination Based on Descent*, UN Comm on the Elimination of Racial Discrimination, 61st Sess at para 5(u), online: <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f0902ff29d93de59c1256c6a00378d1f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f0902ff29d93de59c1256c6a00378d1f?Opendocument)>.

⁷⁰ *Cecilia Kell v Canada*, Communication No 19/2008, UN Doc CEDAW/C/51/D/19/2008 (26 April 2012) at para 10.5.

⁷¹ *Advisory Opinion OC-11/90*, *supra* note 48 at para 2.

⁷² *Ibid* at para 22. As regards the specific question submitted by the IACHR, the Court concluded at paragraph 31, that “if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigence prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies.”

⁷³ *IACtHR, Advisory Opinion OC-16/99* (October 1, 1999) at para 119.

⁷⁴ *IACHR, Report No 81/05, Petition 11,862, Inadmissibility, Andrew Harte and Family, Canada*, October 24, 2005 at para 83.

information on legal procedures, support with administrative procedures, and legal assistance to victims in judicial proceedings.⁷⁵

In *Steel and Morris v. the United Kingdom*, the ECtHR ruled that the state's failure to facilitate a legal aid scheme for defamation proceedings constituted a violation of its obligation to secure equality of arms.⁷⁶ The State is not obliged to use public funds "to ensure total equality of arms, between the assisted person and the opposing party," however, "as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary."⁷⁷

In a case involving civil proceedings against a lawyer as the defendant, where legal aid authorities failed to assign a new legal aid lawyer to the applicant after three State-assigned lawyers successively assigned withdrew due to personal relations with the defendant, the ECtHR found that "permitting the applicant to represent himself in proceedings against a legal practitioner did not afford him access to a court under conditions that would secure him the effective enjoyment of equality of arms that is inherent in the concept of a fair trial."⁷⁸ The ECtHR has said that where an applicant is deprived of the opportunity to present her case under conditions of equality compared with the defendant, it is not necessary to find that the applicant suffered actual prejudice, "as such conduct was, in the circumstances of the case, incompatible with the fair administration of justice."⁷⁹

Right to an Effective Remedy

The right to free legal assistance may be a necessary precondition for the exercise of the right to an effective remedy for rights violations. Under the *UN Principles and Guidelines*, the denial of the right to legal aid itself also entails denial of the right to a remedy, if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.

In a case where the absence of legal aid for constitutional motions was a factor in preventing the author effective access to a higher court for constitutional review of his murder conviction and sentence, the HR Committee stressed that the State party has an obligation under *ICCPR* Article

⁷⁵ OAS, IACHR, *Access To Justice For Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. Doc. 68, 20 January 2007 at para 182, online:

<<http://www.cidh.org/women/Access07/Report%20Access%20to%20Justice%20Report%20English%200507.pdf>>.

⁷⁶ ECtHR, *Case of Steel and Morris v the United Kingdom* (Application no. 68416/01) Judgment of 5 May 2005 at para 72. But see ECtHR, *Case of McVicar v the United Kingdom* (Application No 46311/99), Judgment of 07 August 2002, where the court found that that "the applicant was not prevented from presenting his defence effectively to the High Court, nor was he denied a fair trial, by reason of his ineligibility for legal aid" as he was "a well-educated and experienced journalist who would have been capable of formulating cogent argument," the law was "not sufficiently complex" to require that he be granted legal aid, and "the applicant's emotional involvement was not incompatible with the degree of objectivity required by advocacy in court," at paras 53-62.

⁷⁷ *Steel and Morris v the United Kingdom*, *ibid* at para 62.

⁷⁸ ECtHR, *Case of Bertuzzi v France* (Application No. 36378/97) Judgment of 21 May 2003 at para 31.

⁷⁹ ECtHR, *Case of AB v Slovakia* (Application No 41784/98) Judgment of 04 June 2003 at para 61.

14(2) “to make the remedies in the Constitutional Court addressing violations of fundamental rights available and effective.”⁸⁰

In *Jama Warsame v. Canada*, the HR Committee confirmed that the requirement to exhaust domestic remedies before seeking a decision of the HR Committee does not apply where the decision denying legal aid to pursue judicial review of a negative pre-removal (deportation) risk assessment was upheld on appeal to the director of appeals of the Legal Aid authority.⁸¹

The IACHR has found that a denial of access to pursue a constitutional motion in relation to a criminal proceeding, because of the absence of legal aid, violates, among other things, the right to an effective remedy under *ACHR*, Article 25.⁸²

Right to Legal Aid for Juvenile Offenders

With respect to the rights of children to free legal aid, the CRC states, in *General Comment No. 10 (2007)*,⁸³ at para. 49:

The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals...

Right to Legal Aid for Victims and Witnesses of Crimes

In *CAT General Comment No. 3*, in relation to *CAT*, Article 14, the Committee against Torture states that States parties should provide “adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress”⁸⁴ and that the failure to provide sufficient legal aid and protection measures for victims and witnesses impedes the enjoyment of the right to redress and prevents effective implementation of *CAT* Article 14.⁸⁵

⁸⁰ HR Committee: Communication No 377/1989, *Currie v Jamaica* at para 13.3.

⁸¹ HR Committee: Communication No 1959/2010, *Jama Warsame v Canada* at para 7.6.

⁸² See IACHR, Report No 41/04, Case 12.417, Merits, *Whitley Myrie*, Jamaica, October 12, 2004.

⁸³ UN Committee on the Rights of the Child (CRC), *CRC General Comment No 10 (2007): Children’s rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, online:

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEZN%2bo3pfhJYL%2b%2fo2i7IIJgP6EjqSGKnB2CPSr6g7ed2P0M8AO57Tg1kfwde7vhIIwc0tRQLDmAZWHVA9bVwzD%2b>>.

⁸⁴ UN Committee Against Torture (CAT), *General Comment No 3: Implementation of Article 14 by States Parties*, 19 November 2012, CAT/C/GC/3 at para 30, online:

<http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf>.

⁸⁵ *Ibid* at para 38.

B. Scope of the Right to Legal Aid

The right to legal aid at international law is subject to certain limitations. States are not required to provide free legal aid to every person who applies for it.

The *ICCPR*, Article 14(3)(d), and *ECHR*, Article 6(3), impose two conditions on access to free legal aid for persons charged with a criminal offence: first, they must lack “sufficient means” to pay for their own legal assistance, and, second, the “interests of justice” must demonstrate the need for legal aid.

Principle 3 of the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* goes beyond the standard in *ICCPR*, Article 14(3)(d), in encouraging States to provide legal aid regardless of the person’s means if the case is particularly urgent or complex or the potential penalty is severe.

Where a means test is used, Guideline 1 of the *UN Principles and Guidelines* posits that its application should be “widely publicized.” Test criteria should not exclude persons whose means exceed the limits set by the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would otherwise have been granted and where it is in the interests of justice to provide legal aid. Where the means test is calculated on the basis of family income, but individual members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test. Guideline 1 further provides that children are always exempt from the means test.

Under the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle G (Legal Aid and Legal Assistance), an accused person or a party to a civil case has a right to have free legal assistance where the interests of justice so require and the person lacks the means to pay for it. The interests of justice are to be determined by considering, in criminal matters, the seriousness of the offence and severity of the sentence; in civil cases, considerations include the complexity of the case and ability of the party to adequately represent himself or herself, the rights that are affected, and the likely impact of the case on the wider community. Under the African guidelines, the interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

Similar limitations are imposed on the right to legal aid in civil and administrative proceedings. Persons must show that they lack the financial means to engage legal counsel and may also be required to demonstrate some likelihood of success in the proceeding. Also relevant to a right to legal aid in civil proceedings will be considerations of the importance of what is at stake for the applicant, the complexity of the proceedings, capacity of the litigant to defend himself or herself, and the existence of any statutory requirement to be represented by counsel.

The *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* states “[i]t 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” and that legal aid should be provided to victims and witnesses of crime in appropriate cases.⁸⁶

People who are given free legal aid do not always get to choose which lawyer is appointed to them.

Standards

<i>UN Instruments</i>	
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	
14. (3)	<i>In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...</i> <i>(d) ... 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; ...</i>
INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
18. (3)	<i>In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:...</i> <i>(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;</i>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 3.	<i>20. States should ensure that anyone who is detained, arrested, suspected of, or 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.</i> <i>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.</i> <i>22. Children should have access to legal aid under the same conditions as or more lenient conditions than adults.</i> <i>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.</i>
Guideline 1.	<i>41. Whenever States apply a means test to determine eligibility for legal aid, they should ensure that:</i>

⁸⁶ *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 3, para 23, Principle 4, para.24.

	<p>(a) Persons whose means exceed the limits of the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would have otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance;</p> <p>(b) The criteria for applying the means test are widely publicized;</p> <p>(c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test;</p> <p>(d) Persons who are denied legal aid on the basis of the means test have the right to appeal that decision;</p> <p>(e) A court may, having regard to the particular circumstances of a person and after considering the reasons for denial of legal aid, direct that that person be provided with legal aid, with or without his or her contribution, when the interests of justice so require;</p> <p>(f) If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test.</p>
Regional Instruments	
EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)	
6.	<p>3. Everyone charged with a criminal offence has the following minimum rights: ...</p> <p>(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; ...</p>
THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA	
3.	<p>A legal aid program should include legal assistance at all stages of the criminal process including investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that human rights are protected. Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited para-legal, or legal assistant. Governments should ensure that legal aid programs provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detention or in prison without access to the courts. Special attention should be given to women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons, and foreign nationals.</p>
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
0.	<p>...(b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.</p> <p>...</p> <p>(l) Every child arrested or detained for having committed a criminal offence shall have the following guarantees: ...</p>

	<p>3. to be provided by the State with legal assistance from the moment of arrest; ...</p> <p>(n) Every child accused of having committed a criminal offence shall have the following additional guarantees: ...</p> <p>3. to be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;</p> <p>4. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;</p> <p>5. to have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings; ...</p>
P.	<p>a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.</p> <p>...f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by: ...</p> <p>3. Providing them with proper assistance throughout the legal process; ...</p>
COUNCIL OF EUROPE RESOLUTION (78)8 ON LEGAL AID AND ADVICE	
1.	<p>...When considering whether legal aid is necessary, account should be taken of:</p> <p>a. a person's financial resources and obligations;</p> <p>b. the anticipated cost of the proceedings.</p>
2.	<p>Legal aid should be available even where a person is able to pay part of the costs of his proceedings. In that case, legal aid may be available with a financial contribution by the assisted person which shall not exceed what that person can pay without undue hardship.</p>
3.	<p>Legal aid should provide for all the costs necessarily incurred by the assisted person in pursuing or defending his legal rights and in particular lawyers' fees, costs of experts, witnesses and translations. It is desirable that, where legal aid is granted, there should be exemption from any requirement for security for costs.</p>
4.	<p>It should be possible for legal aid to be obtained in the course of the proceedings, if there is a change in the financial resources or obligations of the litigant or some other matter arises which requires the granting of legal aid.</p>

Interpretation

The Right to Legal Aid Is Subject to Conditions

Both UN and regional human rights systems have affirmed that the right of access to the courts for both criminal and civil matters is not absolute and may be subject to legitimate restrictions, including imposing financial contributions or requiring a case to be well-founded and not vexatious or frivolous. Such conditions must be compatible with the right of access provided in the specific Convention. For example, the *ICCPR* provides that, in criminal proceedings, legal aid should be provided “where the interests of justice so require” and legal aid should be free of charge if the person “does not have sufficient means to pay for it” (Article 14.3(d)). The HR Committee states, in *CCPR General Comment 32*, at para. 10, that while article 14(3)(d) explicitly addresses the guarantee of legal assistance in criminal proceedings, States are

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encouraged to provide free legal aid “in other cases, for individuals who do not have sufficient means to pay for it [emphasis added]” and, in some cases, may be obliged to do so.

Under the *ACHR*, the right to legal aid in Article 8 of the Convention is required only to ensure the right to a fair trial. This applies in both criminal and civil cases.⁸⁷ According to the IACHR, in deciding whether legal representation is required, “regard may be had to the circumstances of the particular case – its significance, legal character, and context in the particular legal system.”⁸⁸

Under the *ECHR*, restrictions on legal aid for civil matters must pursue a legitimate aim and be proportionate.

The ECtHR has ruled that, while the *ECHR* leaves to the State a free choice of the means to be used in guaranteeing to litigants “an effective right of access to a court” for the determination of their “civil rights and obligations” under Article 6(1), any limitations “must not restrict or reduce the access afforded the applicant in such a way or to such an extent that the very essence of that right was impaired”.⁸⁹ A restriction placed on access to a court or tribunal, therefore, will not be compatible with *ECHR* Article 6(1) “unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved”.⁹⁰ When assessing compliance by States with this standard, the ECtHR has said that its task

is not to substitute itself for the competent domestic authorities in determining the most appropriate means of regulating access to justice, nor to assess the facts that led those courts to adopt one decision rather than another. The Court’s role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation and ascertain whether the consequences of those decisions have been compatible with the Convention.⁹¹

In the *Kreuz* case, the Court found that an excessive court fee resulted in the applicant desisting from his claim and in his case not being heard by a court, constituting a disproportionate restriction on his right of access to a court. With respect to legitimate limitations on the right of access, the Court stated

The Court has ruled that in some cases, in particular where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on the individual’s access to a “court” or “tribunal” ... The Court has also accepted that there can be cases where the prospective litigant must obtain prior authorisation before being allowed to proceed with his claim... However, in all those cases the Court has satisfied itself

⁸⁷ *Advisory Opinion OC-11/90*, *supra* note 48 at para 28.

⁸⁸ *IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc 40 rev, February 28, 2000 at para 127.

⁸⁹ *ECtHR, Case of Kreuz v Poland* (Application No 28249/95), Judgment of 19 June 2001 at para 54.

⁹⁰ *Ibid* at para 55. See also *ECtHR, Case of García Manibardo v Spain* (Application No 38695/97), Judgment of 29 June 2000.

⁹¹ *Kreuz, ibid* at para 56.

that the limitations applied did not restrict or reduce the access afforded to the applicant in such a way or to such an extent that the very essence of that right was impaired.⁹²

The question of whether limitations permitted under domestic law are compatible with the right of access in *ECHR* Article 6(1) “depends on the special features of the proceedings in issue”, taking into account “the whole of the trial conducted according to the rules of the domestic legal system and the role played in that trial by the highest court”.⁹³ The role of the appellate courts is important “since the conditions of admissibility of an appeal on points of law may be more rigorous than those for an ordinary appeal”.⁹⁴

The ECtHR has reiterated that its scrutiny under *ECHR* Article 6(1) is based on the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.⁹⁵

The Means Test: Lack the Means to Hire a Lawyer

Persons who do not have sufficient means to pay for their own lawyer will satisfy the first condition for a right to legal aid under *ICCPR* Article 14(3)(d) and *ECHR* Article 6(3). Existing human rights treaties contain no definition of “sufficient means,” and there is no case law indicating the level or kind of private means that may be taken into account when deciding whether to award legal aid. The courts and treaty bodies have not provided a definition of “sufficient means,” leaving it to the State to define the financial threshold for the means test. The courts will take all of the circumstances of each case into account when determining if the defendant’s financial circumstances required the granting of legal assistance.

The courts will apply the same approach when assessing whether a person meets the financial criterion for a grant of legal aid in civil cases.

The SR on the independence of judges and lawyers, Gabriela Knaul, stated in her 2013 Report that while “the onus is on the accused to show that he or she lacks sufficient means, he or she need not, however, do so ‘beyond all doubt’; it is sufficient that there are ‘some indications’ that this is so.”⁹⁶ With respect to civil cases, establishing substantive eligibility criteria is usually more complex, involving an evaluation of costs and benefits. The SR cautioned that

While it is necessary to set out financial guidelines in order to avoid diluting the capacity of legal aid programmes, it is important that, when means testing criteria are put in place, they be accurate and take into account the distribution of wealth in the household, so as not to

⁹² *Ibid* at para 54.

⁹³ *ECtHR, Case of Tabor v Poland* (Application No 12825/02), Judgment of 27 September 2006 at para 40.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at para 39.

⁹⁶ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, supra* note 19 at para 54.

disadvantage those who have restricted access to household wealth, such as women and older persons.⁹⁷

The ECtHR has ruled that the defendant bears the burden of proving that he or she is unable to pay for legal assistance, but it is not necessary to prove indigence “beyond all doubt.”⁹⁸ The first financial condition will be met if “there are some indications” that an applicant is indigent, and there are “no clear indications to the contrary.”⁹⁹ In *Twalib v. Greece*, the ECtHR determined that the applicant lacked sufficient means to fund his own appeal, observing that he been represented by a court-appointed lawyer at his trial and at the appeal by counsel provided by a humanitarian organization and that, at the time of lodging his appeal, he had been in prison for over three years.¹⁰⁰ The ECtHR found no violation of *ECHR* Article 6(1) where a denial of legal aid in a civil case was based on law and did not appear arbitrary, and the applicant’s means exceeded the upper statutory limit.¹⁰¹

The question whether a requirement to reimburse costs is incompatible with *ECHR* Article 6(3) has been considered in a number of cases. In *Croissant v. Germany*, the ECtHR stated that a system in which a convicted person is bound to pay the fees and disbursements of his court-appointed lawyers would not be compatible with Article 6 of the *ECHR* if it adversely affected the fairness of the proceedings.¹⁰² In that case, a requirement to reimburse to the State the fees and disbursements of the three counsel officially appointed to defend the accused did not violate *ECHR* Article 6(3), as the appointment of the three counsel was compatible with Article 6, national courts were entitled to consider it necessary to appoint them and the amounts claimed for them were not excessive. Further, German law provided for a remission of such costs after a costs debtor, having established that he cannot afford to pay the entire amount, has made some payment towards them.¹⁰³ The ECtHR found no violation of *ECHR* Article 6(3) where the applicant was required to pay a contribution to the cost of legal assistance in court-martial proceedings, noting that the terms of the offer were not arbitrary or unreasonable, bearing in mind the applicant’s net salary levels at the time, regardless of whether or not the applicant was given the option of paying by way of installments.¹⁰⁴ A requirement that convicted persons reimburse or remit legal costs of State-appointed lawyers must be compatible with *ECHR* Article 6(3).

⁹⁷ *Ibid* at para 55.

⁹⁸ *ECtHR, Case of Pakelli v Germany* (Application No 8398/78), Judgment of 25 April 1983 at para 34.

⁹⁹ *Ibid*.

¹⁰⁰ *ECtHR, Case of Twalib v Greece* (Application No 42/1997/826/1032), Judgment of 9 June 1998 at para 51. See also *ECtHR, Case of RD v Poland* (Application Nos 29692/96 and 34612/97), Judgment of 18 March 2002 at paras 45-46; *ECtHR, Case of Maksimenko v Ukraine* (Application No 39488/07), Judgment of 20 March 2012 at para 26.

¹⁰¹ *ECtHR, Case of Santambrogio v Italy* (Application No 61945/00), Judgment of 21 December 2004 at para 58.

¹⁰² *ECtHR, Case of Croissant v Germany*, (Application No 13611/88) Judgment of 25 September 1992 at para 36.

¹⁰³ *Ibid* at paras 36-37. See also *ECtHR, Case of Ognyan Asenov v Bulgaria* (Application No 38157/04), Judgment of 17 February 2011 at para 44.

¹⁰⁴ *ECtHR, Case of Morris v the United Kingdom* (Application No 38784/97), Judgment of 26 May 2002 at para 89.

The Merits Test

A right to legal aid at international law may also require that the applicant meet a particular “merits” test.

In criminal proceedings, *ICCPR* Article 14(3)(d) and *ECHR* Article 6(3) require that it be in the “interests of justice” to have legal counsel assigned.

There is no parallel provision for civil cases. However, the courts and treaty bodies have indicated that, in certain situations—for example, where the procedure or a case is very complex or a litigant has particular difficulty in representing themselves—a right to legal aid exists in order to ensure effective access to the courts. Under the *ECHR*, the prospects of success in the proceedings constitutes a legitimate ground for restricting the right to civil legal aid.

Criminal Cases: The Interests of Justice

The courts have provided some guidance on when the “interests of justice” will require the provision of legal aid under *ICCPR* Article 14(3)(d) and *ECHR* Article 6(3). At a minimum, the interests of justice will require the provision of legal aid whenever a person’s liberty is at risk.

The HR Committee indicates, in *CCPR General Comment No. 32*, para. 38, that in criminal cases the gravity of the offence is important in deciding whether counsel should be assigned “in the interests of justice” as is the existence of some objective chance of success at the appeals stage.

The CPT has recommended States abolish their systems whereby people who are charged under particular classes of criminal offences (for example, minor offences) are not entitled to legal aid.¹⁰⁵

In determining whether the “interests of justice” require the granting of free legal aid, the ECtHR has regard to various criteria, such as

- “seriousness of the offence” of which the person is accused;
- the “severity of the sentence” risked;
- the “complexity of the case”; and
- the “ability of the defendant to adequately present his/her case.”¹⁰⁶

According to the ECtHR, a “primary, indispensable requirement” of the “interest of justice” that must be satisfied in each case is that of a “fair procedure before the courts,” which, “among other things, imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire trial.”¹⁰⁷

¹⁰⁵ *Report on the visit to the Netherlands carried out by the CPT from 10 to 21 October 2011*, CPT/Inf (2012) 21 at para 18.

¹⁰⁶ *Quaranta v Switzerland*, *supra* note 37 at paras 32-34. See also *Steel and Morris v the UK*, *supra* note 76 at para 61.

¹⁰⁷ *ECtHR, Case of Wersel v Poland* (Application No 30358/04), Judgment of 13 December 2011 at para 50.

While any one factor may be determinative, these criteria must be considered in the light of the case as a whole, taking into account the situation at the time the decision on the application for legal aid was handed down as well as the situation at the time the case itself was heard.¹⁰⁸

Seriousness of the Offence and Severity of the Penalty

In cases involving a deprivation of liberty, legal aid must be available, and, in particular, persons facing a death penalty must be provided with legal aid at all stages of the proceedings. (See Section C, following, for a fuller analysis of the requirement for effective legal aid at all stages of a criminal proceeding.)

The HR Committee has consistently held that “it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings.”¹⁰⁹ In the case of *LaVende*, the author had been denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal his murder conviction. In the opinion of the HR Committee, this constituted a violation of not only *ICCPR* Article 14(3)(d), but also Article 14(5), since it deprived him of his right to have his conviction and sentence reviewed by a higher tribunal according to law.¹¹⁰

In *Robinson v. Jamaica*,¹¹¹ the HR Committee held that the requirement for legal assistance in capital cases applies even when the unavailability of private counsel is partly attributable to the accused himself and even if the provision of legal assistance would entail an adjournment of the proceedings. The HR Committee indicated that this requirement remained necessary, notwithstanding efforts that the judge might have made to assist the accused in handling his defence in the absence of counsel.¹¹² In the view of the HR Committee, “the absence of counsel constituted unfair trial.”¹¹³ In the case of *Domukovsky et al.*, the four complainants to the HR Committee were denied counsel of their choice and were forced to be absent during long periods of the trial, which ended in a death sentence being imposed in two cases. The HR Committee affirmed that

at a trial in which the death penalty can be imposed...the right to a defence is inalienable and should be adhered to at every instance and without exception. This entails the right to be tried in one’s presence, to be defended by counsel of one’s own choosing, and not to be forced to accept ex-officio counsel.¹¹⁴

¹⁰⁸ *ECtHR, Case of Granger v the United Kingdom* (Application No 11932/86), Judgment of 28 March 1990 at para 46.

¹⁰⁹ HR Committee: Communication No 554/1993, *LaVende v Trinidad and Tobago* at para 5.8.

¹¹⁰ *Ibid.*

¹¹¹ HR Committee: Communication No 223/2987, *Robinson v Jamaica*.

¹¹² *Ibid* at para 10.3.

¹¹³ *Ibid.*

¹¹⁴ HR Committee: Communication No 623, 624, 626, 627/1995, *Domukovsky et al v Georgia* at para 18.9.

The CAT, in its *General Comment No. 2*,¹¹⁵ states, at para. 13:

Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia...the right promptly to receive independent legal assistance...

The African Commission on Human and Peoples' Rights found a violation of the *ACHPR* Article 7(1)(c) in a capital case where the courts had denied the complainant the services of his counsel during the public prosecution's closing address and ignored his request for assistance, compelling him to prepare his own defence.¹¹⁶ The Commission emphatically recalled that "the right to legal assistance is a fundamental element of the right to fair trial. Moreso [sic] where the interests of Justice demand it." In this case, given the "gravity of the allegations" against the accused and the "nature of the penalty," the interests of justice required that he be provided with the assistance of a lawyer at each stage of the case.¹¹⁷

The right to defence, including the right to be defended by counsel of their choice guaranteed by Article 7(1)(c) of the *ACHPR*, was also violated in a case where the seven complainants were deprived of their right to counsel when their defence counsel was "harassed and intimidated to the extent of being forced to withdraw from the proceedings," and the court proceeded to give judgment in the matter, which ultimately resulted in death sentences.¹¹⁸

The ECtHR considered that the risk of three years' imprisonment for alleged drug offences warranted the provision of free legal assistance.¹¹⁹ In *Benham v. the United Kingdom*, where the applicant faced a maximum sentence of three months' imprisonment, the ECtHR, citing its ruling in *Quaranta*, affirmed that, "where deprivation of liberty is at stake, the interests of justice in principle call for legal representation."¹²⁰

The HR Committee found that the "interests of justice" did not require the assignment of a legal aid lawyer where the penalty for a trespassing charge was a fine.¹²¹

Complexity of the Case in Criminal Matters

In *Quaranta v. Switzerland*, since the alleged offence had occurred when the applicant was on probation, an additional factor in the determination of a right to legal aid was the "complexity of

¹¹⁵ UN Committee Against Torture (CAT), *General Comment No 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2 online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11.

¹¹⁶ *ACHPR, Avocats Sans Frontières (on behalf of Bwampamye) v Burundi, Communication 231/99 (2000)*.

¹¹⁷ *Ibid* at para 30.

¹¹⁸ *ACHPR, Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria, Communication 87/93 (2000)* at para 13.

¹¹⁹ *Quaranta v Switzerland, supra* note 37 at para 33.

¹²⁰ *ECtHR, Case of Benham v United Kingdom* (Application No 19380/92), Judgment of 10 June 1996 at para 61.

¹²¹ HR Committee: Communication No 646/1995, *Lindon v Australia* at para 6.5.

the case,” the domestic Court having “both to rule on the possibility of activating the suspended sentence and to decide on a new sentence.”¹²² In *Pham Hoang v. France*, the ECtHR found that, in addition to the sentence of large fines, the complex legal issues to be argued at the Court of Cassation regarding an appeal from a conviction under drugs legislation required a lawyer to be officially assigned to the case.¹²³

In *Sonyo Tsonev v. Bulgaria (No. 3)*, where the absence of legal assistance at the Supreme Court of Cassation constituted a violation of *ECHR* Article 6(3), the ECtHR noted that, “a qualified lawyer would have been able to clarify the grounds set out by the applicant in his appeal and effectively counter the pleadings of the public prosecutor at the hearing...thus ensuring respect for the principle of equality of arms”.¹²⁴

The Social and Personal Situation of the Defendant

The courts will also consider whether the personal situation of an individual indicates that legal aid is required. The *Quaranta* decision is again instructive. In that case, the ECtHR found that the personal circumstances of the applicant – “a young adult of foreign origin from an underprivileged background,” with “no real occupational training”, “a long criminal record,” daily drug use, and who “was living with his family on social security benefits” – did not enable him to present his case in an adequate manner before the investigating judge and then before the Criminal Court without the assistance of a lawyer.¹²⁵ In *Biba v. Greece*, the ECtHR found that the complexity of the proceedings, coupled with the fact that the applicant was a foreign national who did not speak Greek or know the Greek judicial system, meant that the “interests of justice” required granting him legal assistance.¹²⁶

Civil Cases

The question whether *ECHR* Article 6 implies a requirement to provide legal aid in order to guarantee a fair trial will depend upon the specific circumstances of the case. Factors to be considered will include, among others, the importance of what is at stake for the applicant, the complexity of the relevant law or procedure, the applicant’s capacity to represent him or herself effectively, and the existence of a statutory requirement to have legal representation.

Importance of What Is At Stake

In a case where the applicants were denied free legal aid while contesting the severance of their parental rights in child abuse proceedings, the ECtHR found a violation of *ECHR* Article 6(1) in view of the complexity of the case, the importance of what was at stake, and the highly emotional

¹²² *Quaranta v Switzerland*, *supra* note 37 at para 34.

¹²³ *Pham Hoang v France*, *supra* note 37 at para 40.

¹²⁴ *Tsoneyo Tsonev v Bulgaria (No 3)*, *supra* note 37 at para 52.

¹²⁵ *Quaranta v Switzerland*, *supra* note 37 at paras 35-36.

¹²⁶ *ECtHR, Case of Biba v Greece* (Application No 33170/96), Judgment of 26 September 2000 at para 29. But see *Barsom and Varli v Sweden*, *supra* note 41, where the interests of justice did not require appointing a legal aid lawyer since the case did not raise any complex legal questions, there was no risk of a prison sentence, and the applicants had lived in Sweden for almost 30 years and could be assumed to be able to present their case and arguments adequately, without legal assistance before the national court.

nature of the subject matter, concluding that “the principles of effective access to a court and fairness” required that the applicant be provided with legal assistance.¹²⁷ In *Case of A.B. v. Slovakia*, the ECtHR stated that the “seriousness of what is at stake” for the applicant, in that case loss of employment, will be of relevance in assessing whether legal counsel are required to ensure fairness.¹²⁸ In *Steel and Morris*, the ECtHR held that, while defamation proceedings may be distinguished from an application for judicial separation, which may have serious consequences for the family, the applicants, in this case, were defending their right to freedom of expression and the financial consequences of a failure to verify each defamatory statement was significant.¹²⁹

Complexity of the Case

Factors identified by the ECtHR in *Airey v. Ireland* as relevant in determining whether the applicant would have been able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, the involvement of expert evidence and the examination of witnesses, and the fact that the subject matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court.¹³⁰ In *Steel and Morris*, the factual case that the defendants had to prove in the defamation proceedings was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts. Extensive legal and procedural issues also needed to be resolved. In the view of the ECtHR, “neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in persons was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.”¹³¹

Capacity for Litigant to Defend Himself/Herself

In *Airey v. Ireland*, the ECtHR found that, taking into account all of the circumstances, a person in the applicant’s position would not be able to effectively present her own case in judicial separation proceedings.¹³² In contrast, in *McVicar v. the United Kingdom*, the fact that applicant was a well-educated and experienced journalist who would have been capable of formulating cogent argument was relevant to the Court finding that the unavailability of legal aid in that case did not result in a violation of the applicant’s rights under *ECHR* Article 6(1).¹³³

¹²⁷ ECtHR, *Case of Case of P, C and S v the United Kingdom* (Application No 56547/00), Judgment of 16 October 2002 at para 95.

¹²⁸ *Case of AB v Slovakia*, *supra* note 79 at para 55.

¹²⁹ *Steel and Morris v. the UK*, *supra* note 76 at para 63.

¹³⁰ *Airey v Ireland*, *supra* note 53 at para 24.

¹³¹ *Steel and Morris v the UK*, *supra* note 76 at para 69.

¹³² *Airey v Ireland*, *supra* note 53 at para 24.

¹³³ *McVicar v the United Kingdom*, *supra* note 76 at para 53.

Statutory Requirement to Have Legal Representation

In *Airey v. Ireland*, the ECtHR indicated that *ECHR* Article 6(1) may compel the State to provide legal aid where legal representation is rendered compulsory, as is the case in certain EU States for various types of litigation.¹³⁴

Prospects for Success

In *Munro v. U.K.*, the European Commission of Human Rights¹³⁵ indicated that, “given the limited financial resources of most civil legal aid schemes”, it is reasonable to impose conditions on its availability, including the prospects of success of the proceedings.¹³⁶ In *Steel and Morris*, the ECtHR cited *Munro* in holding that, as the right of access to a court is not absolute, “it may be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings.”¹³⁷ However, in *Aerts v. Belgium*, the ECtHR held that it was not for the Legal Aid Board to assess the prospects for success of the applicants proposed appeal of his detention in a psychiatric wing.¹³⁸

Limitations on Right to Choose Lawyer

The right to be defended by a lawyer of one’s own choice can be subject to limitations where free legal aid is concerned, or when required by the interests of justice. While the wishes of the applicant should not be ignored, the choice of lawyer is ultimately up to the State.

The ECtHR stated, in *Croissant v. Germany*:

It is true that Article 6 para. 3 (c)...entitles “everyone charged with a criminal offence” to be defended by counsel of his own choosing...Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes; indeed, German law contemplates such a course... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.¹³⁹

In *Ramon Franquesa Freixas v. Spain*,¹⁴⁰ the ECtHR reiterated that *ECHR* Article 6(3) guarantees neither the right to choose an official defence counsel who is appointed by the court, nor the right

¹³⁴ *Airey v Ireland*, *supra* note 53 at para 26. See also *ECHR*, *Case of Gnahoré v France* (Application No 40031/98), Judgment of 17 January 2001 at para 41,

¹³⁵ Note that the European Commission of Human Rights was abolished in 1998; now complainants have direct access to the ECtHR.

¹³⁶ *ECHR*, *Case of Munro v UK* (Application No 10594/83), Decision of 14 July 1987.

¹³⁷ *Steel and Morris v the UK*, *supra* note 76 at para 62.

¹³⁸ *Case of Aerts v Belgium*, *supra* note 61 at para 60.

¹³⁹ *Croissant v Germany*, *supra* note 102 at para 29.

¹⁴⁰ *ECtHR* (dec), *Case of Ramon Franquesa Freixas v Spain*, (Application No 53590/99), Decision of 21 November 2000.

to be consulted with regard to the choice of an official defence counsel. In that case, the fact that the legal aid lawyer was a specialist in labour law did not mean she was not competent to defend the applicant in a criminal trial, nor was any evidence of incompetence submitted.

Similarly, *ECHR* Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced where there is no evidence that counsel assigned was unable to provide effective legal assistance, or that the applicant lacked confidence in him, nor any indication of a manifest failure on the part of counsel which should have led the courts to intervene of its own motion.¹⁴¹

C. Legal Aid Must Be Prompt, Effective and Sustainable

The UN *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 7, requires that legal aid be effective and provided promptly at all stages of the criminal justice process. This principle reflects international jurisprudence on legal aid that stipulates that it is not enough to merely allow a theoretical or illusory right to legal assistance, but rather legal aid must be “practical and effective” in the way in which it is applied.

Effective legal aid includes, but is not limited to, the right to be informed of the right to legal aid, timely and unhindered access to legal aid providers, confidentiality of communications, access to information and to case files, and adequate time and facilities to prepare legal cases, as well as the provision of legal advice and education, and mechanisms for alternative dispute resolution.

Given the fundamental importance of the right to legal assistance, any waiver of the right to counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right.

States must not only prohibit discrimination with regard to access to courts and tribunals but may also need to take positive measures to ensure meaningful access for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous persons, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of those groups, including gender-sensitive and age-appropriate measures.

In particular, women must have access to courts on an equal footing with men in order to be able to claim their rights effectively. *UN Principles and Guidelines*, Guideline 9 recommends that States incorporate a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid. This includes taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims, as well as providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization.

¹⁴¹ *ECtHR, Case of Lagerblom v Sweden* (Application No 26891/95), Judgment of 14 January 2003 at para 60. See also *ECtHR, Case of Meftah and Others v France* (Application Nos 32911/96, 35237/97 and 34595/97), Judgment of 26 July 2002 at para 45; *ECtHR, Case of Mayzit v Russia* (Application No 63378/00), Judgment of 06 July 2005 at paras 65-71.

In all legal aid decisions affecting children, the best interests of the child should be the primary consideration. Legal aid provided to children should be prioritized in the best interests of the child and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children. States should adopt special measures to promote children's effective access to justice and to avoid stigmatization.

In appointing a legal aid lawyer, the State must be diligent, fair, and should consider the wishes of the suspect or accused person, and any special needs he or she may have.

The SR on the independence of judges and lawyers, Gabriela Knaul, says that States should make appropriate budget provisions for legal aid services that are commensurate with their needs to ensure access to effective legal aid in criminal, civil and administrative cases.¹⁴²

Funding for criminal legal aid cases should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as copying relevant files and documents, collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.

¹⁴² *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, supra* note 19 at paras 73-74.

Standards

<i>UN Instruments</i>	
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	
14.	<p>3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:</p> <p>(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;</p>
INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
16. (7)	<p>When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: ...</p> <p>(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation...</p>
18. (3)	<p>In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees: ...</p> <p>(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay; ...</p>
UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS	
2.	<p>Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.</p>
3.	<p>Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.</p>
4.	<p>Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.</p>
5.	<p>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.</p>
7.	<p>Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from</p>

	<i>the time of arrest or detention.</i>
8.	<i>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.</i>
22.	<i>Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.</i>
UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT	
11. (1)	<i>...A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.</i>
17.	<p>1. <i>A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.</i></p> <p>2. <i>If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.</i></p>
18.	<p>1. <i>A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.</i></p> <p>2. <i>A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.</i></p> <p>3. <i>The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.</i></p> <p>4. <i>Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.</i></p> <p>5. <i>Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.</i></p>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 2.	<p><i>...17. States should enhance knowledge of the people about their rights and obligations under law through appropriate means, in order to prevent criminal conduct and victimization.</i></p> <p><i>18. States should endeavour to enhance the knowledge of their communities about their justice system and its functions, the ways to file complaints before the courts and alternative dispute resolution mechanisms.</i></p> <p><i>19. States should consider adopting appropriate measures for informing their community about acts criminalized under the law. The provision of such information for those travelling to other jurisdictions, where crimes are categorized and prosecuted differently, is essential for crime prevention.</i></p>
Principle 7.	<i>27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.</i>

	<p>28. <i>Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.</i></p>
<p>Principle 8.</p>	<p>29. <i>States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.</i></p> <p>30. <i>States should ensure that information on rights during the criminal justice process and on legal aid services is made freely available and is accessible to the public.</i></p>
<p>Principle 9.</p>	<p>31. <i>States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.</i></p>
<p>Principle 10.</p>	<p>32. <i>Special measures should be taken to ensure meaningful access to legal aid for women, children and groups with special needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum-seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. Such measures should address the special needs of these groups, including gender-sensitive and age-appropriate measures.</i></p> <p>33. <i>States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.</i></p>
<p>Principle 11.</p>	<p>34. <i>In all legal aid decisions affecting children, the best interests of the child should be the primary consideration.</i></p> <p>35. <i>Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.</i></p>
<p>Guideline 2.</p>	<p>42. <i>In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:</i></p> <p>(a) <i>Information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means;</i></p> <p>(b) <i>Information is made available to isolated groups and marginalized groups. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following changes to the law or specific issues affecting a community, targeted community meetings;</i></p> <p>(c) <i>Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;</i></p> <p>(d) <i>Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is provided in police stations, detention centres, courts and prisons, for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information</i></p>

	<p><i>provided to children must be provided in a manner appropriate to their age and maturity;</i></p> <p><i>(e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation;</i></p> <p><i>(f) Means of verification that a person has actually been informed are put in place.</i></p>
Guideline 3.	<p><i>43. States should introduce measures:</i></p> <p><i>(a) To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions;</i></p> <p><i>(b) To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence, and to establish mechanisms for verifying the voluntary nature of the person's consent. An interview should not start until the legal aid provider arrives;</i></p> <p><i>(c) To inform all foreign detainees and prisoners in a language they understand of their right to request contact with their consular authorities without delay;</i></p> <p><i>(d) To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed;</i></p> <p><i>(e) To enable every person who has been detained for any reason to promptly notify a member of his or her family, or any other appropriate person of his or her choosing, of his or her detention and location and of any imminent change of location; the competent authority may, however, delay a notification if absolutely necessary, if provided for by law and if the transmission of the information would hinder a criminal investigation;</i></p> <p><i>(f) To provide the services of an independent interpreter, whenever necessary, and the translation of documents where appropriate;</i></p> <p><i>(g) To assign a guardian, whenever necessary;</i></p> <p><i>(h) To make available in police stations and places of detention the means to contact legal aid providers;</i></p> <p><i>(i) To ensure that persons detained, arrested, suspected or accused of, or charged with a criminal offence are advised of their rights and the implications of waiving them in a clear and plain manner; and should endeavour to ensure that the person understands both;</i></p> <p><i>(j) To ensure that persons are informed of any mechanism available for filing complaints of torture or ill-treatment;</i></p> <p><i>(k) To ensure that the exercise of these rights by a person is not prejudicial to his or her case.</i></p>
Guideline 4.	<p><i>44. To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:</i></p> <p><i>(a) To ensure that police and judicial authorities do not arbitrarily restrict the right or access to legal aid for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular in police stations;</i></p> <p><i>(b) To facilitate access for legal aid providers assigned to provide assistance to detained persons in police stations and other places of detention for the purpose of providing that assistance;</i></p> <p><i>(c) To ensure legal representation at all pretrial proceedings and hearings;</i></p> <p><i>(d) To monitor and enforce custody time limits in police holding cells or other detention centres,</i></p>

	<p><i>for example, by instructing judicial authorities to screen the remand caseload in detention centres on a regular basis to make sure that people are remanded lawfully, that their cases are dealt with in a timely manner and that the conditions in which they are held meet the relevant legal standards, including international ones;</i></p> <p><i>(e) To provide every person, on admission to a place of detention, with information on his or her rights in law, the rules of the place of detention and the initial stages of the pretrial process. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and be in a language that the person in need of legal aid understands. Information provided to children should be provided in a manner appropriate for their age and maturity. The information material should be supported by visual aids prominently located in each detention centre;</i></p> <p><i>(f) To request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular at police stations;</i></p> <p><i>(g) To ensure that every person charged with a criminal offence has adequate time, facilities and technical and financial support, in case he or she does not have sufficient means, to prepare his or her defence and is able to consult with his or her lawyer in full confidentiality.</i></p>
<p>Guideline 5.</p>	<p><i>45. To guarantee that every person charged with a criminal offence for which a term of imprisonment or capital punishment may be imposed by a court of law has access to legal aid in all proceedings at court, including on appeal and other related proceedings, States should introduce measures:</i></p> <p><i>(a) To ensure that the accused understands the case against him or her and the possible consequences of the trial;</i></p> <p><i>(b) To ensure that every person charged with a criminal offence has adequate time, facilities and technical and financial support, in case he or she does not have sufficient means, to prepare his or her defence and is able to consult with his or her lawyer in full confidentiality;</i></p> <p><i>(c) To provide representation in any court proceedings by a lawyer of choice, where appropriate, or by a competent lawyer assigned by the court or other legal aid authority at no cost when the person does not have sufficient means to pay and/or where the interests of justice so require;</i></p> <p><i>(d) To ensure that the counsel of the accused is present at all critical stages of the proceedings. Critical stages are all stages of a criminal proceeding at which the advice of a lawyer is necessary to ensure the right of the accused to a fair trial or at which the absence of counsel might impair the preparation or presentation of a defence;</i></p> <p><i>(e) To request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected or accused of, or charged with a criminal offence; such support could include, for example, appearing before the courts on fixed days;</i></p> <p><i>(f) To enable, in accordance with national law, paralegals and law students to provide appropriate types of assistance to the accused in court, provided that they are under the supervision of qualified lawyers;</i></p> <p><i>(g) To ensure that unrepresented suspects and the accused understand their rights. This may include, but is not limited to, requiring judges and prosecutors to explain their rights to them in clear and plain language.</i></p>
<p>Guideline 6.</p>	<p><i>46. States should ensure that imprisoned persons and children deprived of their liberty have access to legal aid. Where legal aid is not available, States shall ensure that such persons are held in prison in conformity with the law.</i></p> <p><i>47. For this purpose, States should introduce measures:</i></p>

	<p><i>(a) To provide all persons, on admission to the place of imprisonment and during their detention, with information on the rules of the place of imprisonment and their rights under the law, including the right to confidential legal aid, advice and assistance; the possibilities for further review of their case; their rights during disciplinary proceedings; and procedures for complaint, appeal, early release, pardon or clemency. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and should be in a language that the person in need of legal aid understands. Information provided to children should be provided in a manner appropriate for their age and maturity. The information material should be supported by visual aids prominently located in those parts of the facilities where prisoners have regular access;</i></p> <p><i>(b) To encourage bar and legal associations and other legal aid providers to draw up rosters of lawyers, and paralegals, where appropriate, to visit prisons to provide legal advice and assistance at no cost to prisoners;</i></p> <p><i>(c) To ensure that prisoners have access to legal aid for the purpose of submitting appeals and filing requests related to their treatment and the conditions of their imprisonment, including when facing serious disciplinary charges, and for requests for pardon, in particular for those prisoners facing the death penalty, as well as for applications for parole and representation at parole hearings;</i></p> <p><i>(d) To inform foreign prisoners of the possibility, where available, of seeking transfer to serve their sentence in their country of nationality, subject to the consent of the States involved.</i></p>
<p>Guideline 7.</p>	<p><i>48. Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:</i></p> <p><i>(a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization; [footnote omitted]</i></p> <p><i>(b) Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;</i></p> <p><i>(c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;</i></p> <p><i>(d) Victims are promptly informed by the police and other frontline responders (i.e. health, social and child welfare providers) of their right to information, their entitlement to legal aid, assistance and protection and how to access such rights;</i></p> <p><i>(e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;</i></p> <p><i>(f) Victim services agencies and non-governmental organizations can provide legal aid to victims;</i></p> <p><i>(g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e. health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.</i></p>
<p>Guideline 8.</p>	<p><i>49. States should take adequate measures, where appropriate, to ensure that:</i></p> <p><i>(a) Witnesses are promptly informed by the relevant authority of their right to information, their entitlement to assistance and protection and how to access such rights;</i></p> <p><i>(b) Appropriate advice, assistance, care facilities and support are provided to witnesses of crime</i></p>

	<p><i>throughout the criminal justice process;</i></p> <p><i>(c) Child witnesses receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;</i></p> <p><i>(d) All statements or testimony given by the witness at all stages of the criminal justice process are accurately interpreted and translated.</i></p> <p><i>50. States should, where appropriate, provide legal aid to witnesses.</i></p> <p><i>51. The circumstances in which it may be appropriate to provide legal aid to witnesses includes, but is not limited to, situations in which:</i></p> <p><i>(a) The witness is at risk of incriminating him or herself;</i></p> <p><i>(b) There is a risk to the safety and well-being of the witness resulting from his or her status as such;</i></p> <p><i>(c) The witness is particularly vulnerable, including as a result of having special needs.</i></p>
<p>Guideline 9.</p>	<p><i>52. States should take applicable and appropriate measures to ensure the right of women to access legal aid, including:</i></p> <p><i>(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice;</i></p> <p><i>(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;</i></p> <p><i>(c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.</i></p>
<p>Guideline 10.</p>	<p><i>53. States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and other adverse effects as a result of their being involved in the criminal justice system, including:</i></p> <p><i>(a) Ensuring the right of the child to have counsel assigned to represent the child in his or her own name in proceedings where there is or could be a conflict of interest between the child and his or her parents or other parties involved;</i></p> <p><i>(b) Enabling children who are detained, arrested, suspected or accused of, or charged with a criminal offence to contact their parents or guardians at once and prohibiting any interviewing of a child in the absence of his or her lawyer or other legal aid provider, and parent or guardian when available, in the best interests of the child;</i></p> <p><i>(c) Ensuring the right of the child to have the matter determined in the presence of the child's parents or legal guardian, unless it is not considered to be in the best interests of the child;</i></p> <p><i>(d) Ensuring that children may consult freely and in full confidentiality with parents and/or guardians and legal representatives;</i></p> <p><i>(e) Providing information on legal rights in a manner appropriate for the child's age and maturity, in a language that the child can understand and in a manner that is gender- and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition, and not an alternative, to communicating information to the child;</i></p> <p><i>(f) Promoting, where appropriate, diversion from the formal criminal justice system and ensuring that children have the right to legal aid at every stage of the process where diversion is applied;</i></p> <p><i>(g) Encouraging, where appropriate, the use of alternative measures and sanctions to deprivation of liberty and ensuring that children have the right to legal aid so that deprivation of liberty is a</i></p>

	<p><i>measure of last resort and for the shortest appropriate period of time;</i></p> <p><i>(h) Establishing measures to ensure that judicial and administrative proceedings are conducted in an atmosphere and manner that allow children to be heard either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law. Taking into account the child's age and maturity may also require modified judicial and administrative procedures and practices.</i></p> <p><i>54. The privacy and personal data of a child who is or who has been involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law. This generally implies that no information or personal data may be made available or published, particularly in the media, that could reveal or indirectly enable the disclosure of the child's identity, including images of the child, detailed descriptions of the child or the child's family, names or addresses of the child's family members and audio and video records.</i></p>
Regional Instruments	
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD	
4.	<p><i>1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.</i></p> <p><i>2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.</i></p>
17.	<p><i>1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.</i></p> <p><i>2. States Parties to the present Charter shall in particular: ...</i></p> <p style="padding-left: 40px;"><i>(c) ensure that every child accused in infringing the penal law: ...</i></p> <p><i>iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence; ...</i></p>
AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)	
19.	<i>Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.</i>
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2010/C 83/02)	
2.	<i>In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.</i>
THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA	
3.	<i>A legal aid program should include legal assistance at all stages of the criminal process including investigation, arrest, pre-trial detention, bail hearings, trials, appeals, and other proceedings brought to ensure that human rights are protected. Suspects, accused persons, and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited para-legal, or legal assistant. Governments should ensure that legal aid programs provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detention or in prison without access to the courts.</i>

	<i>Special attention should be given to women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons, and foreign nationals.</i>
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
N. (2)	<p><i>2. Right to counsel:...</i></p> <p><i>(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.</i></p> <p><i>(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.</i></p>
O.	<p><i>...(b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.</i></p> <p><i>(c) States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system whether as suspects, accused, complainants or witnesses.</i></p> <p>...</p> <p><i>(f) Law enforcement officials must ensure that all contacts with children are conducted in a manner that respects their legal status, avoids harm and promotes the well-being of the child.</i></p> <p><i>(h) The child's right to privacy shall be respected at all times in order to avoid harm being caused to him or her by undue publicity and no information that could identify a child suspected or accused of having committed a criminal offence shall be published.</i></p> <p>...</p> <p><i>(l) Every child arrested or detained for having committed a criminal offence shall have the following guarantees:...</i></p> <p style="padding-left: 40px;"><i>3. to be provided by the State with legal assistance from the moment of arrest;...</i></p> <p><i>(n) Every child accused of having committed a criminal offence shall have the following additional guarantees: ...</i></p> <p style="padding-left: 40px;"><i>3. to be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;</i></p> <p style="padding-left: 40px;"><i>4. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;</i></p> <p style="padding-left: 40px;"><i>5. to have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings;...</i></p>
P.	<p><i>a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.</i></p> <p><i>...f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by:...</i></p> <p style="padding-left: 40px;"><i>3. Providing them with proper assistance throughout the legal process;...</i></p>

EUROPEAN UNION, DIRECTIVE 2013/48/EU 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)	
2.	<i>Suspects or accused persons shall have access to a lawyer without undue delay...</i>
3.	<i>The right of access to a lawyer shall entail the following: (a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;...</i>
4.	<i>Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.</i>
13.	<i>Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.</i>
COUNCIL OF EUROPE, RECOMMENDATION (2006)2	
98.	<i>98.1 Untried prisoners shall be informed explicitly of their right to legal advice. 98.2 All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.</i>
COUNCIL OF EUROPE, RECOMMENDATION (2003)20	
15.	<i>Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer...</i>
KYIV DECLARATION ON THE RIGHT TO LEGAL AID (2007)	
1.	<i>Legal aid is a right and governments are obliged to implement sustainable, quality controlled, legal aid programs that deliver legal aid services without discrimination to all people in their jurisdictions, subject only to a transparent and reviewable assessment of need, and with special attention to women and vulnerable groups, such as indigent people, children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, asylum seekers, refugees, internally displaced persons, stateless persons, foreign nationals, prisoners, and other persons deprived of their liberty.</i>
2.	<i>A legal aid program must include legal advice and assistance at all stages of the criminal, civil and administrative process.</i>

Interpretation

Right to Prompt Access to Legal Aid at All Stages of the Proceedings

The courts have ruled that prompt access to legal assistance at all stages of the criminal process is relevant to the right to a fair trial. Particular considerations arise during the preliminary investigation and during appeals and constitutional motions. The courts have consistently held that legal aid should be available at the initial stage of police interrogation, before the

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interrogation begins, unless it is demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right. Individuals must be promptly informed of their right to counsel and the right to legal aid. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. The right to free legal assistance in both criminal and civil (where applicable) matters applies at all higher appellate or other stages, depending upon the special features of the proceedings involved, taken in their entirety, and on the role of the appellate or cassation court.

Right to Be Informed and Right to Prompt Access to Legal Aid from Outset of Investigation

CCPR General Comment No. 32, paragraph 34, provides that the right to communicate with counsel under *ICCPR* Article 14(3)(b) requires that the accused be granted prompt access to counsel and that, in cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.

In the HR Committee's view, "it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings," including at any preliminary hearing.¹⁴³ In *Johnson v. Jamaica*,¹⁴⁴ the complainant, a minor, was held in custody for over 18 months before being granted access to a lawyer. He was not represented at all at the preliminary hearing. He was convicted and sentenced to death. In finding a violation of Article *ICCPR* Article 14 (3)(d), the HR Committee stated that "when the author appeared at the preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his right to have legal representation and to ensure legal representation for the author, if he so wished."¹⁴⁵

Violations of *ICCPR* Article 14(3)(d) will also be found where a suspect is not provided legal aid during initial police detention and questioning.¹⁴⁶ The HR Committee found a violation of *ICCPR* Article 14(3)(d) when the suspects were not informed of their right to legal assistance upon their arrest.¹⁴⁷

Both the SPT¹⁴⁸ and the CPT¹⁴⁹ have stressed that a requirement for early access to legal assistance is an important safeguard against torture, as the period immediately following

¹⁴³ HR Committee: Communication No 719/1996, *Levy v Jamaica* at para 7.2. See also HR Committee: Communication No. 356/1989, *Collins v Jamaica* at para. 8.2; HR Committee: Communication No 459/1991, *Wright and Harvey v Jamaica* at para 10.2; HR Committee: Communication No 964/2001, *Saidova v Tajikistan* at para 6.8.

¹⁴⁴ HR Committee: Communication No. 592/1994, *Johnson v Jamaica*.

¹⁴⁵ *Ibid* at para 10.2. See also *Levy v Jamaica*, *supra* note 143 at para 7.2

¹⁴⁶ HR Committee: Communication No 852/1999, *Borisenko v Hungary* at para 7.5; HR Committee: Communication No 1402/2005, *Krasnova v Kyrgyzstan* at para 8.6; HR Committee: Communication No 1412/2005, *Butovenko v Ukraine* at para 7.8; HR Committee: Communication No 1545/2007, *Gunan v Kyrgyzstan* at para 6.3.

¹⁴⁷ *Saidova v Tajikistan*, *supra* note 143 at para 6.8; HR Committee: Communication No 1110/2002, *Pagdayawon Rolando v Philippines* at para 5.6.

¹⁴⁸ Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 March 2014, CAT/C/52/2 at para 80, online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27>.

deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Access to a lawyer has been shown to be a valuable protection against corrupt officials as well as a preventive safeguard against torture and other ill-treatment.¹⁵⁰

According to the CPT, to be fully effective, the right of access to a lawyer should be guaranteed as from the very outset of a person's deprivation of liberty and should be granted no matter how "minor" or "serious" the offence for which a person is suspected, with appropriate provisions for persons who are not in a position to pay for a lawyer. The right of access to a lawyer should also include the right to have the lawyer present during any questioning conducted by the police and the lawyer should be able to intervene in the course of the questioning.¹⁵¹

In *Salduz v. Turkey*, the ECtHR ruled that early access to a lawyer is among the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination under the *ECHR*.¹⁵² The right to access a lawyer arises at the point where a person's position is significantly affected, even if they are not formally taken into custody as a suspect.¹⁵³ A person's position will be significantly affected as soon as the suspicion against him is seriously investigated and the prosecution case compiled.¹⁵⁴

The *Salduz* case involved a minor who made admissions during interrogation in the absence of a lawyer, but later retracted his statement, saying that it was made under duress. The ECtHR found that the applicant's lack of access to legal assistance while he was in police custody violated *ECHR*, Articles 6(1) and 6(3)(c). Noting the particular vulnerability faced by an accused at the investigative stage, amplified by complex rules of criminal procedure, the ECtHR held:

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 [emphasis added].¹⁵⁵

The ECtHR went on to say in *Salduz* that neither the subsequent assistance of a lawyer nor the ability to challenge the statement during the following proceedings could cure the defects which

¹⁴⁹ See European Committee for the Prevention of Torture, *21st General Report*, CPT/Inf (2011) 28 at paras 18-19, online: <<http://www.cpt.coe.int/en/annual/rep-21.pdf>>.

¹⁵⁰ Seventh annual report of the Subcommittee on Prevention of Torture, *supra* note 148 at para 80.

¹⁵¹ CPT, *21st General Report*, *supra* note 149 at paras 20-25.

¹⁵² ECtHR, *Case of Salduz v Turkey* (Application No 36391/02), Judgment of 27 November 2008 at para 54.

¹⁵³ ECtHR, *Case of Shabelnik v Ukraine* (Application No 16404/03), Judgment of 19 May 2009 at para 57.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Salduz*, *supra* note 152 at para 55. See also ECtHR, *Case of Nechiporuk and Yonkalo v Ukraine* (Application No 42310/04), Judgment of 21 July 2011 at paras 262-67; *Öcalan v Turkey*, *supra* note 60 at para 131.

had occurred during police custody.¹⁵⁶ While neither the letter nor the spirit of *ECHR* Article 6 prevents a person from waiving the entitlement to the guarantees of a fair trial, such a waiver must be established in an “unequivocal manner and be attended by minimum safeguards commensurate to its importance.”¹⁵⁷

In *Dayanan v. Turkey*,¹⁵⁸ the ECtHR confirmed the right of an accused person to be assisted by a lawyer as soon as he or she is taken into custody and not only while being questioned. The Court stressed that “the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance”, such as “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.”¹⁵⁹

In order to determine whether the aim of *ECHR* Article 6 – a fair trial – has been achieved, the Court looks to the entirety of the domestic proceedings conducted in the matter.¹⁶⁰ Where national laws attach consequences to the attitude of an accused at the initial stages of police interrogation, *ECHR* Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer.¹⁶¹ Restrictions on the access to a lawyer from the outset of detention affect the fairness of the criminal proceedings under *ECHR* Article 6, but such restrictions do not, in themselves, lead to a breach of the rights to liberty and security of the person under *ECHR* Article 5(1) because the right to legal assistance is a principle specific to a fair trial and cannot be considered a “general principle” implicit in the Convention.¹⁶²

Under the *ECHR*, a person has a right to legal aid not only during any police interrogation but also in the course of other investigative or procedural acts.¹⁶³

¹⁵⁶ *Salduz*, *supra* note 152 at para 58. See also ECtHR, *Case of Titarenko v Ukraine* (Application No 31720/02), Judgment of 20 December 2012; ECtHR, *Case of Hayrettin Demir v Turkey* (Application No 2091/07), Judgment of 24 July 2012. Prior to *Salduz*, most European countries either did not recognize the right of a suspect to have a lawyer present from the first time he or she is interrogated by police, or it was not put into practice. Since the *Salduz* decision, a number of countries have begun to introduce reforms to implement this requirement: U.S Department of Justice, *Expert Working Group Report: International Perspectives on Indigent Defense* (September 2011), online: <<https://ncjrs.gov/pdffiles1/nij/236022.pdf>>.

¹⁵⁷ *Salduz*, *supra* note 152 at para 59.

¹⁵⁸ ECtHR, *Case of Dayanan v Turkey* (Application No 7377/03), Judgment of 13 January 2010 at para 32.

¹⁵⁹ *Ibid.*

¹⁶⁰ ECtHR, *Case of Imbrioscia v Switzerland* (Application No 13972/88), Judgment of 24 November 1993 at para 38.

¹⁶¹ ECtHR, *Case of John Murray v the United Kingdom* (Application No 18731/91), Judgment of 8 February 1996 at para 63. See also ECtHR, *Case of Magee v the United Kingdom* (Application No 28135/95), Judgment of 06 September 2000; ECtHR, *Case of Averill v the United Kingdom* (Application No 36408/97), Judgment of 06 September 2000.

¹⁶² ECtHR, *Case of Carine Simons v Belgium* (Decisions) (Application No 71407/10), Judgment of 28 August 2012 at paras 32-33.

¹⁶³ ECtHR, *Case of Berliński v Poland* (Application No 27715/95 and 30209/96), Judgment of 20 June 2002 at para 77.

Right to Legal Aid at Appellate Stages

ICCPR Article 14(5) provides that anyone convicted of a crime has the right to have their conviction and sentence reviewed by a higher tribunal according to law. The HR Committee explains in *CCPR General Comment No. 32*, para. 45, that the expression “according to law” in Article 14(5) does not mean that States have discretion whether or not to provide the right of appeal from a conviction or sentence, since this right is guaranteed under that Article. Rather, “according to law” in this section relates to the manner by which the appeal to a higher tribunal is to be carried out and by which court, as described in a State’s domestic laws. *ICCPR* Article 13(5) does not require States parties to provide for several instances of appeal, but if their domestic law provides for further instances of appeal, a convicted person must have effective access to them.

Commenting on the particular importance of a right of appeal in death penalty cases, the HR Committee states, in *CCPR General Comment No. 32*, paragraph 51, that

A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court. The right to have one’s conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level [footnotes omitted].¹⁶⁴

The ICCPR, Article 15 paragraph 5, “guarantees the right of convicted persons to have the conviction and sentence reviewed “by a higher tribunal according to law””.¹⁶⁵ The HR Committee has affirmed that the right to legal assistance to convicted prisoners under sentence of death must apply to appellate proceedings as well as to the trial in the court of first instance.¹⁶⁶ In *Maurice Thomas v. Jamaica*, the HR Committee considered the failure to provide legal aid to prepare a special leave for appeal from a murder conviction, which, in turn, denied the complainant the opportunity to have inquiries made about an alleged confession statement by his fellow inmate, which would have exonerated him. The HR Committee found that denial of legal aid denied the complainant an opportunity to pursue further legal remedies, in violation of *ICCPR* Article 14(3)(d).¹⁶⁷

In a capital case, the State case must, both at trial and appeal, provide legal assistance that is adequate to ensure justice and in doing so is bound to consider the accused’s wishes. As the HR Committee commented in *Pinto v. Trinidad*, “legal assistance to the accused in a capital case

¹⁶⁴ *CCPR General Comment 32*, *supra* note 43 at para 51.

¹⁶⁵ HR Committee: Communication No 352/1989, *Douglas, Gentles and Kerr v Jamaica* at para 11.2.

¹⁶⁶ HR Committee: Communication No 250/1987, *Carlton Reid v Jamaica* at para 11.4; HR Committee: Communication No 338/1988, *Simmonds v Jamaica* at para 8.3; *Wright and Harvey v Jamaica*, *supra* note 143 at para 10.5; HR Committee: Communication No. 928/2000, *Sooklal v Trinidad and Tobago* at para 4.10; HR Committee: Communication No. 532/1993, *Maurice Thomas v Jamaica* at para 6.4.

¹⁶⁷ *Thomas v Jamaica*, *ibid.*

must be provided in ways that adequately and effectively ensure justice.”¹⁶⁸ In that case, the complainant received inadequate representation at trial and had no opportunity to consult on the preparation of his appeal or to approve grounds of appeal filed on his behalf by State-appointed counsel, who had been reassigned to him for the appeal, despite the complainant’s objections and the fact that he had arranged for independent legal assistance. *ICCPR* Article 14(3)(d) was further violated in *Simmonds v. Jamaica*, a capital case in which the complainant had indicated he wished to be present in person during the appeal proceedings and that he did not want legal aid. The complainant’s requests were ignored and his application for leave to appeal was heard in his absence and in the presence of a legal aid attorney who argued the appeal on a ground that the complainant had not wanted to pursue. The HR Committee noted “with concern that the author [of the complaint] was not informed with sufficient advance notice about the date of the hearing of his appeal; this delay jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identify he did not know until the day of the hearing itself.” The complainant’s “opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present.”¹⁶⁹

The obligation on the court to ensure that the counsel assigned provides effective representation in the interests of justice includes an obligation to confirm that counsel has consulted with, and informed, the accused when counsel either applies to withdraw an appeal or to argue that an appeal has no merit.¹⁷⁰ If the accused has not been so informed, the court must ensure that the accused is informed and given an opportunity to engage other counsel.¹⁷¹ In *Rasorgueva v. Poland*, the HR Committee rejected the complainant’s claim that the failure of her nephew’s state-appointed lawyer to consult him before filing an appeal and his refusal to lodge a cassation appeal was a violation of *ICCPR* Article 14(3)(d), as the complainant’s nephew had been “duly informed” and advised to hire his own defence lawyer, and a cassation appeal subsequently submitted on his behalf by a lawyer of his own choice was dismissed as manifestly ill-founded. The HR Committee held that “although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice.”¹⁷²

In *McLeod v. Jamaica*,¹⁷³ the HR Committee ruled that the imposition of a death sentence upon conclusion of a trial process that did not accord with *ICCPR* provisions was itself a violation of *ICCPR* Article 6. The HR Committee found that the complainant’s right to appeal and to fair trial rights was effectively denied when his lawyer advised the Appeal Court, without first informing Mr. McLeod, that there were no grounds of appeal he could argue. As there was no indication that the Appeal Court had taken any steps to ensure the author’s right to seek alternative

¹⁶⁸ HR Committee: Communication No.232/1987, *Pinto v Trinidad and Tobago* at para 12.5.

¹⁶⁹ *Simmonds v Jamaica*, *supra* note 166 at para 8.4.

¹⁷⁰ *Collins v Jamaica*, *supra* note 166 at para 8.2; *Sooklal v Trinidad and Tobago*, *supra* note 166 at para 4.10.

¹⁷¹ HR Committee: Communication No 668/1995, *Smith and Stewart v Jamaica* at para. 7.3; HR Committee: Communication No 663/1995, *M Morrison v Jamaica* at para 8.6.

¹⁷² HR Committee: Communication No 1517/2006, *Rastorguev v Poland* at paras 9.3-9.4.

¹⁷³ HR Committee: Communication No 734/1997, *A McLeod v Jamaica*.

representation was respected, the HR Committee found a violation of *ICCPR* Article 14 paragraph 3 (b) and (d).¹⁷⁴

When determining whether the interests of justice require the provision of legal assistance for a constitutional challenge, the HR Committee will consider whether constitutional review of a decision is an inherent aspect of the process for appealing the decision.¹⁷⁵ In *Douglas, Gentles and Kerr v. Jamaica*, denial of legal aid for an application to the Supreme (Constitutional) Court of Jamaica did not violate Article 14(3)(d) of the *ICCPR*, as the State party had provided the complainants with the necessary means to appeal the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. The HR Committee found that “the words “according to law” in article 14, paragraph 5, must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them.” Denial of legal aid for an application to the Constitutional Court did not constitute a violation of Article 14 paragraph 5 as such an application was not part of the domestic criminal appeals process.¹⁷⁶

In *Currie v. Jamaica*, the complainant was unable to seek redress before the Constitutional Court for irregularities in his criminal trial because legal aid was not available for constitutional motions and because the complainant was not able to find a lawyer to act on a *pro bono* basis. The HR Committee held that the role of the Constitutional Court in this case was to ensure that applicants receive a fair trial in all cases, whether criminal or civil. By not providing legal assistance to enable the complainant to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, the State was in violation of *ICCPR* Article 14 (3)(d).¹⁷⁷

The ECtHR has said that the guarantees of *ECHR* Article 6(3) do not cease to apply after the first-instance proceedings.¹⁷⁸ Key points for consideration in determining whether the “interests of justice” require the assignment of legal aid at the appeal level, where free legal assistance had been provided up until then, are the “seriousness of the matter at stake” and the “nature of those proceedings.”¹⁷⁹

The manner in which *ECHR* Article 6(1) and 6(3)(c) are to be applied in relation to appellate or cassation courts

depends upon the special features of the proceedings involved...Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court...in order to determine whether the requirements of fairness in Article 6 (art. 6) were met in the present case, it is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal

¹⁷⁴ *Ibid.* at para. 6.3.

¹⁷⁵ See HR Committee: Communication No 352/1989, *Douglas, Gentles and Kerr v Jamaica* at para 11.2; *Currie v Jamaica*, *supra* note 80 at para 13.4; HR Committee: Communication No 908/2000, *Evans v Trinidad and Tobago* at para 6.6.

¹⁷⁶ *Douglas, Gentles and Kerr v. Jamaica*, *ibid.* See also *Evans v Trinidad and Tobago*, *ibid*

¹⁷⁷ *Currie v Jamaica*, *supra* note 80 at para 13.4. See also HR Committee: Communication No 707/1996, *Taylor v Jamaica* at para 8.2.

¹⁷⁸ *Maksimenko v Ukraine*, *supra* note 148 at para 24.

¹⁷⁹ *Ibid* at para 27.

proceedings as a whole, the scope of the powers of the Court of Appeal, and the manner in which the two applicants' interests were actually presented and protected before the Court of Appeal.¹⁸⁰

The ECtHR has stressed that while the manner in which *ECHR* Article 6 is to be applied to courts of appeal or of cassation “depends on the special features of the proceedings in question,”

there can be no doubt that a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before them the fundamental guarantees of fair trial contained in that Article, including the right to free legal assistance. In discharging that obligation, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6.¹⁸¹

In *Monnell v. UK*, the ECtHR found no violation of *ECHR* Article 6(3) where the applicants were denied a legal aid lawyer to represent them in the oral proceedings before the appellate court, stating that “[t]he interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6.”¹⁸² In *Pakelli v. Germany*, a denial of legal aid to participate in an oral hearing, which concerned the application of a new version of the Code of Criminal Procedure, was found to have deprived the applicant, during the oral stage of the proceedings, of “the opportunity of influencing the outcome of the case, a possibility that he would have retained had the proceedings been conducted entirely in writing” and was therefore a violation of *ECHR* Article 6(3)(c).¹⁸³

In *Granger v. the United Kingdom*, the ECtHR found a violation of *ECHR* Articles 6(3)(c) and 6(1) where the applicant was denied legal aid at an evidentiary hearing in his appeal of a five-year sentence for perjury, depriving the applicant of the ability to make an effective contribution to the proceedings and to provide the court with expert legal argument on both sides of a complex issue.¹⁸⁴ In the cases of *Siałkowska v. Poland* and *Staroszczyk v. Poland*, the applicants' lawyers, appointed under the legal aid scheme, refused to bring an appeal because it did not offer reasonable prospects of success. The refusal was communicated to the applicants three days before the time limit for the appeal had expired. The ECtHR noted that, while “it is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy,” in the circumstances of the case it would have been impossible for the applicants to find a new lawyer in time to bring a cassation appeal.¹⁸⁵ As the applicable domestic regulations did not specify the time-frame within which the applicant should be informed about the refusal to prepare an appeal, the Court found a breach of *ECHR* Article

¹⁸⁰ ECtHR, *Case of Monnell and Morris v the United Kingdom* (Application No. 9562/81; 9818/82) Judgment of 2 March 1987 at para 56.

¹⁸¹ *RD v Poland*, *supra* note 100 at para 44.

¹⁸² ECtHR, *Case of Monnell and Morris v the United Kingdom* (Application No. 9562/81; 9818/82) *Supra* note 183 at para 67.

¹⁸³ *Pakelli v Germany*, *supra* note 98 at paras 39-40.

¹⁸⁴ *Granger v the United Kingdom*, *supra* note 108 at paras 47-48.

¹⁸⁵ ECtHR, *Case of Siałkowska v Poland* (Application No 8932/05) Judgment of 09 July 2007 at paras 112-114.

6(1) in that the State legal aid system failed to secure the applicants access to a court in a “concrete and effective manner.”¹⁸⁶

In *Anghel v Italy*, the ECtHR found that lack of “practical and effective representation” by the legal aid lawyer combined with delay by state authorities combined to deprive the complainant of effective access to court and constituted a violation of Article 6 of the ECHR.¹⁸⁷

Right to Confidential Communications with Counsel

Suspects and accused persons have the right to meet with their lawyer in private, out of hearing of a third person, and to have confidential communications with their lawyer. This right may be restricted for good cause, but any restriction must not impair the right to a fair hearing.

In *CCPR General Comment No. 32*, para. 34, the HR Committee states that

[c]ounsel 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.¹⁸⁸

The HR Committee found a violation of *ICCPR* Article 14(3)(b) in *Nazira Sirageva v. Uzbekistan* when the suspect and his lawyer were only permitted to meet in the presence of an investigator during the preliminary investigations.¹⁸⁹

In *S. v. Switzerland*,¹⁹⁰ the ECtHR found a violation of *ECHR* Article 6(3) when the accused, in detention on remand, was prevented from communicating freely and privately with his lawyer. The Court said that, while the *ECHR* does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance, “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 in a democratic society” and follows from *ECHR* Article 6(3).¹⁹¹ The right of access to counsel including the right to confidentiality may be subject to restrictions for good cause and the question in each case is whether the restriction, in the light of the entirety of the proceedings, deprived the accused of a fair hearing.¹⁹²

Right to Adequate Time to Prepare a Defence

Commenting on the right of an accused person, under *ICCPR* Article 14(3)(b), to have adequate time and facilities for the preparation of their defence and to communicate with counsel, the HR

¹⁸⁶ *Ibid* at para 116.

¹⁸⁷ *ECtHR, Case of Anghel v Italy* (Application No. 5968/09) Judgment of 4 November 2013 at para 54, 64 and 65.

¹⁸⁸ *CCPR General Comment 32*, *supra* note 43 at para 34.

¹⁸⁹ HR Committee: Communication No. 907/2000, *Nazira Sirageva v Uzbekistan* at para 6.3.

¹⁹⁰ *ECtHR, Case of S v Switzerland* (Application No 12629/87; 13965/88) Judgment of 28 November 1991.

¹⁹¹ *Ibid* at para 48.

¹⁹² *ECtHR, Case of Brennan v the United Kingdom* (Application No 39846/98) Judgment of 16 January 2002 at para 58. See also *Öcalan v Turkey*, *supra* note 60 at para 133; *ECtHR, Case of Moiseyev v Russia* (Application No 62936/00) Judgment of 06 April 2009 at para 211; *ECtHR, Case of Sakhnovskiy v Russia*, (Application No 21272/03) Judgment of 2 November 2010 at paras 102-04.

Committee states in General Comment 13, paragraph 8 and General Comment 32 at paragraphs 32 and 33.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. HR Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 9.

32. What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

33. “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory...[footnote omitted].

Failure of the State to ensure sufficient time and facilities for an officially appointed lawyer to prepare for a case, an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms,¹⁹³ violates *ICCPR* Article 14(3)(b).¹⁹⁴ In *Berry v. Jamaica*, the HR Committee found no violation of *ICCPR* Article 14(3)(b) where the complainant did not have an opportunity to instruct his legal aid lawyer for the appeal prior to the hearing, as the complainant would not have been allowed “unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial.”¹⁹⁵

The ECtHR ruled that a failure of State authorities to provide adequate time and facilities for an officially appointed lawyer to prepare for the case in front of the Bologna Court of Appeal violated *ECHR* Article 6(3)(c), which was not remedied when the applicant’s later appeal to the Court of Cassation was dismissed on points of law.¹⁹⁶ Article 6 of *ECHR*, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes the right to organize a defence in an appropriate way without restriction as to the opportunity to put all relevant defence arguments before the trial court and thus to influence the outcome of the

¹⁹³ *Douglas, Gentles and Kerr v Jamaica*, *supra* note 175 at para 11.1; HR Committee: Communication No 330/1988, *Berry v Jamaica* at para 11.4.

¹⁹⁴ HR Committee: Communication No. 355/1989, *George Winston Reid v Jamaica* at para 14.2. See also HR Committee: Communication No. 526/1993, *Hill v. Spain* at para. 14.1; HR Committee: Communication No 248/1987, *Campbell v Jamaica* at para 6.5.

¹⁹⁵ *Berry v Jamaica*, *supra* note 193 at para 11.6.

¹⁹⁶ ECtHR, *Case of Goddi v Italy* (Application No 8966/80), Judgment of 9 April 1984 at paras 27-32.

proceedings.¹⁹⁷ Even where the defence is familiar with the case, they must be given additional time after certain occurrences in the proceedings in order to adjust their position, prepare a request, and lodge an appeal. Such “occurrences” may include, for example, changes in the indictment, adoption of a judgment by the trial court, introduction of new evidence by the prosecution, or a sudden and drastic change in the opinion of an expert during the trial.¹⁹⁸

Restrictions on Waiver of the Right to Legal Assistance

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.”¹⁹⁹ The waiver must not only be voluntary, but must constitute a “knowing and intelligent relinquishment of a right.” The Court explained that the right to counsel, “being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard.”²⁰⁰

The State Must Not Be Arbitrary in Granting Legal Aid

In dealing with legal aid requests, the authorities or courts should act diligently so as to secure to applicants the genuine and effective enjoyment of their rights to a fair trial. This includes the provision of written reasons for a refusal of legal aid and providing a decision within sufficient time so as not to deprive an applicant of the right to access the courts.²⁰¹

The body responsible for appointing legal aid must offer “substantial guarantees to protect them from arbitrariness.”²⁰² The legal aid system may be considered to be arbitrary where the decisions of the legal aid body are unreviewable, or where the criteria and method of selection of cases eligible for the legal aid is unclear or the composition of the body could be said to be biased.²⁰³

In *Case of İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*,²⁰⁴ the ECtHR found no reason to depart from its findings in earlier cases in which the Court found a violation of ECHR Article 6(1) on the grounds, among others, that the legal aid system in Turkey fails to offer individuals substantial guarantees to protect them from arbitrariness. A refusal of the applicants’ legal aid

¹⁹⁷ ECtHR, *Case of Luchaninova v Ukraine* (Application No. 16347/02), Judgment of 09 September 2011 at paras 61-62.

¹⁹⁸ ECtHR, *Case of Miminoshvili v Russia* (Application No. 20197/03), Judgment of 28 September 2011 at para 141.

¹⁹⁹ ECtHR, *Case of Pishchalnikov v Russia* (Application No 7025/04), Judgment of 24 December 2009 at para 77.

²⁰⁰ *Ibid* at para 78.

²⁰¹ *Tabor v Poland*, *supra* note 93 at paras 44-46. See also ECtHR, *Case of Wersel v Poland* (Application No 30358/04), Judgment of 13 December 2011 at paras 52-54; ECtHR, *Case of AB v Slovakia*, *supra* note 79 at para 61; *RD v Poland*, *supra* note 100 at paras 50-52.

²⁰² *Anghel v Italy*, *supra* note 187 at para 51.

²⁰³ *Santambrogio v Italy*, *supra* note 101 at paras 54-55. See also ECtHR, *Case of Anakomba Yula v Belgium* (Application No 45413/07), Judgment of 10 June 2009 at paras 37-39.

²⁰⁴ ECtHR, *Case of İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, (Application No 19986/06), Judgment of 10 July 2012 at paras 53-54.

request, without reasons, deprived them of the possibility of submitting their case before a tribunal, which in the Court's view was a disproportionate restriction on the applicants' right of access to a court.

Relevance of Prospects of Success of Appeal

It is not generally for the domestic legal aid authority to assess an applicant's prospects of success on an appeal in determining eligibility for legal aid in criminal cases. The ECtHR found in *Aerts v. Belgium* that, by refusing an application for legal aid to contest a committal to a psychiatric institution on the basis that the appeal did not appear to be "well-founded," the Legal Aid Board impaired the very essence of the applicant's right to a tribunal.²⁰⁵ However, in *Monnell and Morris v. the United Kingdom*, the ECtHR found that the interests of justice cannot "be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with [ECHR] Article 6."²⁰⁶ The applicants in this case were denied an opportunity to make oral submissions or to have free legal counsel at an oral leave to appeal hearing, after having benefitted from free legal advice throughout the trial and ignoring the advice of their counsel that there were no reasonable prospects of successfully appealing. Also, in the case of *Del Sol v. France*, the ECtHR cited the quality of the legal aid system set up by the French legislature which "offers individuals substantial guarantees to protect them from arbitrariness" in finding no violation of ECHR Article 6(1) in the rejection of the applicant's request for free legal assistance on the basis that there were of no arguable grounds for appeal.²⁰⁷

Legal Aid and the Rights of the Child

In *CCPR General Comment No. 32*, at para. 42, the HR Committee states that, in addition to the guarantees and protections accorded to adults under *ICCPR* Article 14, juveniles need special protection, taking into account their age or situation and the desirability of promoting their rehabilitation.

In *CRC General Comment No. 10*, the CRC states, at para. 50:

As required by article 14 (3) (b) of *ICCPR*, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of *CRC*, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of *CRC*). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of *CRC*), apparently assuming that it requires exclusively the provision of legal

²⁰⁵ *Aerts v Belgium*, *supra* note 61 at para 60. Following the judgment, Belgium changed its standard to "manifestly ill founded".

²⁰⁶ *ECtHR, Case of Monnell and Morris v United Kingdom* (Application No 9818/82), Judgment of 2 March 1987 at paras 63 and 67.

²⁰⁷ *ECtHR, Case of Del Sol v France* (Application No 46800/99), Judgment of 26 May 2002 at paras 25-27. See also *Gnahoré v France*, *supra* note 134 at para 41; *ECtHR, Case of Essaadi v France* (Application No 49384/99), Judgment of 04 September 2002 at para 36.

assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

Victims and Witnesses of Crime

In *CAT General Comment No. 3*, the CAT commented on the need for adequate legal aid for victims of torture:

30. Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation. States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress...

...

38. States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to:... the failure to provide sufficient legal aid and protection measures for victims and witnesses;...²⁰⁸

D. Competence, Accountability and Independence of Legal Aid Providers

States are required to ensure the quality of legal aid services, so as to guarantee an effective right of access to the courts. This requires that legal aid providers possess qualifications and training appropriate for the services they provide, according to established accreditation criteria, and are subject to appropriate oversight mechanisms. Where there is a shortage of qualified lawyers, States should ensure that minimum quality standards for paralegal services are met and that paralegals receive adequate training and operate under the supervision of qualified lawyers.

Legal aid lawyers should be able to do their job freely and independently, without State interference. States should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider. Decisions appointing lawyers must be made fairly and without arbitrariness. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

²⁰⁸ UN Committee Against Torture (CAT), General Comment No 3: Implementation of Article 14 by States Parties, 19 November 2012, CAT/C/GC/3 at paras 30, 38, online: <http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf> [*CAT General Comment No 3*].

Standards

<i>UN Instruments</i>	
UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS	
9.	<i>Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.</i>
16.	<i>Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.</i>
17.	<i>Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.</i>
18.	<i>Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.</i>
19.	<i>No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.</i>
20.	<i>Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.</i>
21.	<i>It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.</i>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 2.	<i>16. The State should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider.</i>
Principle 12.	<i>36. States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; are able to travel, to consult and meet with their clients freely and in full confidentiality both within their own country and abroad, and to freely access prosecution and other relevant files; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.</i>
Principle 13.	<i>37. States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work,</i>

	<p><i>including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.</i></p> <p><i>38. Disciplinary complaints against legal aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review.</i></p>
Regional Instruments	
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
H.	<p><i>(e) When legal assistance is provided by a judicial body, the lawyer appointed shall:</i></p> <ol style="list-style-type: none"> <i>1. be qualified to represent and defend the accused or a party to a civil case;</i> <i>2. have the necessary training and experience corresponding to the nature and seriousness of the matter;</i> <i>3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;</i> <i>4. advocate in favour of the accused or party to a civil case;</i> <i>5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.</i> <p><i>(f) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:</i></p> <ol style="list-style-type: none"> <i>1. when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;</i>

Interpretation

In her summary of the normative content of the right to legal aid, the SR on the independence of judges and lawyers, Gabriela Knaul, states that the effectiveness of legal aid should be further ensured through the “institutionalization of services”, which allows for their evaluation, organization and monitoring, and that the providers of legal aid should “be held accountable for the services they offer as a means to ensure the quality of legal advice, counsel and representation, and proper and adequate access to the court system.”²⁰⁹

Duty of State to Intervene to Ensure Effective Representation

Assigning legal aid counsel does not in itself ensure the effectiveness of the representation. While the independence of the legal profession from the state means that the state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, if the lawyer fails to provide effective representation, and this is manifest or is sufficiently brought to the State’s attention, then the State is under an obligation to intervene to remedy the situation.

²⁰⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, *supra* note 19 at para 42.

ICCPR Article 14(3)(d) does not entitle the accused to choose legal aid counsel provided by the State, but the State must consider the wishes of the applicant in appointing counsel. The State must also take measures to ensure that a lawyer, once assigned, provides effective representation in the interests of justice.²¹⁰

In *CCPR General Comment 32*, para. 38, the HR Committee states that counsel provided by the State on the basis of *ICCPR* Article 14(3)(d), “must be effective in the representation of the accused” and that,

[u]nlike in the case of privately retained lawyers, blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case, or absence during the hearing of a witness in such cases may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice. There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively [footnotes omitted].²¹¹

In *Borisenko v. Hungary*, although the State had assigned a lawyer to the complainant, the lawyer failed to appear at the interrogation or at the detention hearing. Finding a violation of *ICCPR* Article 14(3)(d), the HR Committee recalled its earlier jurisprudence that “it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation.”²¹² The State cannot be held accountable for alleged deficiencies in the defence of the accused or alleged errors made by a defence lawyer, however, unless it should have been manifest to the court that the lawyer’s behavior was incompatible with the interests of justice.²¹³

The HR Committee found a violation of *ICCPR* Article 14(3)(d) right to effective representation in *Campbell v. Jamaica*, a capital case where the legal aid lawyer failed to follow the complainant’s instructions to raise objections to confessional evidence, which the complainant claimed was obtained through maltreatment and that failure influenced the decision of the Appeal Court.²¹⁴ In *Butovenko v. Ukraine*, the complainant was detained in a punishment cell for three days without access to a lawyer or any communication with the outside world, during which time he was interrogated, beaten and threatened. A state-appointed lawyer, who was imposed upon the complainant despite the complainant’s ability and desire to engage his own lawyer, advised him to confess or the beatings would continue. The complainant eventually signed a confession, but he recanted it at trial once he had independent counsel. The court relied on the earlier confession and sentenced him to life imprisonment. The HR Committee found that the ineffectiveness of the state appointed lawyer constituted a violation of *ICCPR* Article 14(3)(b) and (d).

²¹⁰ *Saidova v Tajikstan*, *supra* note 143 at para 6.8.

²¹¹ *CCPR General Comment 32*, *supra* note 43 at para 38.

²¹² *Borisenko v Hungary*, *supra* note 146 at para 7.5.

²¹³ HR Committee: Communication No 709/1996, *Bailey v Jamaica* at para 7.2; HR Committee: Communication No. 732/1997, *Whyte v Jamaica* at para 9.2; HR Committee: Communication No 649/1995, *Forbes v Jamaica* at para 7.1; *Smith and Stewart v Jamaica*, *supra* note 171 at para 7.2; *Rastorguev v Poland*, *supra* note 172 at para 9.3. See also HR Committee: Communication No 580/1994, *Glenn Ashby v Trinidad*.

²¹⁴ *Campbell v Jamaica*, *supra* note 194 at para 6.6.

In a case where the complainant was represented by an inexperienced junior counsel who failed to follow his instructions and made mistakes in the presentation of the defence, the HR Committee found no indication that the decisions made by counsel were not made in the exercise of her professional judgment, so there was no basis for finding a violation of *ICCPR* Article 14(3)(d).²¹⁵

In *Artico v. Italy*, the ECtHR commented on States' obligation to ensure the right to an adequate defence, guaranteed under the *ECHR* Article 6(3):

[T]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective... [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.²¹⁶

The State unsuccessfully argued in *Artico* that there is no violation of *ECHR* Article 6(3)(c) unless the lack of effective legal assistance has prejudiced the person charged with a criminal offence. In rejecting this argument, the ECtHR responded that “the existence of a violation is conceivable even in the absence of prejudice” and to introduce a requirement of actual prejudice in the interpretation of Article 6(3)(c) would “deprive it in large measure of its substance.”²¹⁷

While the ECtHR acknowledges that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, a State is obliged to intervene if a failure by legal aid counsel to provide effective representation is manifest or has been sufficiently brought to their attention in some other way.²¹⁸ In situations where the failure is objectively manifest, the defendant does not need to actively complain or bring the failure to the State's attention.²¹⁹

In *Daud v. Portugal*, the ECtHR found a violation of *ECHR* Article 6(3) when the State failed to act when the applicant's lawyer had not taken any steps to assist his client in eight months, ignored the applicant's request to the court for an interview with his lawyer, replaced the lawyer only when he reported sick and assigned a new lawyer with insufficient notice to the applicant or time to adequately prepare a defence. The ECtHR said that the applicant's letter should have alerted the authorities to the “manifest shortcomings on the part of the first officially assigned lawyer” and that the court should have made inquiries into the conduct of the lawyer, possibly replacing him sooner, and once replaced, should have adjourned the trial on its own initiative.²²⁰

²¹⁵ *Whyte v Jamaica*, *supra* note 213 at para 9.2. See also *Forbes v Jamaica*, *supra* note 213 at para 7.1.

²¹⁶ ECtHR, *Case of Artico v Italy* (Application No 6694/74), Judgment of 13 May 1980 at para 33.

²¹⁷ *Ibid* at para 35.

²¹⁸ ECtHR, *Kamasinski v Austria*, (Application No 9783/82), Judgment of 19 December 1989 at para 65.

See also ECtHR, *Case of Daud v Portugal* (Application No. 22600/93), Judgment of 21 April 1998 at para 38; ECtHR, *Case of Czekalla v Portugal* (Application No 38830/97), Judgment of 10 January 2003 at para 60; ECtHR, *Case of Sannino v Italy* (Application No 30961/03), Judgment of 13 September 2006 at para 49; ECtHR, *Case of Bogumil v Portugal* (Application No 35228/03), Judgment of 06 April 2009 at para 46; *Anghel v Italy*, *supra* note 187 at para 51.

²¹⁹ *Sannino v Italy*, *ibid* at para 51. See also ECtHR, *Case of Moldoveanu v Romania* (Application No 4238/03), Judgment of 19 September 2012 at para 75.

²²⁰ *Daud v Portugal*, *supra* note 218 at paras 39-42.

In *Twalib v. Greece*, the ECtHR found no violation of *ECHR* Article 6(1) in conjunction with 6(3)(b) when defects in the applicant's representation in the proceedings at first instance resulted in "serious shortcomings," because the applicant failed to raise the issue on appeal where he was represented by another lawyer. There was no clear indication that the appellate court could assume that there had been a defect without being alerted to the matter, and there was nothing to suggest that the fairness of the appeal proceedings could be called into question.²²¹ In *Imbrioscia v. Switzerland*, the ECtHR found there had been no breach of *ECHR* Article 6(3), because the applicant had not complained of his lawyer's inactivity, the period in question was short and the State acted promptly to assign legal counsel when informed of the applicant's withdrawal.²²²

In a case where the assigned lawyer failed to indicate to the court that his client needed an interpreter, the ECtHR found that the trial judge, as "the ultimate guardian of the fairness of the proceedings," had a duty to treat the interests of the accused with "scrupulous care" once he been clearly apprised of the difficulties which the absence of interpretation might create for the applicant.²²³

Failings generally considered to be manifest include absenteeism,²²⁴ silence, failure to undertake basic functions,²²⁵ and conflict of interest.²²⁶

The fact that an applicant is dissatisfied with the preparation of his defence or that it could have been conducted in another way, are unlikely to require an intervention on the part of the State.²²⁷ However, a manifest failure to provide effective legal representation was found where the legal aid lawyer lodged an appeal without complying with the formal requirements of Portuguese law, thereby depriving the defendant of an effective remedy.²²⁸

Provision of Legal Aid Must Be Free from Political or Judicial Interference

Absent any manifest failures to provide effective representation by legal aid counsel, the State must respect the independence of the legal profession and the right of individuals to obtain independent legal advice and assistance.

The SR on the independence of judges and lawyers, Gabriela Knaul, reiterates that "[s]tate-run legal aid schemes, regardless of their administrative structure, should be free from undue political

²²¹ *ECtHR, Case of Twalib v Greece* (Application No 42/1997/826/1032), Judgment of 9 June 1998 at paras 40-42.

²²² *Imbrioscia v Switzerland, supra* note 160 at para 41.

²²³ *ECtHR, Case of Cuscani v the United Kingdom* (Application No 32771/96), Judgment of 24 December 2002 at paras 38-40.

²²⁴ *Artico v Italy, supra* note 216 at para 33.

²²⁵ *ECtHR, Case of Falcao dos Santos v Portugal* (Application No 50002/08), Judgment of 19 November 2012 at paras 12-18, 45.

²²⁶ *Moldoveanu v Romania, supra* note 219 at para 74.

²²⁷ *Kamasinski v Austria, supra* note 218 at paras 66-70.

²²⁸ *Czekalla v Portugal, supra* note 218 at para 68.

or judicial interference and be independent of Government in decision-making related to legal aid.”²²⁹

The CPT has noted that, “[s]everal persons stated that *ex officio* lawyers were in fact taking the side of the police, e.g. by trying to convince their clients to admit to everything they were being suspected of.” The CPT called on the State governments to set up or review free legal aid structures for persons in police custody, paying particular attention to the issue of “independence of *ex officio* lawyers from the police structures and the prosecuting authorities.”²³⁰ The SPT has indicated a need for States to have a legal framework that allows for “functional independence”.²³¹

In *Case of Staroszczyk v. Poland*, the ECtHR stated that

it is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of independent legal profession in a democratic society which is founded on trust between lawyers and their clients. The Court emphasises that it is the responsibility of the State to ensure requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other.²³²

E. State Duty to Ensure Legal Aid Education and Information

In order to guarantee the effective right of access to legal aid, States must ensure that information on the availability of legal aid services and how to gain access to them is widely publicized and easily accessible by all.

Under the UN *Principles and Guidelines*, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.

States should ensure that information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public, including isolated groups and marginalized groups, in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means.

²²⁹ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, supra* note 19 at para 50.

²³⁰ *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47 at para 23; *Report on the visit to Croatia carried out by the CPT from 4 to 14 May 2007*, CPT/Inf (2008), 29 at para 19.

²³¹ *Fifth Annual Report on the SPT covering the period January-December 2011*, 19 March 2012, UN Doc CAT/C/48.3 at para 78, online: <http://www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-C-48-3_en.pdf>.

²³² *ECtHR, Case of Staroszczyk v Poland* (Application No 59519/00), Judgment of 09/07/2007 at para 133.

Prior to being questioned or at the time of detention, accused persons must be promptly informed of their right to legal assistance, in clear and plain language which can be understood. Police, prosecutors and judges are responsible for ensuring that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid and for ensuring that unrepresented suspects and accused parties understand their rights. Means of verification that a person has actually been informed should be put in place.

States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs. Legal aid providers representing children should be trained in and be knowledgeable about children’s rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding.

All States should enhance knowledge of the people about their rights and obligations under law through appropriate means, in order to prevent criminal conduct and victimization. States should endeavour to enhance the knowledge of their communities about their justice system and its functions, the ways to file complaints before the courts and alternative dispute resolution mechanisms. States should consider adopting appropriate measures for informing their community about acts criminalized under the law. The provision of such information for those travelling to other jurisdictions, where crimes are categorized and prosecuted differently, is essential for crime prevention. Such rights education should be based on the principles of the Universal Declaration of Human Rights and relevant international human rights treaties and instruments.²³³

Standards

<i>UN Instruments</i>	
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	
14.	<p><i>3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:</i></p> <p><i>(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;</i></p>

²³³ See the *Declaration on Human Rights Education and Training*, 19 December 2012, UN General Assembly, A/RES/66/137, online: OHCHR <<http://www2.ohchr.org/english/issues/education/training/UNDHREducationTraining.htm>>; see also Lawyers’ Rights Watch Canada, *The Right to Know Our Rights: International Law Obligations to Ensure International Human Rights Education and Training*. Vancouver: LRWC, 2012, Lawyers Rights Watch Canada (LRWC) May 2012, available online: LRWC <<http://www.lrwc.org/ws/wp-content/uploads/2012/05/The.Right.to.Know.Our.Rights.May2012online1.pdf>>.

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
16. (7)	<p><i>When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:...</i></p> <p><i>(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation...</i></p>
18. (3)	<p><i>In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:...</i></p> <p><i>(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;...</i></p>
UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS	
4.	<i>Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.</i>
5.	<i>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.</i>
UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT	
11. (1)	<i>...A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.</i>
17.	<p><i>1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.</i></p> <p><i>2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.</i></p>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 2.	<p><i>...17. States should enhance knowledge of the people about their rights and obligations under law through appropriate means, in order to prevent criminal conduct and victimization.</i></p> <p><i>18. States should endeavour to enhance the knowledge of their communities about their justice system and its functions, the ways to file complaints before the courts and alternative dispute resolution mechanisms.</i></p> <p><i>19. States should consider adopting appropriate measures for informing their community about acts criminalized under the law. The provision of such information for those travelling</i></p>

	<i>to other jurisdictions, where crimes are categorized and prosecuted differently, is essential for crime prevention.</i>
Principle 8.	<p>29. <i>States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.</i></p> <p>30. <i>States should ensure that information on rights during the criminal justice process and on legal aid services is made freely available and is accessible to the public.</i></p>
Principle 9.	31. <i>States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.</i>
Guideline 2.	<p>42. <i>In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:</i></p> <p>(a) <i>Information on the right to legal aid and what such aid consists of, including the availability of legal aid services and how to access such services and other relevant information, is made available to the community and to the general public in local government offices and educational and religious institutions and through the media, including the Internet, or other appropriate means;</i></p> <p>(b) <i>Information is made available to isolated groups and marginalized groups. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular, following changes to the law or specific issues affecting a community, targeted community meetings;</i></p> <p>(c) <i>Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;</i></p> <p>(d) <i>Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is provided in police stations, detention centres, courts and prisons, for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity;</i></p> <p>(e) <i>Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation;</i></p> <p>(f) <i>Means of verification that a person has actually been informed are put in place.</i></p>
Guideline 7.	<p>48. <i>Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:</i></p> <p>(a) <i>Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization; [footnote omitted]</i></p> <p>(b) <i>Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;</i></p> <p>(c) <i>Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation</i></p>

	<p><i>in separate legal proceedings, whichever is consistent with the relevant national legislation;</i></p> <p><i>(d) Victims are promptly informed by the police and other frontline responders (i.e. health, social and child welfare providers) of their right to information, their entitlement to legal aid, assistance and protection and how to access such rights;</i></p> <p><i>(e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;</i></p> <p><i>(f) Victim services agencies and non-governmental organizations can provide legal aid to victims;</i></p> <p><i>(g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e. health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.</i></p>
Guideline 8.	<p><i>49. States should take adequate measures, where appropriate, to ensure that:</i></p> <p><i>(a) Witnesses are promptly informed by the relevant authority of their right to information, their entitlement to assistance and protection and how to access such rights;</i></p> <p><i>(b) Appropriate advice, assistance, care facilities and support are provided to witnesses of crime throughout the criminal justice process;</i></p> <p><i>(c) Child witnesses receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;</i></p> <p><i>(d) All statements or testimony given by the witness at all stages of the criminal justice process are accurately interpreted and translated.</i></p> <p><i>50. States should, where appropriate, provide legal aid to witnesses.</i></p> <p><i>51. The circumstances in which it may be appropriate to provide legal aid to witnesses includes, but is not limited to, situations in which:</i></p> <p><i>(a) The witness is at risk of incriminating him or herself;</i></p> <p><i>(b) There is a risk to the safety and well-being of the witness resulting from his or her status as such;</i></p> <p><i>(c) The witness is particularly vulnerable, including as a result of having special needs.</i></p>
Regional Instruments	
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
N. (2)	<p><i>Right to counsel: ...</i></p> <p><i>(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.</i></p> <p><i>(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.</i></p>

COUNCIL OF EUROPE, RECOMMENDATION (2006)2	
98.	<p>98.1 <i>Untried prisoners shall be informed explicitly of their right to legal advice.</i></p> <p>98.2 <i>All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.</i></p>
COUNCIL OF EUROPE, RECOMMENDATION (2003)20	
15.	<p><i>Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer...</i></p>

Interpretation

The CAT, in *CAT General Comment No. 3*, requests that reports on the implementation of CAT Article 14 provide information on the legal aid and witness protection available to victims of torture or ill-treatment as well as witnesses and others who have intervened on behalf of witnesses, including how such protection is made known and made available in practice.²³⁴

The ECtHR has repeatedly held that States must actively ensure that suspects are aware of their rights, including the right to access legal representation. In *Panovits v. Cyprus*, the Court found that “the obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary.”²³⁵ Any waiver of the right to receive legal representation prior to a police interrogation must be “explicit and unequivocal.”²³⁶

F. Right to an Effective Remedy for Violation of Right to Legal Aid

States are required to establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid. Under the UN *Principles and Guidelines*, such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation.

²³⁴ *CAT General Comment No 3*, *supra* note **Error! Bookmark not defined.** at para 46.

²³⁵ *ECtHR, Case of Panovits v Cyprus* (Application No 4268/04), Judgment of 11 March 2009 at para 72.

²³⁶ *Ibid* at para 73.

Standards

<i>UN Instruments</i>	
UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)	
8.	<i>Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.</i>
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	
3.	<p><i>Each State Party to the present Covenant undertakes:</i></p> <p><i>(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;</i></p> <p><i>(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;</i></p> <p><i>(c) To ensure that the competent authorities shall enforce such remedies when granted.</i></p>
CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)	
2.	<p><i>States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:</i></p> <p><i>(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;</i></p> <p><i>(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;</i></p> <p><i>(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; ...</i></p>
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)	
6.	<i>States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.</i>
INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
83.	<p><i>Each State Party to the present Convention undertakes:</i></p> <p><i>(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;</i></p>

	<p>(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;</p> <p>(c) To ensure that the competent authorities shall enforce such remedies when granted.</p>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 9	31. States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.
Guideline 2.	42. In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that: ... (e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation; ...
<i>Regional Instruments</i>	
PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA	
25.	<p>States Parties shall undertake to:</p> <p>a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;</p> <p>b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.</p>
AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)	
25.	<p>1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.</p> <p>2. The States Parties undertake:</p> <p>a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;</p> <p>b. to develop the possibilities of judicial remedy; and</p> <p>c. to ensure that the competent authorities shall enforce such remedies when granted.</p>
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2010/C 83/02)	
47.	<p>Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</p> <p>Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.</p>

	<i>Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.</i>
EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)	
13.	<i>Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.</i>
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
C.	<p><i>(a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.</i></p> <p><i>(b) The right to an effective remedy includes:</i></p> <ol style="list-style-type: none"> <i>1. access to justice;</i> <i>2. reparation for the harm suffered;</i> <i>3. access to the factual information concerning the violations.</i> <p><i>(c) Every State has an obligation to ensure that:</i></p> <ol style="list-style-type: none"> <i>1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;</i> <i>2. any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities;</i> <i>3. any remedy granted shall be enforced by competent authorities;</i> <i>4. any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy.</i> <p><i>(d) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.</i></p>

Interpretation

The SR on the independence of judges and lawyer, Gabriela Knaul, reports that States have an obligation to take the steps necessary to give effect to the right to legal aid in their domestic laws and policies. This includes the obligation to establish effective remedies if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid, pursuant to the guarantees in *UDHR* Article 8 and *ICCPR* Article 2(3)(a) and (b).²³⁷

The HR Committee discusses States' obligations to ensure effective remedies in *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*:

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to

²³⁷ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, supra* note 19 at paras 44, 45.

vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

...

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are

requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.²³⁸

G. Right to Legal Aid Must Be Legally Guaranteed in National Legal Systems

States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution. - *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 1.

States are responsible under international law to take all necessary steps, including the adoption of legislative measures, towards the full realization of the right to legal aid for any individual within its territory and subject to its jurisdiction who does not have sufficient financial means to pay for legal aid or to meet the costs associated with judicial proceedings. *ICCPR* Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.

Legal aid legislation must put in place a comprehensive legal aid system that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.²³⁹

Legal aid legislation, policies and regulations should explicitly take into account the rights and special developmental needs of the child, including the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence; the right to be heard in all judicial proceedings affecting him or her; standard procedures for determining best interest; privacy and protection of personal data; and the right to be considered for diversion.²⁴⁰

Standards

<i>UN Instruments</i>	
<i>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</i>	
2. (2)	<i>Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.</i>
<i>INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)</i>	
2. (1)	<i>Each State Party to the present Covenant undertakes to take steps, individually and through</i>

²³⁸ *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) at paras 15-20, online: <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>.

²³⁹ *Principles and Guidelines*, *supra* note 9 at para 15.

²⁴⁰ *Ibid* at para 58(b).

	<i>international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.</i>
INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES	
84.	<i>Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.</i>
UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)	
4.	<i>States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...</i>
PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS	
Principle 1.	<i>14. Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, [footnote omitted] States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.</i>
Principle 2.	<i>15. States should consider the provision of legal aid as their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system.</i>
Regional Instruments	
AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS (Banjul Charter)	
1.	<i>The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.</i>
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD	
1. (1)	<i>Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.</i>
PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA	
26. (1)	<i>States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.</i>
AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)	
28.	<i>1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it</i>

	<i>exercises legislative and judicial jurisdiction.</i>
	<i>2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.</i>
EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)	
52.	<i>On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.</i>
THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA	
2.	<i>... Since those in control of government criminal justice agencies control access to detainees and to prisoners, they should ensure that the right to legal aid is fully implemented...</i>

Interpretation

SR on the independence of judges and lawyer, Gabriela Knaul, identifies elements of the right to legal aid that should be set out in domestic legislation in her 2013 report:

Legislation on legal aid should ensure that effective legal assistance is provided at all stages of the justice process, at the pretrial stage, as well as in any judicial or extrajudicial procedure aimed at determining rights and obligations, provided that the person does not have sufficient means to pay for legal aid and, in criminal cases, that the interest of justice so require. In particular, legislation should ensure that effective legal aid is provided to victims of human rights violations in order to ensure that they have access to an effective remedy by the competent national tribunals for acts violating the fundamental rights set out in international treaties, the Constitution or the law.

National legislation should also include specific criteria to determine eligibility for legal aid, particularly with regard to the limits of the financial means that trigger eligibility. Moreover, persons who are denied legal aid on the basis of the criteria set out in national legislation should have the right to appeal the decision.

...

[N]ational legislation on legal aid should ensure that professionals working for the legal aid system possess the qualifications and training appropriate for the services they provide.²⁴¹

H. Other State Measures to Support an Effective Legal Aid System

Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make

²⁴¹ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, *supra* note 19 at paras 53-56.

adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system. - *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 12*

The *UN Principles and Guidelines* provide practical recommendations as to how States can create and maintain a functioning and effective legal aid system. Some of these measures include creating dedicated legal aid funds; identifying fiscal mechanisms for channeling funds to legal aid, partnering with lawyers' associations and other institutions; promoting coordination between justice agencies and other professionals; using paralegals; and establishing an independent legal aid body to provide, administer, coordinate and monitor legal aid services and to develop a long-term strategy guiding the evolution and sustainability of legal aid.

Standards

<i>UN Instruments</i>	
<i>UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS</i>	
<i>11.</i>	<i>In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups. Duties and responsibilities</i>
<i>PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS</i>	
<i>Principle 14.</i>	<i>39. States should recognize and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid.</i> <i>40. Where appropriate, public-private and other forms of partnerships should be established to extend the reach of legal aid.</i>
<i>Guideline 11.</i>	<i>55. In order to encourage the functioning of a nationwide legal aid system, States should, where it is appropriate, undertake measures:</i> <i>(a) To ensure and promote the provision of effective legal aid at all stages of the criminal justice process for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and for victims of crime;</i> <i>(b) To provide legal aid to persons who have been unlawfully arrested or detained or who have received a final judgment of the court as a result of a miscarriage of justice, in order to enforce their right to retrial, reparation, including compensation, rehabilitation and guarantees of non-repetition;</i> <i>(c) To promote coordination between justice agencies and other professionals such as health, social services and victim support workers in order to maximize the effectiveness of the legal aid system, without prejudice to the rights of the accused;</i> <i>(d) To establish partnerships with bar or legal associations to ensure the provision of legal aid at all stages of the criminal justice process;</i> <i>(e) To enable paralegals to provide those forms of legal aid allowed by national law or practice to persons detained, arrested, suspected of, or charged with a criminal offence, in</i>

particular in police stations or other detention centres;

(f) To promote the provision of appropriate legal aid for the purpose of crime prevention.

56. States should also take measures:

(a) To encourage legal and bar associations to support the provision of legal aid by offering a range of services, including those that are free (pro bono), in line with their professional calling and ethical duty;

(b) To identify incentives for lawyers to work in economically and socially disadvantaged areas (e.g., tax exemption, fellowships and travel and subsistence allowances);

(c) To encourage lawyers to organize regular circuits of lawyers around the country to provide legal aid to those in need.

57. In the design of their nationwide legal aid schemes, States should take into account the needs of specific groups, including but not limited to the elderly, minorities, persons with disabilities, the mentally ill, persons living with HIV and other severe contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, refugees and internally displaced persons, in line with guidelines 9 and 10.

58. States should take appropriate measures to establish child-friendly and child-sensitive legal aid systems, taking into account children's evolving capacities and the need to strike an appropriate balance between the best interests of the child and children's right to be heard in judicial proceedings, including:

(a) Establishing, where possible, dedicated mechanisms to support specialized legal aid for children and support the integration of child-friendly legal aid into general and non-specialized mechanisms;

(b) Adopting legal aid legislation, policies and regulations that explicitly take into account the child's rights and special developmental needs, including the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence; the right to be heard in all judicial proceedings affecting him or her; standard procedures for determining best interest; privacy and protection of personal data; and the right to be considered for diversion;

(c) Establishing child-friendly legal aid service standards and professional codes of conduct. Legal aid providers working with and for children should, where necessary, be subject to regular vetting to ensure their suitability for working with children;

(d) Promoting standard legal aid training programmes. Legal aid providers representing children should be trained in and be knowledgeable about children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding. All legal aid providers working with and for children should receive basic interdisciplinary training on the rights and needs of children of different age groups and on proceedings that are adapted to them, and training on psychological and other aspects of the development of children, with special attention to girls and children who are members of minority or indigenous groups, and on available measures for promoting the defence of children who are in conflict with the law;

(e) Establishing mechanisms and procedures to ensure close cooperation and appropriate referral systems between legal aid providers and different professionals to obtain a comprehensive understanding of the child, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.

59. To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:

(a) Be free from undue political or judicial interference, be independent of the Government in

	<p><i>decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;</i></p> <p><i>(b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; the assessment of legal aid needs nationwide; and the power to develop its own budget;</i></p> <p><i>(c) Develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy guiding the evolution and sustainability of legal aid;</i></p> <p><i>(d) Report periodically to the responsible authority.</i></p>
<p>Guideline 12.</p>	<p><i>60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.</i></p> <p><i>61. To this end, States could take measures:</i></p> <p><i>(a) To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor nongovernmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;</i></p> <p><i>(b) To identify fiscal mechanisms for channelling funds to legal aid, such as:</i></p> <p style="padding-left: 40px;"><i>(i) Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision;</i></p> <p style="padding-left: 40px;"><i>(ii) Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;</i></p> <p><i>(c) To identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (e.g., tax exemptions or reductions, student loan payment reductions);</i></p> <p><i>(d) To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.</i></p> <p><i>62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.</i></p>
<p>Guideline 13.</p>	<p><i>63. States should, where appropriate, make adequate and specific provisions for staffing the nationwide legal aid system that are commensurate with their needs.</i></p> <p><i>64. States should ensure that professionals working for the national legal aid system possess qualifications and training appropriate for the services they provide.</i></p> <p><i>65. Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals. At the same time, States should promote the growth of the legal profession and remove financial barriers to legal education.</i></p>

	<p>66. States should also encourage wide access to the legal profession, including affirmative action measures to ensure access for women, minorities and economically disadvantaged groups.</p>
<p>Guideline 14.</p>	<p>67. States should, in accordance with their national law and where appropriate, recognize the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.</p> <p>68. For this purpose, States should, in consultation with civil society and justice agencies and professional associations, introduce measures:</p> <p>(a) To develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting;</p> <p>(b) To ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;</p> <p>(c) To ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;</p> <p>(d) To promote, in consultation with civil society and justice agencies, the development of a code of conduct that is binding for all paralegals working in the criminal justice system;</p> <p>(e) To specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;</p> <p>(f) To ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres, and so forth;</p> <p>(g) To allow, in accordance with national law and regulations, court accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.</p>
<p>Guideline 15.</p>	<p>69. In adherence to principle 12, and subject to existing national legislation ensuring transparency and accountability, States, in cooperation with professional associations, should:</p> <p>(a) Ensure that criteria are set for the accreditation of legal aid providers;</p> <p>(b) Ensure that legal aid providers are subject to applicable professional codes of conduct, with appropriate sanctions for infractions;</p> <p>(c) Establish rules to ensure that legal aid providers are not allowed to request any payment from the beneficiaries of legal aid, except when authorized to do so;</p> <p>(d) Ensure that disciplinary complaints against legal aid providers are reviewed by impartial bodies;</p> <p>(e) Establish appropriate oversight mechanisms for legal aid providers, in particular with a view to preventing corruption.</p>
<p>Guideline 16.</p>	<p>70. States should, where appropriate, engage in partnerships with non-State legal aid service providers, including non-governmental organizations and other service providers.</p> <p>71. To this end, States should take measures, in consultation with civil society and justice agencies and professional associations:</p> <p>(a) To recognize in their legal systems the role to be played by non-State actors in providing legal aid services to meet the needs of the population;</p> <p>(b) To set quality standards for legal aid services and support the development of</p>

	<p><i>standardized training programmes for non-State legal aid service providers;</i></p> <p><i>(c) To establish monitoring and evaluation mechanisms to ensure the quality of legal aid services, in particular those provided at no cost;</i></p> <p><i>(d) To work with all legal aid service providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural and economically and socially disadvantaged areas and among minority groups;</i></p> <p><i>(e) To diversify legal aid service providers by adopting a comprehensive approach, for example, by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics and non-governmental and other organizations to provide legal aid services.</i></p> <p><i>72. States should, where appropriate, also take measures:</i></p> <p><i>(a) To encourage and support the establishment of legal aid clinics in law departments within universities to promote clinical and public interest law programmes among faculty members and the student body, including in the accredited curriculum of universities;</i></p> <p><i>(b) To encourage and provide incentives to law students to participate, under proper supervision and in accordance with national law or practice, in a legal aid clinic or other legal aid community scheme, as part of their academic curriculum or professional development;</i></p> <p><i>(c) To develop, where they do not already exist, student practice rules that allow students to practise in the courts under the supervision of qualified lawyers or faculty staff, provided that such rules are developed in consultation with and accepted by the competent courts or bodies that regulate the practice of law before the courts;</i></p> <p><i>(d) To develop, in jurisdictions requiring law students to undertake legal internships, rules for them to be allowed to practise in the courts under the supervision of qualified lawyers.</i></p>
<p>Guideline 17.</p>	<p><i>73. States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid.</i></p> <p><i>74. For this purpose, States could introduce measures:</i></p> <p><i>(a) To conduct regular research and collection of data disaggregated by the gender, age, socioeconomic status and geographical distribution of legal aid recipients and to publish the findings of such research;</i></p> <p><i>(b) To share good practices in the provision of legal aid;</i></p> <p><i>(c) To monitor the efficient and effective delivery of legal aid in accordance with international human rights standards;</i></p> <p><i>(d) To provide cross-cultural, culturally appropriate, gender-sensitive and age-appropriate training to legal aid providers;</i></p> <p><i>(e) To improve communication, coordination and cooperation between all justice agencies, especially at the local level, to identify local problems and to agree on solutions to improve the provision of legal aid.</i></p>
<p>Guideline 18.</p>	<p><i>75. Technical assistance based on needs and priorities identified by requesting States should be provided by relevant intergovernmental organizations, such as the United Nations, bilateral donors and competent non-governmental organizations, as well as by States in the framework of bilateral and multilateral cooperation, with a view to building and enhancing the national capacities and institutions for the development and implementation of legal aid systems and criminal justice reforms, where appropriate.</i></p>

GENERAL ASSEMBLY RESOLUTION ON HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE (20 FEBRUARY 2002)	
5.	<i>Appeals to Governments to include in their national development plans the administration of justice as an integral part of the development process and to allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice;</i>
GENERAL ASSEMBLY RESOLUTION 2449 (XXIII), LEGAL AID (19 DECEMBER 1968)	
1.	<p><i>Recommends Member States:</i></p> <p><i>(a) To guarantee the progressive development of comprehensive systems of legal aid to those who need it in order to protect their human rights and fundamental freedoms;</i></p> <p><i>(b) To devise standards for granting, in appropriate cases, legal or professional assistance;</i></p> <p><i>(c) To consider ways and means of defraying the expenses involved in providing such comprehensive legal aid systems;</i></p> <p><i>(d) To consider taking all possible steps to simplify legal procedures so as to reduce the burdens on the financial and other resources of individuals who seek legal redress;</i></p> <p><i>(e) To encourage cooperation among appropriate bodies making available competent legal assistance to those who need it;</i></p>
Regional Instruments	
THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA	
2.	<i>Government officials, including police and prison administrators, judges, lawyers, and prosecutors, should be made aware of the crucial role that legal aid plays in the development and maintenance of a just and fair criminal justice system. Since those in control of government criminal justice agencies control access to detainees and to prisoners, they should ensure that the right to legal aid is fully implemented. Government officials are encouraged to allow legal aid to be provided at police stations, in pre-trial detention facilities, in courts, and in prisons. Governments should also sensitize criminal justice system administrators to the societal benefits of providing effective legal aid and the use of alternatives to imprisonment. These benefits include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.</i>
PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA	
H.	<p><i>(f) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:</i></p> <p><i>1. when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;</i></p> <p><i>2. where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.</i></p> <p><i>(g) Given the fact that in many States the number of qualified lawyers is low, States should recognize the role that para-legals could play in the provision of legal assistance and establish the legal framework to enable them to provide basic legal assistance.</i></p> <p><i>(h) States should, in conjunction with the legal profession and non-governmental</i></p>

	<p>organizations, establish training, the qualification procedures and rules governing the activities and conduct of para-legals. States shall adopt legislation to grant appropriate recognition to para-legals.</p> <p>(i) Para-legals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.</p> <p>(j) Non-governmental organizations should be encouraged to establish legal assistance programmes and to train para-legals.</p> <p>(k) States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.</p>
J.	<p>(a) States shall ensure that national legislation does not prevent collaboration amongst legal professionals in countries in their region and throughout Africa.</p> <p>(b) States shall encourage the establishment of agreements amongst states and professional legal associations in their region that permit cross-border collaboration amongst lawyers including legal representation, training and education, and exchange of information and expertise.</p>
P.	<p>d) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.</p> <p>e) States are required to investigate and punish all complaints of violence against women, including domestic violence, whether those acts are perpetrated by the state, its officials or agents or by private persons. Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.</p>
KYIV DECLARATION ON THE RIGHT TO LEGAL AID (2007)	
3.	<p>Governments are obliged to make public officials aware of the crucial role that legal aid plays in both ensuring access to justice and achieving desirable societal goals, and to educate and train them in procedures necessary to ensure that the right to legal aid is provided at all stages of criminal, civil and administrative proceedings.</p>
4.	<p>Governments are obliged to ensure that legal information is available regarding administrative, civil and criminal matters and to this end public servants are obliged to inform and explain substantive and procedural aspects of legal matters to all members of the public.</p>
5.	<p>Governments should establish cooperative arrangements with a wide range of stakeholders – such as non-governmental organisations, community-based organisations, religious and non-religious charitable organisations, professional bodies and associations and academic institutions – and ensure effective public participation in the formulation of legal aid policies, programs and legislation.</p>
6.	<p>Legal aid should be available to all people without discrimination who seek legal redress for violation of their human rights, including for violations by any organ of state.</p>
7.	<p>Governments and all stakeholders should recognise the significance of traditional and community-based alternatives to formal legal processes, and should provide support for such</p>

	<i>mechanisms provided that they conform to human rights norms.</i>
8.	<i>Governments should consider a variety of service delivery options such as government funded public defender offices, judicare programmes, justice centres, law clinics, as well as partnerships with civil society and faith-based organisations.</i>
9.	<i>Governments should consider appropriate alternatives to the use of lawyers through the provision of complementary legal and related services by non-lawyers such as lay advocates, law students, paralegals, legal assistants, and other service providers.</i>
10.	<i>Support for and involvement in the provision of legal aid should be recognised as an important duty of the legal profession which should, through the organised bar and law schools, provide moral, ethical, professional and logistical support to those providing legal aid, especially through pro-bono legal aid services. Governments should promote an enabling environment for private practitioners to provide pro-bono services and ensure competitive rates of remuneration.</i>
11.	<i>Governments should make appropriate fiscal, budgetary and operational arrangements for a sustainable legal aid program, including for the provision of a broad range of legal aid services, establishment of infrastructure, an independent, cost-effective, professional and quality driven case management system, and with the ability to satisfy the needs of the community in the long term.</i>
12.	<i>Governments should ensure that human rights education and legal literacy programmes are conducted in educational institutions and in non-formal sectors of society, particularly for vulnerable groups such as children, young people, and the urban and rural poor. Governments are encouraged to ensure that human rights and legal documents are translated and made widely available. International and regional bodies are encouraged to make available human rights documentation in relevant languages.</i>
13.	<i>Governments and multilateral donors should ensure that programmes of assistance to justice systems in developing and transitional countries include the provision of legal aid information and other measures to further access to justice, particularly among the poor and vulnerable, in a sustainable way.</i>
14.	<i>Governments should ensure that there is an enabling environment for the provision of legal aid services, including protection for lawyers and all other service providers from harassment, intimidation and other threats to their safety and security.</i>

Interpretation

The HR Committee has pointed out that “legal aid should enable counsel to prepare his client’s defence in circumstances that can ensure justice”, which include “provision for adequate remuneration for legal aid.”²⁴²

Both the SPT and the CPT have noted with concern the numerous examples of national legal aid management bodies that are understaffed and under-resourced, noting that low fees for services have a discouraging effect on the legal aid lawyers²⁴³ The SPT observed that:

²⁴² *C Reid v Jamaica*, supra note 166 at para 13.

Budget and staff constraints directly affect the public defence system as they generate an excessive workload that is not compatible with the effective defence of the interests of persons deprived of their liberty. This was observed repeatedly in the countries visited by the Subcommittee, through numerous interviews both with detainees and officials from various State organizations and civil society, and through information collected and verified during these visits.²⁴⁴

The CPT has, in numerous reports to Government, made recommendations to States to develop a “fully fledged and properly funded system of legal aid”²⁴⁵ and noted that “this should be done in co-operation with the relevant bar associations.”²⁴⁶ The CPT has also recommended that in order to avoid delays, lawyers could be “chosen from pre-established lists drawn up in agreement with the relevant professional organisations.”²⁴⁷

In the view of the SPT,

[e]ffective protection of the right to counsel requires the existence of a legal assistance model, whatever this model might be, to ensure the performance of defence counsels in an independent, free and technically qualified manner. For the realization of the right to counsel there should be a legal framework which allows for public or ex officio defence – whether provided by public officials or by lawyers working pro bono – with functional independence and budgetary autonomy to guarantee free legal assistance for all detainees who require it

²⁴³ *Fifth Annual Report on the SPT*, supra note 231 at para 79. See also *Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003*, CPT/Inf (2007) 15 at para 24, online: <<http://www.cpt.coe.int/documents/hrv/2007-15-inf-eng.pdf>>; *Report on the visit to Croatia carried out by CPT from 4 to 14 May 2007*, CPT/Inf (2008) 29 at para. 19, online <<http://www.cpt.coe.int/documents/hrv/2008-29-inf-en.pdf>>; *Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999*, CPT/Inf (2001) 2 at para 32, online: <<http://www.cpt.coe.int/documents/hun/2001-02-inf-eng.pdf>>; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006) 20 at para 23, online: <<http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.pdf>>; *Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004*, CPT/Inf (2006) 11 at para 21, online: <<http://www.cpt.coe.int/documents/pol/2006-11-inf-eng.pdf>>.

²⁴⁴ *Fifth Annual Report on the SPT*, *ibid.*

²⁴⁵ *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para 23, online: <<http://www.cpt.coe.int/documents/arm/2007-47-inf-eng.htm>>; *Report on the visit to Austria carried out by the CPT from 14 to 23 April 2004*, CPT/Inf (2005) 13 at para 26, online: <<http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.htm>>; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006) 20 at para 23, online: <<http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.htm>>; *Report on the visit to Poland carried out by the CPT*, CPT/Inf (2006) 11 at para 21, online: <<http://www.cpt.coe.int/documents/pol/2006-11-inf-eng.htm>>; *Report on the visit to Poland carried out by the CPT from 26 November to 8 December 2009*, CPT/Inf (2011) 20 at para 26, online: <<http://www.cpt.coe.int/documents/pol/2011-20-inf-eng.htm>>.

²⁴⁶ *Report on the visit to the Slovak Republic carried out by the CPT from 24 March to 2 April 2009*, CPT/Inf (2010) 1 at para 28, online: <<http://www.cpt.coe.int/documents/svk/2010-01-inf-eng.htm>>; *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47 at para 23, online: <<http://www.cpt.coe.int/documents/arm/2007-47-inf-eng.htm>>.

²⁴⁷ *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 13 April 1992 at para 37, online: <<http://www.cpt.coe.int/en/annual/rep-02.htm>>.

from the time of their arrest in a timely, effective and comprehensive manner. In addition, the existence of an organizational framework which ensures effective equality of arms between the public defender (be it State, pro bono or mixed), the Public Prosecutor and the police force is essential.²⁴⁸

²⁴⁸ *Fifth Annual Report on the SPT*, *supra* note 243 at para 78.

APPENDIX A : Treaties, Declarations and Other Instruments

The international law and principles setting out the standards for legal aid are found in the following international instruments: (Numbers of states parties indicated is current to June 2014)

Treaties are binding at international law on all States that have ratified them. Declarations and other international human rights instruments may not have the binding force of international law. However, human rights Declarations of the General Assembly have considerable authority, because they are developed by experts in international law, negotiated at length by States and are often adopted by consensus (“without a vote”) of all members of the United Nations. Most Declarations and instruments include codifications of existing international law. Some Declarations and instruments are considered, in whole or in part, to be statements of customary international law or general principles.

United Nations (UN) Treaties, Declarations and Other Instruments

The UDHR

- *Universal Declaration of Human Rights* (“UDHR”), adopted 10 Dec. 1948, U.N. Doc. A/810, at 71 (1948), online: <<http://www.un.org/en/documents/udhr/>>.

UN Treaties

- *Vienna Convention on the Law of Treaties* (“Vienna Convention”), adopted 23 May 1969, entered into force 27 Jan. 1980, U.N. Doc. A/CONF. 39/26, reprinted in 8 ILM 679 (1969), online: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>. 114 states parties.
- *International Covenant on Civil and Political Rights* (“ICCPR”), adopted 16 Dec. 1966, entered into force 23 March 1976, U.N. Doc. A/6316, 999 U.N.T.S. 171, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>. 168 states parties.
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 - *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), adopted 21 December 1965, entered into force 4 January 1969, U.N. Doc. A/6014 (1966), online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>>. 177 states parties.
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July 2003, A/RES/45/158, online:
<<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>>. 47 states parties.

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- *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (“Principles and Guidelines”): resolution/adopted by unanimous consent of the General Assembly, 28 March 2013, A/RES/67/187, annex, online: <http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid>.
- *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (“Body of Principles”); resolution/adopted without a vote by the General Assembly, 9 December 1988, A/RES/43/173 online: <<http://www.un.org/documents/ga/res/43/a43r173.htm>>.
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- *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 2 October 2007, by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the USA) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), A/RES/61/295, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>>. Canada and the other 3 States who voted against the Declaration have all since reversed their position.

- *U.N. Human Rights Council Resolution on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, adopted without a vote on 7 June 2013, A/HRC/23/L.9, online: <<http://daccess-ddsny.un.org/doc/UNDOC/LTD/G13/144/57/PDF/G1314457.pdf?OpenElement>>.
- *General Assembly Resolution on Human Rights in The Administration of Justice*, adopted without a vote on 20 February 2002, A/RES/56/161, online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/161&Lang=E>.
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AU Treaties

- *African (Banjul) Charter on Human and Peoples' Rights* (“Banjul Charter”), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, online: <<http://www.achpr.org/instruments/achpr/>>. 53 states parties.
- *African Charter on the Rights and Welfare of the Child*, July 11, 1990, OAU Doc. CAB/LEG/24.9/49, entered into force Nov. 29, 1999, online: <<http://www.achpr.org/instruments/child/>>. 41 States parties.
- *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, entered into force 25 November 2005, online: <<http://www.achpr.org/instruments/women-protocol/>>. 28 States parties.
- *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, adopted 10 June 1998, entered into force 25 January 2004, online: <<http://www.achpr.org/instruments/court-establishment/>>. 24 states parties.

African Union Other Instruments

- *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (“The Robben Island Guidelines”), adopted by the African on Human and Peoples’ Rights during its 32nd ordinary session, October, 2002, online: <<http://www.achpr.org/sessions/32nd/resolutions/61>>
- *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (African Guidelines), African Commission on Human and Peoples’ Rights, OAU Doc. DOC/OS(XXX) 247, 12 *Int'l Hum. Rts. Rep.* 1180 (2005), online: <<http://www.achpr.org/instruments/fair-trial/>>.

Organization of American States (OAS) Treaties, Declaration and Other Instruments:

OAS Treaties

- *American Convention on Human Rights* (“ACHR”), "Pact of San Jose", Costa Rica, 22 November 1969, entered into force 18 July 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, online: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>. 25 parties ratified/acceded, but 2 states later denounced their ratification (Trinidad and Tobago, Venezuela). (9 states, including Canada and the USA have not ratified the Convention).
- *American Declaration on the Rights and Duties of Man* (“American Declaration”), adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948, OEA/Ser.L./V/11.71, at 17 (1988), online: <<http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf>>.
- *Charter of the Organization of American States*, 30 April 1948, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 13 Dec. 1951, amended 1967, 1985, 14 Dec. 1992, 10 June 1993, online: <http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf>. 35 member states.

Other OAS instruments

- *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Inter-American Commission on Human Rights, approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, online: <<http://www.cidh.org/basicos/english/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>>.

Other inter-American instruments

- *Brasilia Regulations Regarding Access To Justice For Vulnerable People*, approved by the XIV Ibero-American Judicial Summit, held in Brasilia on March 4 to 6, 2008, online: <<http://www.osce.org/odhr/68082>>.

Council of Europe (COE): Treaties and Other Instruments:

COE Treaties

- *European Convention on Human Rights* (“ECHR”), Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online: <<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>>. 47 states parties. Ratification is required for entry into the European Union.
- *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, signed 26 November 1987, entered into force 1 Feb. 1989, Doc. No. H(87)4 1987, ETS 126. Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) amended Convention, entered into force 1 March 2002, online: <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>. 47 States parties. Ratification is required for entry into the European Union.

Other COE instruments

- *Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules* (“Council of Europe, Recommendation (2006)2”), adopted by the Committee of Ministers on 11 January 2006, online: <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>.
- *Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse* (“Council of Europe, Recommendation (2006)13”), adopted by the Committee of Ministers on 27 September 2006, online <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>.
- *Recommendation CM/Rec (2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures* (“Council of Europe, Recommendation (2008)11”), adopted by the Committee of Ministers on 5 November 2008, online: <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp>.
- 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

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and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294 of 2013-11-06, pp. 1-12.

Other Instruments

- *The Kyiv Declaration on the Right to Legal Aid (2007)*, Conference on the Protection and Promotion of Human Rights through Provision of Legal Services, Best Practices from Africa, Asia and Eastern Europe Kyiv, Ukraine 27-30 March 2007, online: <http://www.irf.ua/index.php?option=com_content&view=article&id=5445:irf-news-en-5595&catid=74:news-law-en&Itemid=73>.
- *Parliamentary Supremacy Judicial Independence: Latimer House Guidelines for the Commonwealth*, 19 June 1998. The guidelines were further refined and endorsed by Commonwealth Heads of Government in November 2003 as the *Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government* (the Principles), online: <<http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>>.

APPENDIX B : Other Resources

American Bar Association, Standing Committee on Legal and Indigent Defendants, *Standards for the Provision of Civil Legal Aid* (August 2006), online: <<http://www.lsc.gov/sites/default/files/Grants/civillegalaidstds2006.pdf>>.

Council of Europe/European Court of Human Rights, *Guide on Article 6 - Right to a Fair Trial (civil limb)* (2013), online: http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

Council of Europe/European Court of Human Rights, *Guide on Article 6 - Right to a Fair Trial (criminal limb)* (2013), online: http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003), particularly, Chapter 7, “The Right to a Fair Trial: Part II – From Trial to Final Judgment”, online: <http://www1.umn.edu/humanrts/monitoring/hradmin.html>

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Template Brief Issue #1 – Early Access to Legal Assistance, online: <http://www.opensocietyfoundations.org/sites/default/files/legal-tools-early-access-20120424.pdf>

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