

# The Right to Counsel

A Guide to International Law Rights to  
Legal Assistance and Representation



Lawyers' Rights Watch Canada 2021



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## I. INTRODUCTION

A fair legal system that is based on the rule of law<sup>1</sup> is fundamental for a sustainable, just, and inclusive society. The complexities of international and domestic legal systems, however, often make accessing justice a challenging and overwhelming experience for those without appropriate legal training and especially for vulnerable and marginalised individuals, who are constantly faced with violations of their most fundamental rights.<sup>2</sup> Ensuring access to counsel is therefore key to achieving the targets set out in the Sustainable Development Goals,<sup>3</sup> as access to counsel helps people

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<sup>1</sup> In “The rule of law and transitional justice in conflict and post-conflict societies - Report of the Secretary-General” (23 August 2004) the UN Secretary-General described 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.” online: <<http://www.un.org/ruleoflaw/files/2004%20report.pdf>>.)

<sup>2</sup> United Nations Office on Drugs and Crime & United Nations Development Programme, “Global Study on Legal Aid” (2016) at pg 5, online: <[https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global\\_Study\\_on\\_Legal\\_Aid\\_-\\_FINAL.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf)>.

<sup>3</sup> UN General Assembly, *Transforming our world: the 2030 Agenda*

who come in contact with the justice system to claim their internationally protected rights through procedures that are fair, reliable, and legitimate.

The right to counsel means more than simply having access to a lawyer. It also entails the right to have adequate time and facilities to prepare for one's defence, to choose one's own counsel, to defend oneself in person, and to have legal assistance assigned "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."<sup>4</sup> These elements of the right to counsel show that it is a requirement of fair trial and due process guarantees and necessary to the protection of other fundamental rights.

The structure and functioning of legal systems varies greatly from country to country, but certain fundamental principles of justice that form part of customary international law<sup>5</sup> must be respected everywhere.

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for Sustainable Development, 21 October 2015, A/RES/70/1, online: <https://www.refworld.org/docid/57b6e3e44.html>.

<sup>4</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, online: <<https://www.refworld.org/docid/3ae6b3aa0.html>>.

<sup>5</sup> Article 38 of the Statute of the International Court of Justice lists, in its item "c", the general principles of law among the sources of international law. Such general principles can be used to provide a standard when a custom or treaty is lacking on a specific subject matter

International law and standards are thus important to help States understand where their obligations lie and how they can comply with these obligations to ensure that the fundamental rights and freedoms of every individual are duly guaranteed. As a result, this guide focuses on the international and regional legal provisions that address the right to counsel and its main components, as well as on jurisprudence from international and regional human rights bodies and on the opinions of scholars and experts on the issue.

Given the inherent complexity of any legal system and the different elements that make up the right to counsel, public awareness of the right to counsel is a critical component of a legal system operating according to the rule of law and in compliance with international human rights laws and standards. Understanding the right to counsel is important so that individuals and their advocates can grasp its fundamental elements in criminal and in civil proceedings involving determination of rights and obligations.<sup>6</sup>

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(United Nations, *Statute of the International Court of Justice*, 18 April 1946, online: <https://www.refworld.org/docid/3deb4b9c0.html>).

<sup>6</sup> United Nations Development Programme, “Programming for Justice: Access for All – a Practitioner’s Guide to a Human Rights-



This guide aims to assist readers in gaining a comprehensive understanding of the right to counsel. It presents a compilation of the main international and regional treaties, instruments, and cases that set out the duties of States' to respect and ensure the right to legal counsel. In this sense, the guide highlights the importance of the right to counsel as a right in itself and as a right to guarantee other rights, and sheds light on the ways to strengthen this right as part of States' duties to ensure fundamental rights to fair and impartial justice and the rule of law.

The Guide is aimed at actors of the legal and criminal justice systems, government authorities, officials from international and regional organisations, civil society organizations, and victims of human rights violations. It may be used by persons in every country as a means to promote and advance the right to counsel nationally, regionally, and internationally.

The guide is divided into five sections, starting with this brief introduction, where its purpose, importance, and audience are set out. Part II discusses the duty of States in

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Based Approach to Access to Justice” (18 March 2005), at 140, online: <[http://www.un.org/ruleoflaw/files/Justice\\_Guides\\_ProgrammingForJustice-AccessForAll.pdf](http://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf)>.

implementing international and regional human rights law and standards, including the right to counsel. Part III describes the essential elements of the right to counsel as set out in international and regional treaties, instruments, and cases. Part IV addresses the remedies for violations of the right to counsel. Part V concludes with some key remarks on the importance of the right to counsel, underlining some of the ways in which this right can be strengthened.

## II. DUTY OF STATES

International human rights instruments have been created to promote and protect the fundamental rights and freedoms of every individual and to prompt States to assume full responsibility for the human beings within their jurisdiction. The body of international human rights law, formed by treaties and customary law, together with other instruments such as declarations, guidelines and principles adopted internationally, establish obligations which States are bound to respect. This means that by becoming party to treaties, States assume duties to respect, protect, and fulfil human rights.<sup>7</sup>

The responsibility to respect entails refraining from interfering with the enjoyment of human rights, whereas the responsibility to protect requires protection from human rights abuses. The responsibility to fulfil, in turn, entails taking positive action for the enjoyment of human rights.<sup>8</sup> In accordance with these obligations, States must take human rights into account in all their undertakings and act to make the enjoyment of these rights a reality for all.

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<sup>7</sup> Office of the High Commissioner for Human Rights, “International Human Rights Law”, (2018) online: <<https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>>.

<sup>8</sup> *Ibid.*

The main way in which States fulfil their human rights obligations is by adopting domestic measures and legislation compatible with their treaty obligations and duties. But they should also engage in efforts to raise awareness on human rights, to support the creation of independent institutions for promoting and protecting rights, to provide effective remedy for violations, and to promote education.<sup>9</sup>

***Regional Human Rights Frameworks:*** International law does not prescribe what method States should adopt when domestically implementing their international obligations. It is thus up to States to decide how these obligations will be discharged. In this regard, regional human rights provisions are important because countries from a particular region may have a shared goal of protecting human rights in that region and have more proximity to influence each other's behaviour regarding compliance with human rights standards. Moreover, regional systems also allow regional values to be taken into account – to some extent – in the definition and

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<sup>9</sup> United Nations Special Rapporteur on the Situation of Human Rights Defenders, “What are the obligations of States?” (2018), online: <<https://www.protecting-defenders.org/en/content/what-are-obligations-states>>

implementation of human rights norms. Finally, regional systems enable the creation of enforcement mechanisms that are more aligned with local conditions.<sup>10</sup>

***States' Duty of Good Faith:*** Regardless of the chosen method of implementation, States must respect the principle of *pacta sunt servanda*, which means that treaties are expected to be executed in good faith. States must, therefore, comply with their duties and refrain from restricting the substance and scope of their commitments by opting for methods of implementation which are less onerous than others.<sup>11</sup>

A State cannot justify a breach of its international obligations under the argument that it is following the provisions of a domestic law because the State, through all its branches of power, is responsible for every aspect of its internal rule-making.<sup>12</sup> Hence, when a State fails to observe its international obligations, for instance by enacting

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<sup>10</sup> Christof Heyns, David Padilla & Leo Zwaak, "A schematic comparison of regional human rights systems: an update," (2006) 3:4 Sur. Revista Internacional de Direitos Humanos 160 at 163-164, online:: <<https://sur.conectas.org/en/schematic-comparison-regional-human-rights-systems/>>.

<sup>11</sup> Christian Tomuschat. *Human Rights – between idealism and realism*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2008) at 111.

<sup>12</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed (Oxford: Oxford University Press, 2008) at 34.

legislation that goes against the provisions of a ratified treaty, it commits a breach of international law.<sup>13</sup> It is important to note, however, that a State will only incur in international responsibility for a breach of its international human rights obligations if it has failed to provide the alleged victim with an adequate remedy.<sup>14</sup> This is because the legal obligation of States to protect human rights entails not only a duty to prevent and punish violations, but also to restore rights or provide compensation.<sup>15</sup>

The full implementation of human rights obligations by a State can only be achieved if those obligations are enforced by judicial, administrative and other internal decisions or actions. Therefore, States have a specific interest in ensuring that those involved in the administration of justice have appropriate knowledge of international human rights norms and have the conditions to implement them. This is especially true when it comes to ensuring that the right to counsel is respected in both law and practice, as the right to counsel is both a right in itself

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<sup>13</sup> *ibid* at 35.

<sup>14</sup> Office of the High Commission for Human Rights (OHCHR) and International Bar Association (IBA), “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers” (July 2003), HR/P/PT/9, at 18, online (pdf): <<https://www.ohchr.org/Documents/Publications/training9add1.pdf>>.

<sup>15</sup> *ibid* at 19

and a right that enables the protection of other fundamental rights.

***States of Emergency:*** Although the International Covenant on Civil and Political Rights (ICCPR) does not include access to counsel in the list of non-derogable rights, the Human Rights Committee has recognised that fair trial guarantees must not be dispensed with when necessary to preserve non-derogable rights. The Committee has highlighted that:

(...) the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.<sup>16</sup>

As a key element of fair trial, the right to counsel is therefore crucial to protect non-derogable rights. As a result, the duty of States to ensure respect for the right to counsel implies that this right must be safeguarded at all times, including during times of emergency.

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<sup>16</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, at para 16, online: <https://www.refworld.org/docid/453883fd1f.html>.

### III. ESSENTIALS OF THE RIGHT TO COUNSEL

One of the main elements of the rule of law is “accessible and impartial dispute resolution mechanisms that allow justice to be delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.”<sup>17</sup> A fair justice system is, therefore, a key component of the rule of law.

A fair justice system that is driven by the right to a fair trial and due process is intrinsically connected with the right to counsel. As already mentioned, the right to counsel has both substantial and procedural value, as it aims not only at ensuring reliable results, but also at guaranteeing a fair process through which those results are achieved.<sup>18</sup>

Having one’s right to counsel violated often leads to routine forfeiture of rights or to substantial injustices.<sup>19</sup> The

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<sup>17</sup> World Justice Project, “The WJP Rule of Law Index” (2016), online:  
<[https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf)>.

<sup>18</sup> J.D. King, “Life and Liberty: The Evolving Right to Counsel”, (2013) 48:1 Harv. C.R.-C.L. L. REV 36 at 45-46, online:  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2037500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037500)>.

<sup>19</sup> Russell Engler, “Toward a Context-Base Access to Counsel through “Access to Justice” Initiatives”, (2006) 40:3-4 Clearinghouse Review 196, online:



individual and social costs of losing basic rights such as housing, healthcare, and family are huge and often exceed, for instance, those associated with incarceration.<sup>20</sup> Therefore, ensuring respect for the right to counsel is key for a fair justice system that is legitimate, accessible to all, and based on the rule of law.

Every actor in the justice system, including judges, prosecutors, public defenders, lawyers, clerks, mediators, and investigators, has a shared responsibility in ensuring that the right to counsel of those who come in contact with the justice system is respected. The recognition of this shared responsibility entails a shift in the way the roles of these actors are generally perceived, requiring them to play an active role to maintain the system's impartiality, fairness, and legitimacy.<sup>21</sup>

The importance of the right to counsel is reflected in a variety of international and regional human rights instruments that contain provisions setting out States' obligations to respect and protect individuals' right to

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<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=944542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=944542)>.

<sup>20</sup> Paul Marvy & Debra Gardner, "A Civil Right to Counsel for the Poor", (2005) 3:3 at 1 HUM RTS online:

<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/huri32&div=35&id=&page=>>>.

<sup>21</sup> *supra* note 19 at 198.

counsel in both civil and criminal matters. These provisions often specify key elements of the right to counsel, all of which must be safeguarded by States in accordance with their international obligations of ensuring a fair justice system based on the rule of law.

### **3.1. The right to counsel as a precondition of a fair trial**

#### ***a) International legal framework***

The Universal Declaration of Human Rights (UDHR) touches upon fair trial rights by establishing, in its article 11, that Though a non-binding instrument, the UDHR contains principles and values that are recognised as *jus cogens* and thus binding customary international law (CIL) obligations on all nations.<sup>22</sup> *Jus cogens* norms are:

“...norms accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same

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<sup>22</sup> The concept of *jus cogens* was officially recognized with the inclusion of the peremptory norms of general international law in articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (Antônio Augusto Cançado Trindade. “Jus Cogens: the determination and the gradual expansion of its material content in contemporary international case-law” in XXXV *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (Washington D.C.: General Secretariat of the OAS, 2009) at 7).

character”<sup>23</sup>

The provisions of the UDHR have been enshrined by other legally binding international instruments, thus reflecting the commitment of UN member States to their implementation.<sup>24</sup> Particularly when it comes to a fair justice system, the Human Rights Committee has highlighted that deviating from principles of fair trial is prohibited at all times.<sup>25</sup> While the right to counsel is not recognised as *jus cogens*, it is a right required to ensure respect for *jus cogens* norms, such as the prohibition of torture.

In addressing rights to a fair trial and due process, the International Covenant on Civil and Political Rights (ICCPR) establishes that the principles of equality before the courts and of presumption of innocence, as well as the right to a fair and public hearing by a competent and

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<sup>23</sup> International Law Commission, Report on the work of the seventy-first session (2019), A/74/10, Chapter V, p. 142, online: <<https://legal.un.org/ilc/reports/2019/english/chp5.pdf>>.

<sup>24</sup> Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law,” (1995) 25 Ga J Int'l & Comp L 287 at 144, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1957798](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957798)>.

<sup>25</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, at para 6, online: <<https://www.refworld.org/docid/478b2b2f2.html>>.

independent tribunal, *shall* be respected:

14.1. 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. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

***Right to non-discrimination and fairness:*** The right to equality before courts and tribunals and the right to a fair and public hearing require respect for the principle of equality of arms, by which the same procedural rights are ensured to all parties unless there are justified distinctions based on law.<sup>26</sup> Ultimately, the principle of equality of arms aims at ensuring that a litigant's claim is resolved based on justice and not on resources.<sup>27</sup> Therefore, respect

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<sup>26</sup> *ibid* at paras 8, 13.

<sup>27</sup> MF Davis, "Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law", (2013) 122:8 Yale LJ

for the right to counsel as a condition of a fair hearing is directly related with respect for the principle of equality of arms.

In *Larrañaga v. The Philippines*,<sup>28</sup> a case dealing with death sentence following an unfair trial, the Human Rights Committee found that the State violated the principle of equality of arms when the trial judge refused to hear the remaining defence witnesses on the ground that the evidence was ‘irrelevant and immaterial’ and because of time constraints. In this regard, while the Committee recognised that it is for the national courts to evaluate facts and evidence in a particular case, it concluded that the trial court’s denial to hear the remaining defence witnesses without any further justification constituted a violation of article 14 of the ICCPR, especially given the seriousness of the charges involved in the case.

The Human Rights Committee has time and again emphasised the importance of a fair and public hearing as an intrinsic component of the right to a fair trial. In *Guerra*

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at 2280, online:

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2228814](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228814)>.

<sup>28</sup> *Francisco Juan Larrañaga v. the Philippines*, Communication No. 1421/2005, at para 7.7, Human Rights Committee, 14 September 2006, online: <<http://hrlibrary.umn.edu/undocs/1421-2005.html>>

*de la Espriella v. Colombia*,<sup>29</sup> a case in which the complainant was convicted in a trial with faceless judges in his absence and that of his counsel, the Committee emphasised that all criminal proceedings must provide the accused with the right to an oral hearing, at which he/she may appear in person or be represented by counsel and bring evidence and examine witnesses. Given that the complainant did not have his right to an oral hearing respected during the proceedings that culminated in his conviction and sentencing, and taking into account that interrogations were conducted without respect for minimum fair trial guarantees, the Committee found that the complainant's right to a fair trial had been violated.

Similarly, in *Y. M. v. Russia*,<sup>30</sup> the Human Rights Committee found that the State party violated the complainant's rights to a fair and public hearing when it failed to explain why it was necessary to close the entire trial of the complainant, including the hearings of the facts

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<sup>29</sup> *José Elías Guerra de la Espriella v. Colombia*, Communication No. 1623/2007, Human Rights Committee 26 March 2010, at para 9.3, online:

<[http://www.worldcourts.com/hrc/eng/decisions/2010.03.18\\_Guerra\\_de\\_la\\_Espriella\\_v\\_Colombia.pdf](http://www.worldcourts.com/hrc/eng/decisions/2010.03.18_Guerra_de_la_Espriella_v_Colombia.pdf)>.

<sup>30</sup> *Y. M. v. Russia*, Communication No. 2059/2011, Human Rights Committee, 5 July 2010, at para 92, online: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f116%2fD%2f2059%2f2011&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f116%2fD%2f2059%2f2011&Lang=en).

and evidence related to the charges of murder, robbery and illegal possession of weapons, instead of closing only part of the trial in order to protect rights of minors, or intimate and personal information of parties in the trial.

***Right to Presumption of Innocence:*** The right of an accused person to be presumed innocent until proved guilty is also a fundamental component of fair trial and due process. Given the serious consequences of a criminal conviction, a fair trial requires the prosecution to have concrete evidence to prove that the accused person is indeed guilty of the criminal charges against him/her. In this context, due process calls for access to effective defence by the accused person, as a violation of the right to counsel may negatively impact an accused person's right to be presumed innocent.

The effectiveness of defence must be both personal, which relates to the ability and conduct of defence counsel, and structural, which relates to the functioning of the justice system as a whole.<sup>31</sup> Effectiveness can thus be understood as equating with fairness, which is a product

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<sup>31</sup> E.B. Primus, "The Illusory Right to Counsel", (2011) 37:3 N. U. L. Rev 597 at 602-603 online: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1406&context=articles>>.

both of procedural rigour and of the competence of counsel. This means that a trial is fair when the right to counsel is manifested both in the competence of individual counsel and in the adequacy of the adversarial system.<sup>32</sup>

Although systemic defects are independent from the competence of counsel,<sup>33</sup> States' duties to ensure fair trial and due process guarantees entail ensuring both the effectiveness of counsel (by, for instance, providing adequate training to legal professionals) and of the justice system (by, for example, providing adequate funding for courts, legal aid systems, etc.). This is important not only for those who come in contact with the law in either civil or criminal cases, but for every member of society, as a fair justice system that is accessible to all is paramount for achieving peaceful, just, and inclusive societies.<sup>34</sup>

In *Owen v. France*,<sup>35</sup> the Human Rights Committee recalled that the presumption of innocence is fundamental

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<sup>32</sup> Joe Margulies, "Resource Deprivation and the Right to Counsel", (1990) 80:3 Crim. L. & Criminology 674 at 676, online: <<https://www.jstor.org/stable/1143896?seq=1>>.

<sup>33</sup> *ibid* at 725.

<sup>34</sup> United Nations, "Sustainable Development Goals, Goal n. 16", (2016) online: <<https://sustainabledevelopment.un.org/sdg16>>.

<sup>35</sup> *John Owen v. France*, Communication No. 1620/2007, Human Rights Committee, 1 April 2011, at para 9.6, online: <<https://digitallibrary.un.org/record/704322?ln=en>>.



to the protection of human rights and that it imposes on the prosecution the burden of proving the charge against the accused. The Committee noted that the applicant was not given a proper defence owing to his lawyer's lack of diligence and to the fact that on one of the hearings, he was represented not by his counsel, but by another who was not authorised to do so. As a result, the Committee concluded that the limited opportunity for defence available to the author led to the State party's courts to place a disproportionate burden of proof on the author, thus violating his right to be presumed innocent until proved guilty.

***Other Elements of the Right to Counsel:*** In addition to addressing the principles of equality before the courts and presumption of innocence and the right to a fair and public hearing by a competent and independent tribunal, article 14 of the ICCPR addresses other fundamental fair trial guarantees. Article 14 highlights the main elements of the right to counsel, such as the right to have adequate time and facilities to prepare for one's defence and to communicate with counsel of one's own choosing; the right to defend oneself in person or through legal assistance of one's own choosing; and the right to have legal assistance

assigned to oneself when the interests of justice so require and without payment in the case of lack of sufficient means:

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

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(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;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

The right to prompt access to counsel upon arrest and detention is crucial both to guarantee the detainee's right to

counsel and to protect his/her physical and mental integrity.<sup>36</sup> The same is true of the right to the free assistance of an interpreter, as ignorance of the language used by a court or difficulty in understanding it may constitute a major obstacle to the right of defence.<sup>37</sup>

The right to prompt access to counsel is particularly important in cases of secret and/or *incommunicado* detention, which leaves the individual outside the cloak of any legal protection and thus constitutes the gravest violation of the right to liberty.<sup>38</sup> The Committee against Torture, which oversees States parties' compliance with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, has recommended that State parties endeavour to abolish *incommunicado* detention. The Committee has also urged State parties to ensure that all persons deprived of their liberty are guaranteed the right to consult a lawyer of their choice, to have a family member or person of their choice notified of

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<sup>36</sup> *supra* note 14 at 235.

<sup>37</sup> *ibid* at 291.

<sup>38</sup> Working Group on Arbitrary Detentions, "Compilation of Deliberations, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", (17 October 2013), at para 60, online: <<https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>>.

their arrest and current place of detention, and to meet privately with a lawyer.<sup>39</sup>

In *Aarrass v. Morocco*,<sup>40</sup> the Committee against Torture recalled that the right of detainees to promptly receive independent legal assistance is amongst the main basic guarantees that must be applied to all persons deprived of their liberty in order to prevent them from being subjected to torture. The Committee highlighted that it is precisely while they cannot communicate with their families and lawyers that suspects are most vulnerable to torture. The Committee, therefore, found the State party in violation of the Convention due to, amongst others, the fact that the complainant was not guaranteed access to legal assistance, particularly during his time in custody, and that he was allegedly forced to sign statements in a language that he did not know well.

### ***Right to Counsel in other IHRL Instruments: The***

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<sup>39</sup> UN Committee Against Torture (CAT), *Report of the Committee against Torture: Forty-third session (2-20 November 2009); Forty-fourth session (26 April - 14 May 2010)*, 2010, A/65/44, at para 9, online: <https://www.refworld.org/docid/4eef70112.html>.

<sup>40</sup> *Ali Aarrass v. Morocco*, Communication no. 477/2011, UN Communication Against Torture (CAT), 19 May 2014, at para 10.3, online: [http://www.worldcourts.com/cat/eng/decisions/2014.05.19\\_Aarrass\\_v\\_Morocco.pdf](http://www.worldcourts.com/cat/eng/decisions/2014.05.19_Aarrass_v_Morocco.pdf).

importance of guaranteeing the right to counsel is also recognised in other international instruments besides the ICCPR. For instance, the Convention on the Rights of the Child provides:

37. States Parties shall ensure that:

(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.

The Convention Relating to the Status of Refugees deals with the right to counsel within the broader right to free access to the courts, prescribing that:

16.1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

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*.

Likewise, the Convention Relating to the Status of Stateless Persons establishes that:

16.1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.

2. A stateless person 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*.

The Convention on the Elimination of All Forms of Racial Discrimination does not make specific reference to the right to counsel. Nevertheless, the Committee on the Elimination of Racial Discrimination, which is responsible for overseeing the States parties' compliance to the Convention, has recommended that States parties strive to supply the needed legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights.<sup>41</sup> The Committee has also called upon States parties to guarantee to all arrested persons, whatever the racial, national or ethnic group to which they belong, the enjoyment of the fundamental rights of defence, including the right to the assistance of counsel.<sup>42</sup>

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also does not deal directly with the right to counsel, but it does address the right to prompt, fair and adequate compensation for victims of torture or ill-treatment. In this context, the

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<sup>41</sup> Committee on the Elimination of Racial Discrimination, *General Comment n. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, 2005, at para 7, online: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1\\_Global/INT\\_CERD\\_GEC\\_7503\\_E.doc](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_GEC_7503_E.doc).

<sup>42</sup> *ibid* at para 23.

Committee against Torture has clarified that adequate compensation for victims of torture or ill-treatment should provide for legal or specialised assistance, including free legal aid, and other costs associated with bringing a claim for redress.<sup>43</sup> The Committee has also affirmed that provision of means for the rehabilitation of victim should include, among others, legal services.<sup>44</sup>

The Basic Principles on the Role of Lawyers, though a non-binding instrument, prescribes the need for any detained person to have prompt access to a lawyer:

7. 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.

The Basic Principles further set out important guarantees for the work of lawyers which are fundamental to enable the free exercise of the legal profession and thereby safeguard clients' right to counsel.<sup>45</sup>

The Guidelines on Justice Matters Involving Child

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<sup>43</sup> UN Committee Against Torture (CAT), *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012, at para 10 and 30, online: <<https://www.refworld.org/docid/5437cc274.html>>.

<sup>44</sup> *ibid* at para 11.

<sup>45</sup> See principles 16 to 22.

Victims and Witnesses address the right of child victims to have access to legal and other assistance and to be informed of the availability of legal advice or representation:

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, inter alia:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(...)

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

Also dealing with children in contact with the justice system, the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice have urged States to prevent and respond to incidents of violence against children by providing them with adequate legal



services:

23. Acknowledging the complementary roles of the criminal justice system, child protection agencies, health, education and social service sectors and, in some cases, informal justice systems in creating a protective environment and preventing and responding to incidents of violence against children, Member States are urged, as appropriate:

(...)

(g) To ensure that adequate medical, psychological, social and legal services sensitive to the needs of child victims of violence are in place to enhance the criminal justice management of cases involving violence against children, to encourage the development of specialized health services, including comprehensive, free and confidential forensic examinations by trained health providers and appropriate treatment, including HIV-specific treatment, and to facilitate and support inter-agency referrals of child victims for services;

In the context of juvenile justice, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) include the right to counsel and the right to legal aid as some of the basic procedural rights to be guaranteed to juveniles:

7.1 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.

Complementing the Standard Minimum Rules for the

Administration of Juvenile Justice, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) call for States to take account of the distinctive needs of women prisoners in the application of the Standard Minimum Rules, including with regard to receiving legal advice:

#### Rule 2

1. Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice; information about prison rules and regulations, the prison regime and where to seek help when in need in a language that they understand; and, in the case of foreign nationals, access to consular representatives as well.

(...)

#### Rule 7

1. If the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.

The Body of Principles for the Protection of All

Persons under Any Form of Detention or Imprisonment prescribes guarantees for persons deprived of liberty, including the right to communicate with counsel:

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

The Body of Principles further establishes that:

Principle 17

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.

The Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty highlight the importance of legal assistance as a fundamental guarantee of fair trial for people facing capital punishment:

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

Finally, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) mentions that:

18. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Although the Declaration makes no explicit mention of the right to counsel, it could be argued that the term “decision-making institutions” could apply to courts. This is strengthened by article 40 of the Declaration, which reinforces indigenous peoples’ right to just and fair procedures for the resolution of conflicts and to access effective remedies for infringement of their rights:

40. Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

These provisions in both binding and non-binding international instruments make it clear that the right to counsel is a well-accepted notion in international law. It is the duty of States to ensure the right to counsel and all of its composing elements are guaranteed both in paper and in

practice to every individual within their jurisdiction.

## ***b) Regional legal frameworks***

### ***African Human Rights System***

The African human rights system was created with the support of the African Union and it is the youngest of the three regional human rights systems currently in function.<sup>46</sup> The African human rights system is based on the African Charter on Human and Peoples' Rights ("the Banjul Charter")<sup>47</sup> and it creates a Commission and a Court, which are the two main bodies for interpreting the African human rights instruments and overseeing their enforcement by member States.

The Banjul Charter addresses fair trial and due process guarantees, making specific mention to the right to counsel:

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

(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and

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<sup>46</sup> International Justice Resource Center, "African Human Rights System" (2018), online: <https://ijrcenter.org/regional/african/#gsc.tab=0>.

<sup>47</sup> *African Charter on Human and Peoples' Rights*, ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Online: <https://www.achpr.org/legalinstruments/detail?id=49>.

guaranteed by conventions, laws, regulations and customs in force;

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

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

(d) the right to be tried within a reasonable time by an impartial court or tribunal.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, although vaguely, addresses the duty of States Parties to provide legal support for victims of harmful practices:

5. States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

(...)

c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

On the other hand, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa is a bit more specific when it comes to the duties of States Parties regarding legal assistance:

4.2 Ensure the provision of legal assistance to Older Persons in

order to protect their rights;

and

5. Ensure that, in the event of incapacity, Older Persons shall be provided with legal and social assistance in order to make decisions that are in their best interests and wellbeing;

When addressing the rights of the child accused of infringing criminal law, the African Charter on the Rights and Welfare of the Child reproduces some of the main guarantees contained in article 14.3 of the ICCPR:

17.2. State Parties to the present Charter shall in particular:

(...)

(c) ensure that every child accused of infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

Also dealing with young persons in conflict with the law, the African Youth Charter establishes that it is the duty of African States to:

18.2(f) Ensure that accused and convicted young people are entitled to a lawyer.

The African Youth Charter further establishes that:

23.1. States Parties acknowledge the need to eliminate discrimination against girls and young women according to obligations stipulated in various international, regional and national human rights conventions and instruments designed to protect and promote women's rights. In this regard, they shall:

(...)

m) Develop programmes of action that provide legal, physical and psychological support to girls and young women who have been subjected to violence and abuse such that they can fully re-integrate into social and economic life;

Though it does not make a specific mention regarding the right to counsel, the African Union Convention on Preventing and Combating Corruption does address the minimum guarantees of a fair trial in criminal proceedings involving acts of corruption, corroborating the provisions of the African Charter of Human and Peoples' Rights:

14. Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter of Human and Peoples' Rights and any other relevant international human rights instrument recognised by the concerned States Parties.

The African Commission on Human and Peoples' Rights is a quasi-judicial body with jurisdiction over the rights set out in the Banjul Charter. By examining national



reports on the human rights situation in each State, adopting resolutions and declarations, and considering complaints submitted by Member States, individuals and NGOs, the Commission interprets the Banjul Charter and monitors States' compliance.

The Commission also adopts guidelines on different human rights issues to assist States in the implementation of regional human rights norms and standards. While non-binding, these guidelines complement the African charters and conventions by going into more detail on how States should proceed to prevent and remedy human rights violations.

For instance, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>48</sup> clarifies the essential elements of all fair legal proceedings, namely:

A.2. The essential elements of a fair hearing include:

- a. equality of arms between the parties to proceedings, whether they be administrative, civil, criminal, or military;
- b. equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex,

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<sup>48</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, online: <https://www.achpr.org/legalinstruments/detail?id=38>.

gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;

c. equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;

d. respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

e. adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

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;

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;

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;

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

j. an entitlement to an appeal to a higher judicial body.

In addition, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa specifies the rights that must be guaranteed during a criminal trial. In particular, the Principles highlight the principle of equality of arms for procedural equality

between the parties, the right to a fair hearing, and the right to be presumed innocent until proved guilty:

N.6 Rights during a trial:

a. In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor.

i. The prosecution and defence shall be allowed equal time to present evidence.

ii. Prosecution and defence witnesses shall be given equal treatment in all procedural matters.

b. The accused is entitled to a hearing in which his or her individual culpability is determined. Group trials in which many persons are involved may violate the person's right to a fair hearing.

(...)

e. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

i. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.

ii. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.

iii. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

The Principles and Guidelines also contains specific provisions with regard to the right to legal assistance of

## children facing criminal charges:

O.1 Every child arrested or detained for having committed a criminal offence shall have the following guarantees:

(...)

iii. to be provided by the State with legal assistance from the moment of arrest;

n. Every child accused of having committed a criminal offence shall have the following additional guarantees:

i. to be presumed innocent until proven guilty according to the law;

ii. to be informed promptly and directly, and in a language that he or she understands, of the charges, and if appropriate, through his or her parents or legal guardians;

iii. to be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;

iv. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;

v. 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;

vi. not to be compelled to give testimony or confess guilt; to examine or have examine adverse witnesses and to obtain the participation of witnesses on his or her behalf under conditions of equality;

(...)

The African Commission's Guidelines on Policing

Assemblies in Africa deals with the legal safeguards – including the right to access legal services – that must be ensured for persons who are detained in the context of assemblies:

23.2. The use of detention by law enforcement officials in the context of assemblies must conform to the provisions of the Africa Charter and, in particular, Parts 2 (General Protections) and 7 (Vulnerable Groups) of the African Commission's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. This includes the provision of safeguards, such as the presumptive right to bail and bond; the right to have detention reviewed without delay by a competent authority; and access to confidential and independent complaints mechanisms, legal services, family, interpreters and medical assistance; and the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.

The Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) mentions the right to access to a lawyer when touching upon the basic safeguards that must be awarded to persons deprived of their liberty:

I. A. Basic Procedural Safeguards for those Deprived of their Liberty

II. 20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their

liberty. These include:

(...)

c. The right of access to a lawyer;

As already mentioned, in addition to the African Commission on Human Rights, the African Union also comprises the African Court of Human and Peoples' Rights. The Court is the judicial organ in charge of ensuring the attainment of the goals of the African Union, in particular the objectives of the Banjul Charter and other human rights instruments ratified by the States concerned. It does so by receiving and analysing complaints submitted by member States, the Commission and other organs of the African Union, non-governmental organisations and individuals.<sup>49</sup>

The African Court of Human and People's Rights has ruled on several important cases related to the right to counsel. In *Mango v. Tanzania*, the Banjul Charter were violated because the applicants should have been promptly

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<sup>49</sup> The Court may only receive cases filed by individuals and non-governmental organisations with observer status before the African Commission if the State against which they are complaining have recognised the jurisdiction of the Court to accept cases from NGOs and individuals, see: African Court on Human and People's Rights, "Welcome to the African Court" (2018), online: <<http://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1>>.

informed of the evidence to support charges against them. An undue delay in providing the applicants with the witness statement constituted a violation of article 7(1)(c) of the Charter.<sup>50</sup>

In another case, *Mohamed Abubakari v. United Republic of Tanzania*, the African Court of Human and People's Rights held that since the applicant was not informed of the right to be assisted by counsel at the time of arrest, his right to access counsel under article 7 of the Charter was violated by the Respondent State. Additionally, the Court noted that when article 7 of the Charter is read together with Article 14 of the International Covenant on Civil and Political Rights (ICCPR), the accused is entitled to free legal assistance where the offence is serious, and the penalty provided by the law is severe. Thus, the Court held that the Respondent State should have provided the applicant, immediately and free of charge, the services of a lawyer throughout the proceedings. In failing to do so, the State violated both article 7 of the Charter and article 14 of the ICCPR.<sup>51</sup>

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<sup>50</sup> *Mango v. Tanzania*, (2018) Afr. Ct. H.P.R. No. 005/2015 at para 76, 78, 130 <<https://africanlii.org/afu/judgment/african-court/2018/8>>.

<sup>51</sup> *Mohamed Abubakari v. United Republic of Tanzania*, Merits, (2016) Afr. Ct. H.P.R. Application 007/2013 at para 122, 139 and 145,

In addition to the African Court on Human and Peoples' Rights, The African Commission on Human and Peoples' Rights has also ruled on cases under Article 7(1)(c) of the Charter. For example, in *Constitutional Rights Project (in respect of Lekwot and six others) v. Nigeria*, the Commission ruled that the right to counsel may be violated if intimidation and harassment of the counsel results in the his/her withdrawal from the case and if the accused is not granted another chance to procure new counsel.<sup>52</sup> In *Communications 64/92, 68/92, 78/92 (joined), Achuthan (on behalf of Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, the Commission has also found the State to be in violation of article 7(1)(c) of the African Charter when the applicants appeared without counsel before Court on a charge that carried the death penalty.<sup>53</sup>

This combination of both hard and soft law in the

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online: <<https://afchpr-commentary.uwazi.io/en/entity/yjjg470b1twjuv24ezp7am7vi?searchTerm=counsel&page=35>>.

<sup>52</sup> Franz Viljoen, "Overview of the African Regional Human Rights System" (1998) 3 Hum Rts L Afr 128 at 136 online: <<https://heinonline.org/HOL/P?h=hein.intyb/humrafr1998&i=136>>; *Constitutional Rights Project (in respect of Lekwot and six others) v. Nigeria*, Communication 87/93, (1993) ACHPR <<http://hrlibrary.umn.edu/africa/comcases/Comm87-93.pdf>>.

<sup>53</sup> *ibid.*



African Union provides a broad and detailed framework for protecting the rights to fair trial and due process, including the right to counsel. They constitute, therefore, important sources of law to guide African States in their duties towards individuals under their jurisdiction.

### *Inter-American Human Rights System*

The Inter-American human rights system was created within the Organisation of American States with the objective to promote peace, justice, and solidarity, and to protect states' sovereignty, territorial integrity, and independence.<sup>54</sup>

The Inter-American human rights system also contains a Commission and a Court and is composed by a series of human rights instruments that form the basis for the promotion and protection of human rights in the region. One of the main instruments of the Inter-American system is the American Declaration of the Rights and Duties of Man, which contains important provisions on fair trial and due process guarantees:

XVIII. Every person may resort to the courts to ensure respect

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<sup>54</sup> Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, Article 1, online: <<https://www.refworld.org/docid/3ae6b3624.html>>.

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.

(...)

XXVI. Every accused person is presumed to be innocent until proved guilty.

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.

The American Convention on Human Rights, another major instrument of the Inter-American human rights system, also contains provisions on the right to a fair trial and due process, highlighting the minimum guarantees that must be awarded to persons accused of crimes:

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.
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:
  - a. the right of the accused to be assisted without charge by a

translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

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

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

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;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

The Inter-American Convention on Protecting the Human Rights of Older Persons prescribes that older persons must have their right to access to justice duly guaranteed by the state:

31. Older persons have 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 them or for the determination of their rights and obligations of a civil, labor, fiscal, or any other nature.

States Parties shall ensure effective access to justice for older persons on an equal basis with others, including through the provision of procedural accommodations in all legal and administrative proceedings at any stage.

More generally, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) also addresses basic procedural guarantees for women subjected to violence:

7. The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

(...)

f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

Though non-binding, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas establish that those deprived of liberty shall have their right to access to justice and to due process and fair trial duly guaranteed:

Principle V. Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.

Persons deprived of liberty shall have the right to be promptly informed in a language they understand of the reasons for their deprivation of liberty and of the charges against them, as well as to be informed of their rights and guarantees; to have access to a translator or interpreter during the proceedings; and to communicate with their family. They shall have the right to a hearing and a trial, with due guarantees and within a reasonable time, by a judge, authority or official who is legally authorized to exercise judicial functions, or to be released without prejudice to the continuation of the proceedings; to appeal the judgment to a higher judge or court; and to not be subjected to a new trial for the same cause, if they have been acquitted by a non-appealable judgment in conformity with due process of law and international human rights law.

Three criteria shall be taken into consideration when determining if a judicial proceeding complied with the reasonable time requirement: the complexity of the case; the conduct of the applicant; and the conduct of the relevant authorities.

The Inter-American Court of Human Rights (IACtHR) is the judicial body responsible for applying and interpreting the American Convention on Human Rights with regard to those State parties who have recognised the Court's jurisdiction.<sup>55</sup> Only the Inter-American Commission on Human Rights (IACHR) and State parties may submit cases to the IACtHR; victims may submit briefs containing pleadings, motions, and evidence autonomously.<sup>56</sup> In these cases, the Rules of Procedure of

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<sup>55</sup> *ibid.*

<sup>56</sup> Organization of American States (OAS), *Rules of Procedure of the*

the Inter-American Court recognise the importance of the right to counsel by prescribing the appointment of a defender to assist victims that lack legal representation:

37. In cases where alleged victims are acting without duly accredited legal representation, the Tribunal may, on its own motion, appoint an Inter-American defender to represent them during the processing of the case.

The IACtHR's recognition of the need to respect the right to counsel is also reflected in its decisions. In *Acosta Calderón v. Ecuador*,<sup>57</sup> a case involving the arrest and preventative detention of a complainant for alleged drug trafficking, the Court held that the State violated the fair trial provisions of the American Convention on Human Rights when it did not ensure the right to counsel to the accused. According to the Court, the detainee must be notified of his right to contact a third party, including a lawyer, when arrested and before offering his first statement before the authorities.

### European Human Rights System

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*Inter-American Commission on Human Rights*, 109<sup>th</sup> Special Session December 2000, Articles 25, 35, 36, online: <[https://www.oas.org/xxxvga/english/doc\\_referencia/Reglamento\\_CIDH.pdf](https://www.oas.org/xxxvga/english/doc_referencia/Reglamento_CIDH.pdf)>.

<sup>57</sup> *Acosta Calderón v. Ecuador, Merits, reparations and costs*, (2005) IACHR Series C No 129, online: <[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_129\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_129_ing.pdf)>.

The European human rights system emerged with the creation of the Council of Europe in 1949, in the aftermath of the Second World War. The Council of Europe was created with the aim of promoting human rights and fundamental freedoms and preventing the region from being once again consumed by war.

It is important to highlight that the Council is independent from the European Union and it currently counts 47 member states. Its first international instrument was the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights. The Convention, drafted in 1950, was created to promote fundamental freedoms, political democracy and the rule of law.<sup>58</sup>

Like the other regional instruments already discussed, the European Convention on Human Rights also provides for the right to a fair trial of individuals charged with criminal offences. The Convention further provides for the principle of presumption of innocence:

6.1 In the determination of his civil rights and obligations or of

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<sup>58</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms – Preamble*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, online: <<https://www.refworld.org/docid/3ae6b3b04.html>>.

any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

6.2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

In *Salduz v. Turkey*,<sup>59</sup> a case involving a minor taken into custody for allegedly participating in an unlawful demonstration, the complainant argued his defence rights had been violated as he had been denied access to a lawyer while in custody, leading him to confess to the offences due to duress and to be convicted. The European Court noted that to remain effective, access to a lawyer had to be provided from the first police interview of a suspect, which did not happen in this case. Even if counsel was provided to the complainant later on, the Court emphasised that the damages caused by the denial of the complainant's right to counsel in the first stages of investigation affected his defence rights irretrievably. The Court thus concluded the

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<sup>59</sup> *Salduz v. Turkey*, Application, (2008) ECHR n. 36391/02, online: <<https://hudoc.echr.coe.int/eng?i=001-89893>>.



State violated article 6 of the European Convention on Human Rights.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence establishes that States have the responsibility of ensuring, among others, legal counselling for victims in order to facilitate their recovery:

20.1 Parties shall take the necessary legislative or other measures to ensure that victims have access to services facilitating their recovery from violence. These measures should include, when necessary, services such as legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment.

Likewise, the Council of Europe Convention on Action against Trafficking in Human Beings prescribes that States shall adopt counselling on legal rights and assistance to enable victims' rights to be presented at criminal proceedings against offenders:

12.1 Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

(...)

d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;

When dealing with consent to extradition, the Third Additional Protocol to the European Convention on Extradition emphasises the importance of guaranteeing the right to counsel to persons who consent to or renounce extradition:

4.2. Each Party shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the legal consequences. To that end, the person sought shall have the right to legal counsel. If necessary, the requested Party shall ensure that the person sought has the assistance of an interpreter.

In a more general approach, the European Convention on the International Validity of Criminal Judgements highlights the right to legal assistance for persons sentenced *in absentia* or by an *ordonnance pénale*:

27. For the purpose of lodging an opposition and for the purpose of the subsequent proceedings, the person sentenced in absentia or by an *ordonnance pénale* shall be entitled to legal assistance in the cases and on the conditions prescribed by the law of the requested State and, where appropriate, of the requesting State.

Though non-binding, the European Agreement relating to Persons Participating in Proceedings of the

European Court of Human Rights also addresses the right to counsel by highlighting the right of persons under detention to consult with a lawyer:

3.2 As regards persons under detention, the exercise of this right shall in particular imply that:

(...)

c such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Court, or any proceedings resulting therefrom.

Likewise, the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights addresses the rights of persons under detention to consult with a lawyer in order to obtain counsel for applications before the European Commission of Human Rights:

3.2 As regards persons under detention, the exercise of this right shall in particular imply that:

(...)

c such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Commission, or any proceedings resulting therefrom.

### **3.2. The right to have adequate time and facilities to**

## **prepare for one's defence**

### ***a) International legal framework***

The right to have adequate time and facilities to prepare for one's defence is prescribed by article 14, paragraph 3 (b), of the ICCPR.

The Human Rights Committee, in its General Comment No. 13 on article 14 of the ICCPR, has clarified that the concept of “adequate time” for the preparation of defence and communication of counsel of own choosing depends on the circumstances of each case and that if counsel feels that the time to prepare the defence was insufficient, he/she should request the adjournment of the trial.<sup>60</sup>

When it comes to the notion of “adequate facilities”, the Committee has affirmed adequate facilities also include access to documents and other evidence necessary to prepare the case of the accused, as well as the opportunity to engage and communicate with counsel.<sup>61</sup> The Committee has further clarified that counsel must be able to

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<sup>60</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, at para 32, online: <https://www.refworld.org/docid/453883f90.html>.

<sup>61</sup> *ibid* at 33.

communicate with the accused in conditions of confidentiality and without any restrictions, influences, pressures or undue interference from any quarter.<sup>62</sup>

The failure to prepare one's defence substantially affects every stage of a case and it defeats the counsel's ability to challenge procedural and substantial aspects of the case.<sup>63</sup> Indeed, where adequate fact investigation is made difficult or impossible, effective representation is essentially impossible.<sup>64</sup>

In *Bee and Obiang v. Equatorial Guinea*,<sup>65</sup> the Human Rights Committee found the State party to be in violation of the ICCPR when victims allegedly arrested arbitrarily and submitted to torture and ill-treatment were not notified of the grounds for the charges against them until two days before the trial, depriving them of sufficient time to prepare their defence and making it impossible for them to select their defence lawyers.

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<sup>62</sup> *ibid* at 34.

<sup>63</sup> *supra* note 32 at 679.

<sup>64</sup> *ibid* at 689.

<sup>65</sup> *Bee and Obiang v. Equatorial Guinea*, Communications No. 1152/2003 and 1190/2003, Human Rights Committee, 31 October 2005, at para 6.3, online: <[http://www.worldcourts.com/hrc/eng/decisions/2005.10.31\\_Bee\\_v\\_Equatorial\\_Guinea.htm](http://www.worldcourts.com/hrc/eng/decisions/2005.10.31_Bee_v_Equatorial_Guinea.htm)>.

Similarly, in *Larrañaga v. The Philippines*, the Human Rights Committee noted that in a capital case, when the counsel for the defendant requests an adjournment because he was not given enough time to acquaint himself with the case, the court must ensure that the defendant is given an opportunity to prepare his defence.<sup>66</sup>

Besides the ICCPR, other international instruments also touch upon issues surrounding the preparation of one's defence. For instance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also indicates the right to have adequate time and facilities for the preparation of one's defence as one of the main elements of the right to counsel:

18.3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

(...)

(b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

The Convention on the Rights of the Child, while lacking a specific mention of adequate time and facilities,

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<sup>66</sup> *Francisco Juan Larrañaga v. the Philippines*, Communication No. 1421/2005, Human Rights Committee, 14 September 2006, at para 7.5, online: <<http://hrlibrary.umn.edu/undocs/1421-2005.html>>.

does prescribe the minimum guarantees for children charged with a criminal infraction, amongst which is the right to legal or other appropriate assistance in the preparation of his/her defence:

40. 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(...)

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(...)

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(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 and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(...)

This provision is in line with article 14, paragraph 4, of the ICCPR, which prescribes that in the case of juvenile persons facing criminal charges, the procedure must take into account the person's age.

In *Koreba v. Belarus*,<sup>67</sup> a case dealing with the detention of a juvenile person in violation of fair trial guarantees, the Human Rights Committee recalled that accused juvenile persons are to be separated from adults and to enjoy at least the same guarantees and protection as those accorded to adults under article 14 of the ICCPR. The Committee further emphasised that juveniles need special protection in criminal proceedings, and in particular to be informed directly of the charges against them and to be provided with appropriate assistance in the preparation and presentation of their defence. The Committee thus found the State party to be in violation of the ICCPR as the complainant's son, who was 17 at the time of his arrest and conviction, was not separated from adults and did not benefit from the special guarantees prescribed for criminal investigation of juveniles.

Also in the context of juvenile justice, though without specifically mentioning adequate time and facilities for the preparation of one's defence, the Rules for the Protection of Juveniles Deprived of their Liberty ("the Havana Rules") address the right to maintain appropriate communication

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<sup>67</sup> *Anna Koreba v. Belarus*, Communication No. 1390/2005, Human Rights Committee, 25 October 2010, at para 7.4, online: <<http://hrlibrary.umn.edu/undocs/1390-2005.html>>.



with defence counsel:

60. Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.

As already mentioned, it is the Human Rights Committee's understanding that the right to communicate with counsel is included in the right to have adequate time and facilities to prepare one's defence.

The Basic Principles on the Role of Lawyers further address minimum guarantees for the preparation of one's defence. Principle 8 establishes that:

8. 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.

In addition, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establish several minimum guarantees with regard to the defence of detained persons, including the right to have adequate time and facilities for consultations with legal counsel:

## Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.
3. 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.
4. 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.
5. 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.

Though these international instruments do not specify exactly what constitutes adequate time and facilities, it is undeniable that this element of the right to counsel aims at ensuring that accused persons in general and detained and imprisoned persons in particular have their fair trial rights safeguarded through the access to an effective defence. The right to have adequate time and facilities to prepare one's defence, therefore, must be fully guaranteed by all States.

***b) Regional legal framework***  
***African Human Rights System***

Although the African Charter on Human and Peoples' Rights does not expressly address the right to adequate time and facilities to prepare one's defence, the African Commission on Human and Peoples' Rights has addressed it as a right intrinsically related to the right to defence.

For instance, in *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*,<sup>68</sup> a case dealing with the sentencing to death of individuals accused of bombings on the Sinai Peninsula, the Commission noted that the complainants were denied the opportunity to consult with counsel privately in order to prepare their defence, as communication with counsel allegedly happened through bars of the court room and in the presence of security officials. Therefore, the Commission concluded that the State violated the right to counsel and the right to defence as defined by article 7.1(d) of the African Charter on Human and Peoples' Rights.

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<sup>68</sup> *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, Communication 334/06, African Commission on Human and Peoples' Rights, 3 March 2011, online: <<http://www.globalhealthrights.org/wp-content/uploads/2014/09/EIPR-and-INTERIGHTS-v.-Egypt.pdf>>.

In *African Commission on Human and Peoples Rights v. Libya*,<sup>69</sup> a case involving *incommunicado* detention and denial of the right to counsel, the Court noted that fair trial is a fundamental right and it implies that every individual accused of an offence is afforded the right of defence, which did not happen in the case. The Court further highlighted that the right to defence also implies that the detainee has the right to communicate with his/her counsel and have adequate time and facilities to prepare his/her defence. In this regard, the Court noted that the accused has a right to adequate time for preparation of a defence commensurate with the nature of the proceedings and the factual circumstances of the case. The Court thus found that Libya had violated the Articles 6 and 7 of the African Charter.

Several other African human rights instruments mention the right to adequate time and facilities to prepare one's defence. The African Commission's Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa deals with the right of

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<sup>69</sup> *African Commission on Human and Peoples Rights v. Libya*, Merits, Application 002/2013, African Court on Human and Peoples' Rights, 3 June 2016, online: <<https://afchpr-commentary.uwazi.io/en/document/65aa3w7rrnzl04v250ikny7gb9>>.

arrested and detained persons to communicate with legal assistance of their choice, which is essential to prepare one's defence:

3.b. Any individual arrested or detained shall be treated in accordance with relevant regional and international human rights standards, in particular the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. This includes, but is not limited to:

(...)

(vii) Outside Communication: Any individual arrested or detained shall be provided meaningful access to his or her choice of legal assistance, family members, representatives, or other persons having a legitimate interest, and in the case of a foreign national, his or her embassy or consular post or relevant international or regional organization. For foreign nationals, the detaining State has an obligation to promptly inform the detainee's embassy or consular post.

The Principles and Guidelines and Peoples' Rights while Countering Terrorism in Africa further address adequate time to prepare one's defence in the context of a case's evidence:

#### 4.C. Evidence

(ii) Secret Evidence: The essential elements of a fair hearing include adequate opportunity to prepare a case, present arguments and evidence, and to challenge or respond to opposing arguments or evidence. The accused shall have a right to all relevant information held by the prosecution or other public authorities that could help the accused exonerate him or herself, or cast doubt on the State's case against him or her.

Before judgment or sentence is rendered, the accused shall have the right to know and challenge all the evidence which may be used to support the decision. It is the duty of the competent authorities to ensure lawyers have access to appropriate information, files and documents in their possession or control in sufficient time to enable those lawyers to provide effective legal assistance to their clients.

Moreover, in the context of access to legal services by detained persons, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa make a brief mention of...

8.d.iv. The right to access case files and have adequate time and facilities to prepare a defence.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also address adequate facilities to prepare a defence as a right to be safeguarded to individuals who are arrested:

M.2. Rights upon arrest:

(...)

e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.

When dealing with the provisions applicable to proceedings relating to criminal charges, the Principles and Guidelines on the Right to a Fair Trial and Legal

Assistance in Africa go deeper into the right to adequate time and facilities to prepare one's defence, specifying factors which may affect this right:

N.3 Right to adequate time and facilities for the preparation of a defence:

a. The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

b. The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

c. The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

d. The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

e. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

i. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.

ii. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

iii. The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.

iv. 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.

v. The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.

Therefore, while the African Charter does not address the right to have adequate time and facilities to prepare one's defence, it is clear that this right is an intrinsic part of the right to defence under the African human rights system.

### *Inter-American Human Rights System*

Although few of the Inter-American human rights instruments mention the right to adequate time and materials directly, this does not mean that this right is not recognised as an essential fair trial right by the bodies and mechanisms of the system.

One of the main instruments of the Inter-American system, the American Convention on Human Rights (Pact of San Jose, Costa Rica), expressly mentions the right to



adequate time and facilities to prepare for one's defence within the concept of presumption of innocence:

8.2. 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:

(...)

c. adequate time and means for the preparation of his defense;

In *Castillo Petruzzi et al. v. Peru*,<sup>70</sup> a case involving alleged involvement in a terrorist organisation, a military tribunal tried the claimants, sentencing them to life in prison. The IACtHR observed that defence attorneys were not given enough time to view the files of the case and were not allowed to cross-examine witnesses nor to introduce any evidence for the defence. As a result, the Court noted that the conditions under which the defence attorneys had to operate were wholly inadequate for a proper defence, as they did not have access to the case file until the day before the ruling of first instance was delivered. The Court thus found that the State violated, among others, article 8.2(c) of the American Convention on Human Rights.

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<sup>70</sup> *Castillo Petruzzi et al. v. Peru*, Compliance with Judgement, IACtHR series C, n. 59, 1999.

## European Human Rights System

The right to adequate time and facilities is expressly guaranteed by the European Convention on Human Rights, which is the major instrument of the European system:

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

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;

Moreover, the European Court of Human Rights (ECtHR) has addressed the issue of adequate time and facilities to prepare one's defence on several occasions. For instance, in *Pélissier and Sassi v. France*,<sup>71</sup> a case involving charges of fraudulent bankruptcy, the complainants argued that they have been convicted of an offence different from the one they were charged with, in violation of article 6, paragraphs 1 and 3 (a) and (b), of the Convention. The ECtHR observed that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare

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<sup>71</sup> *Pélissier and Sassi v. France*, Application (1999) ACHR n. 25444/94, online: <<https://hudoc.echr.coe.int/fre?i=001-58226>>.

his defence. Therefore, the Court concluded the State violated article 6, paragraph 3(a) and (b) of the European Convention on Human Rights.

### **3.3. The right to choose counsel**

#### ***a) International legal framework***

The right to choose one's own counsel as prescribed by article 14, paragraph 3 (d), of the ICCPR is an important component of a fair trial and is directly related to the right to defend oneself in person and the right to the assignment of free legal assistance in the case of lack of sufficient means to pay for legal services.

The Human Rights Committee has highlighted that while the ICCPR refers to the possibility of a person defending him/herself without a lawyer, this right is not absolute. The HR Committee has recognised some circumstances in which the interests of justice may require the assignment of a lawyer against the wishes of the accused, for instance in cases of persons substantially obstructing the conduct of trial or facing a serious charge but being unable to act in their own interests. The HR Committee, however, has emphasised that any limitations to the right of a person to defend him/herself must be clearly justified as necessary for upholding the interests of

justice.<sup>72</sup>

In *Correia de Matos v. Portugal*,<sup>73</sup> the HR Committee noted that the right to defend oneself in person and the right to defend oneself through legal assistance of one's own choosing are not mutually exclusive, as persons assisted by a lawyer retain the right to act on their own behalf. The Committee noted that the wording of the ICCPR is clear in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing. As such, the Committee recognised that the right to conduct one's own defence may be restricted when a lawyer is imposed against the wishes of the accused, because the accused may no longer be able to defend him/herself effectively if forced to accept counsel against their will. The Committee considered, in this context, that it is the responsibility of courts to assess whether in a specific case the assignment of a lawyer is necessary in the interests of justice, inasmuch as a person facing criminal prosecution may not be in a position to make a proper assessment of the

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<sup>72</sup> *supra* note 25 at para 37.

<sup>73</sup> *Carlos Correia de Matos v. Portugal*, Communication No. 1123/2002, Human Rights Committee, 28 March 2006, at para 7.3 and 7.5, online: [http://www.worldcourts.com/hrc/eng/decisions/2006.03.28\\_Correia\\_de\\_Matos\\_v\\_Portugal.htm](http://www.worldcourts.com/hrc/eng/decisions/2006.03.28_Correia_de_Matos_v_Portugal.htm).

interests at stake, and thus defend himself effectively. The State maintained that its legislation allowed an accused to make submissions on the facts and required that the technical defence be made by a lawyer. The Committee concluded that they had not provided any objective reason to explain why, in this instance of a relatively simple case, the absence of a court-appointed lawyer would have jeopardized the interests of justice or why the author's right to self-representation had to be restricted. The Committee therefore concluded that the applicant's right to defend himself in person had been violated by the State and recommended that the State amend its laws to ensure conformity with the ICCPR, Article 14.

When it comes to capital cases, the HR Committee has reiterated the need for legal representation to be made available for the accused. In *Larrañaga v. The Philippines*,<sup>74</sup> the Committee noted that the applicant did not wish his court-appointed counsel to represent him and requested an adjournment to hire a new counsel. In this context, the Committee recognised that the applicant's right to be represented by counsel of his own choosing was violated when the trial court denied the request for a

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<sup>74</sup> *supra* note 66 at para 7.6.

different counsel.

In *Ismailov v. Uzbekistan*,<sup>75</sup> the Human Rights Committee emphasised that the right to have adequate time and facilities for the preparation of one's defence and the right to communicate with counsel of one's own choosing are important elements of a fair trial and of the principle of equality of arms. The Committee stressed that

“the counsel provided by the competent authorities on the basis of [article 14.3(d)] must be effective in the representation of the accused, and that, in certain cases, the counsel's misbehavior or incompetence may entail the responsibility of the State concerned of a violation of article 14, paragraph 3 (d).”

The Committee noted that the complainant was not provided with a lawyer during his interrogation and his right to have the assistance of the lawyer of his own choosing was denied by the investigator, who assigned another lawyer to the case. The Committee further noted that the assigned lawyer met with the applicant's husband only twice and signed the interrogation reports despite the fact they were carried out in his absence. The Committee

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<sup>75</sup> *Ismailov v. Uzbekistan*, Communication No. 1769/2008, Human Rights Committee, 1 April 2011, at para 7.4, online: <[http://www.worldcourts.com/hrc/eng/decisions/2011.03.25\\_Bondar\\_v\\_Uzbekistan.pdf](http://www.worldcourts.com/hrc/eng/decisions/2011.03.25_Bondar_v_Uzbekistan.pdf)>.

concluded that the absence of legal representation until the trial stage was a violation of the ICCPR article 14.3(d) guarantees and recommended a re-trial.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also mentions the guarantees the right to counsel of own choosing:

18.3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

(...)

(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;

The International Convention for the Protection of All Persons from Enforced Disappearance also requires State Parties' to undertake legislative measures to ensure that persons deprived of liberty have the right to choose their own counsel and to defend themselves in person guaranteed:

17.2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

(...)

(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

(...)

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

Other international instruments contain provisions that show the importance of safeguarding the right to counsel of one's own choosing. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment addresses both the right to defend oneself in person and to be assisted by counsel:

#### Principle II

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

(...)



The Basic Principles on the Role of Lawyers cites the right of every individual to be assisted by a lawyer of his/her choice and to be informed of this right upon arrest or when charged with a criminal offence. The Basic Principles also clarify that access to lawyers must be ensured without discrimination of any kind:

1. 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.

2. 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.

(...)

5. 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.

## ***b) Regional legal frameworks***

### ***African Human Rights System***

The African Charter on Human and Peoples' Rights (Banjul Charter) contains specific provisions on the right to be defended by counsel of one's own choice:

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

(...)

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

The African Union Convention Governing the Specific Aspects of Refugee Problems in Africa also addresses the right to choose own counsel in the case of suspects or persons accused of terrorist acts:

7.3. Any person against whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(...)

(c) be assisted by a lawyer of his or her choice;

The African Commission's Principles and Guidelines and Peoples' Rights while Countering Terrorism in Africa also recognizes the right of arrested and detained persons to choose their own legal representation:

3.b. Any individual arrested or detained shall be treated in

accordance with relevant regional and international human rights standards, in particular the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. This includes, but is not limited to:

(...)

(iii) Right to Legal Representation: Any individual arrested or detained, or who is not deprived of liberty but who is suspected of, or charged with, an offence, has the right to defend him or herself through legal representation of his or her choosing at all stages of a criminal, administrative, or any other form of legal proceeding. The accused shall have 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 if he or she does not have sufficient means to pay for it. These above rights apply from the moment of arrest or detention and prior to and during any questioning. States shall not block access to legal representation, and must meaningfully facilitate legal representation of the individual's choosing. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa similarly recognizes the right arrested persons have to choose their own counsel:

4. Rights of an arrested person The following rights shall be afforded to all persons under arrest:

d. The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions.

The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa further emphasizes that the right of arrested children to choose their own counsel:

31.g. Children shall be guaranteed the right to the presence of lawyer, or other legal services provider, of their choice and, where required, access to free legal services, from the moment of arrest and at all subsequent stages of the criminal justice process. Legal assistance shall be accessible, age appropriate and responsive to the specific needs of the child.

The Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) recognizes the right to choose one's own counsel and to defend oneself in person during pre-trial processes:

B. Safeguards during the Pre-trial Process States should:

27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.

When addressing the right to legal aid in both criminal and civil cases, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that:

H.d. An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.

The Principles and Guidelines address the right to counsel of one's own choosing and to defend oneself in person more specifically in proceedings relating to criminal charges:

#### N.2 Right to Counsel

- a. 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.
- 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.
- c. This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.
- d. The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

The right to defend oneself in person or through counsel of choice has been the subject of several cases before the African Commission on Human and Peoples'

Rights (ACHPR) and the African Court On Human and Peoples' Rights (ACtHPR) In *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*,<sup>76</sup> the ACHPR considered the case of Sudanese nationals who were arrested in an Internally Displaced Persons (IDPs) camp in Khartoum without being informed of the reasons for their arrest and without having access to a lawyer, having been held for more than 12 months without any charge. The HR Commission observed that the fact the complainants did not have access to counsel for 9 months since they were first arrested impeded their ability adequately assure their defence, and found that the State had violated the complainants' right to defence, including the right to counsel of choice.

### *Inter-American Human Rights System*

The right to choose one's own counsel or to defend oneself in person is well recognised in the Inter-American human rights system. The American Convention on Human Rights (ACHR), guarantees a right to fair trial:

8.d. the right of the accused to defend himself personally or to

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<sup>76</sup> *Abdel Hadi, Ali Radi & others v. Republic of Sudan*, ACHPR, Communication No. 368/09, 2014, online: [https://www.achpr.org/index.php?url=files/sessions/54th/comunications/368.09/achpr54\\_decis\\_368\\_09\\_sudan\\_2013\\_eng.pdf](https://www.achpr.org/index.php?url=files/sessions/54th/comunications/368.09/achpr54_decis_368_09_sudan_2013_eng.pdf).

be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

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

The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas emphasise the importance of the right of all persons deprived of liberty to have legal counsel chosen by themselves, their family or the State:

Principle V. All persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family, or provided by the State; they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.

In *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*,<sup>77</sup> the Inter-American Court of Human Rights (IACtHR) ruled that the State violated article 8(2)(d) of the American Convention when Narine Sooklal, one of the applicants, was denied on six occasions the opportunity to make telephone calls to obtain

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<sup>77</sup> *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Merits, Reparation, and Costs*, (2002) Inter-Am. Ct. H.R. Series C No. 94 at para 129, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_94\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.doc)>.

representation, and was therefore unable to benefit from legal counsel until immediately before the preliminary hearing. The Court also ruled that the State violated article 8(2)(d) and (e) when one of the other applicants, Keiron Thomas, was barred from obtaining a new counsel after his original lawyer told him his claim was unfounded and would not succeed.

### European Human Rights System

The European Convention on Human Rights (ECHR) addresses the right to defend oneself in person or through counsel of choice when dealing with fair trial rights:

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

(...)

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

The European Convention on the Legal Status of Migrant Workers also mentions the right to counsel of own choice when dealing with the right to access to courts:

26.1 Each Contracting Party shall secure to migrant workers treatment not less favourable than that of its own nationals in respect of legal proceedings. Migrant workers shall be entitled, under the same conditions as nationals, to full legal and judicial



protection of their persons and property and of their rights and interests; in particular, they shall have, in the same manner as nationals, the right of access to the competent courts and administrative authorities, in accordance with the law of the receiving State, and the right to obtain the assistance of any person of their choice who is qualified by the law of that State, for instance in disputes with employers, members of their families or third parties. The rules of private international law of the receiving State shall not be affected by this article.

The European Convention on the Exercise of Children's Rights establishes that in proceedings before a judicial authority, children should be allowed to be assisted by a person of their choice to help them express their views, and to appoint their own, separate representative:

5. Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- a. the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;
- b. the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;
- c. the right to appoint their own representative;
- d. the right to exercise some or all of the rights of parties to such proceedings.

The European Convention on Establishment and Protocol thereto addresses the right to obtain assistance by a person of one's choice by highlighting that nationals of

any contracting party shall enjoy in any other party the same conditions of the latter's nationals:

7. Nationals of any Contracting Party shall enjoy in the territory of any other Party, under the same conditions as nationals of the latter Party, full legal and judicial protection of their persons and property and of their rights and interests. In particular they shall have, in the same manner as the nationals of the latter Party, the right of access to the competent judicial and administrative authorities and the right to obtain the assistance of any person of their choice who is qualified by the laws of the country.

In *Martin v. Estonia*,<sup>78</sup> a case involving the arrest of a minor on murder charges, the complainant argued his defence rights had been violated as he was pressured by the police to terminate the services of his counsel of choice and to agree to be represented by counsel chosen by the investigative authorities under the legal aid scheme. The European Court noted the authorities' failure to make use of formal procedures to remove the complainant's counsel of choice and concluded there was an infringement of the applicant's right to defend himself through legal assistance of his own choosing.

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<sup>78</sup> *Martin v. Estonia*, Application, (2013) n. 35985/09.

### **3.4. The right to free legal assistance**

#### ***a) International legal framework***

The right to free legal assistance for anyone facing criminal charges who lacks sufficient means to pay for legal services is a widely accepted principle of international law.<sup>79</sup> Article 14, paragraph 3 (d), of the ICCPR guarantees the right to free legal assistance whenever the interests of justice so require and when the accused lacks means to pay for it.

According to the Human Rights Committee, the provision of free legal assistance should take into account the gravity of the offence and the existence of some objective chance of success at the appeals stage. Furthermore, the Committee has emphasised that assigned counsel must be effective in all stages of the proceedings and that blatant misbehaviour and incompetence may constitute violation of State duties under article 14, paragraph 3 (d).<sup>80</sup>

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<sup>79</sup> Lois Leslie, Connor Bildfell & Catherine Morris, “*The Right to Legal Aid: A Guide to International Law Rights to Legal Aid*” (2014) Lawyers’ Rights Watch Canada, online: <[http://www.lrwc.org/ws/wp-content/uploads/2014/09/International-Rights-to-Legal-Aid-Sept.19.BN\\_1.pdf](http://www.lrwc.org/ws/wp-content/uploads/2014/09/International-Rights-to-Legal-Aid-Sept.19.BN_1.pdf)>.

<sup>80</sup> *supra* note 25 at para 38.

In *Chan v. Guyana*,<sup>81</sup> a case involving the death sentence, the Human Rights Committee concluded that the complainant's right to have effective legal assistance assigned to him had been violated where, on the first day of trial, a representative of the appointed legal aid counsel requested a 2-day adjournment to prepare. The Committee concluded that the adjournment sought did not allow adequate time to prepare a defense, the accused had not been effectively represented in violation of article 14, paragraph 3 (b) and (d).

The right to counsel, including the right to free legal assistance, must be guaranteed to all persons, but certain groups are entitled to additional protection because they are more vulnerable to violations of their fundamental rights. While the Convention on the Elimination of all Forms of Racial Discrimination does not contain specific provisions on the right to free legal assistance, the Committee on the Elimination of Racial Discrimination has noted the disproportionate impact that the lack of a generally recognised right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national

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<sup>81</sup> *Lawrence Chan v. Guyana*, Communication no. 913/2000, Human Rights Committee, 3 November 2005, at para 6.3, online: <<http://hrlibrary.umn.edu/undocs/913-2000.html>>.

minorities.<sup>82</sup> The Committee has recommended that States parties take the necessary steps to promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice; to ensure equality before the law for members of all racial and ethnic groups; and to promote free legal help and advice centres, legal information centres, and centres for conciliation and mediation for victims of racism, including by cooperating with lawyers' associations, universities, non-governmental organisations, and others.<sup>83</sup>

In *Z. T. v. Norway*, a complaint regarding the review of a prior decision of inadmissibility on a case involving the State's denial of legal aid for an asylum seeker, the Committee against Torture recommended that the State Party undertake measures to ensure that asylum-seekers were duly informed about all domestic remedies available to them, in particular the possibility of judicial review

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<sup>82</sup> MF Davis, "Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law", (2013) 122:8 Yale LJ at 2276

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2228814](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228814)>.

<sup>83</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, at para 8, 9, 17(b), and 30, online: <[https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1\\_Global/INT\\_CERD\\_GEC\\_7503\\_E.doc](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/INT_CERD_GEC_7503_E.doc)>.

before the courts and the opportunity of being granted legal aid for such recourse.<sup>84</sup>

The Committee on the Elimination of Discrimination against Women, which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women, has highlighted that the concentration of courts and quasi-judicial bodies in urban centres, their non-availability in rural areas, the time and financial resources necessary to access these bodies, the complexity of proceedings, the barriers for women with disabilities, the lack of access to high-quality and gender-competent legal advice and legal aid, and the deficiencies in the quality of justice systems, such as gender-insensitive judgements, are some of the main obstacles to women's access to justice.<sup>85</sup> The Committee therefore recommended that State parties: remove economic barriers to justice for women by providing legal aid and reduce or waive procedural costs for women with low or no income; remove

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<sup>84</sup> *Z.T. (No.2) v. Norway*, CAT/C/35/D/238/2003, UN Committee Against Torture (CAT), 5 December 2005, at para 7.4, online: <<https://www.refworld.org/cases,CAT,4402ccee6.html>>.

<sup>85</sup> Committee on the Elimination of Discrimination against Women, *General recommendation no. 33, 2015: On Women's access to justice*, 2015, at para 13, online: <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/33&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/33&Lang=en)>.

linguistic barriers by providing quality translation and interpretation services when needed and individualised assistance for illiterate women; develop outreach activities to disseminate information about the justice mechanisms and remedies available; and establish centres with a range of legal and social services to reduce the number of steps that a woman has to take to gain access to justice.<sup>86</sup>

Several international instruments affirm the duty of States to provide free legal aid to those who cannot afford counsel. For instance, the Basic Principles on the Role of Lawyers identify the duty of States to provide funds for the provision of legal services to the poor and other disadvantaged person, without payment by them if they cannot afford such services:

3. 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.

4. 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

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<sup>86</sup> *ibid* at 17.

call upon the assistance of lawyers.

(...)

6. 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.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment identifies the right to free legal assistance of a detained person.:

Principle 17

(...)

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.

The Guidelines for Action on Children in the Criminal Justice System also confirms the right of children to legal and other assistance free of charge:

16. Priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice.



(...)

46. Child victims should have access to assistance that meets their needs, such as advocacy, protection, economic assistance, counselling, health and social services, social reintegration and physical and psychological recovery services. Special assistance should be given to those children who are disabled or ill. Emphasis should be placed upon family- and community-based rehabilitation rather than institutionalization.

The Rules for the Protection of Juveniles Deprived of their Liberty (“the Havana Rules”) establish that:

18.(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. Privacy and confidentiality shall be ensured for such communications;

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) highlight that juveniles must have the right to legal assistance, including free legal aid where such is available:

15.1 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.

The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice also address legal aid in relation to children who come in contact with the justice system. The Model Strategies encourage States to ensure that child victims of violence

are informed of available legal aid from the first contact with the justice system and throughout all judicial proceedings.<sup>87</sup> The Model Strategies also urge States to ensure that children arrested or under investigation be informed of their rights and have prompt access to legal aid, from investigation procedures throughout all stages of the justice process.<sup>88</sup>

Dealing with persons under arrest awaiting trial, the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) prescribe that:

93. 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. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides the only internationally agreed definition of legal aid:

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<sup>87</sup> UN General Assembly, *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: resolution / adopted by the General Assembly*, 26 January 2015, A/RES/69/194, at para 23(f) and 24(d), online: <https://www.refworld.org/docid/54cf56124.html>.

<sup>88</sup> *ibid* at paras 34(f), 35(b), and 37(d).

“(…) 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.”<sup>89</sup>

The Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems establish that States should guarantee the right to legal aid to all persons who need it, including those charged with a criminal offence and victims of crime and witnesses:<sup>90</sup>

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

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.

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.

Children should have access to legal aid under the same

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<sup>89</sup> *ibid* at para 8.

<sup>90</sup> See also guidelines 7 to 10 in UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution / adopted by the General Assembly*, 28 March 2013, A/RES/67/187, online: <https://www.refworld.org/docid/51e6526b4.html>.

conditions as or more lenient conditions than adults.

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.

#### Principle 4. Legal aid for victims of crime

Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.

#### Principle 5. Legal aid for witnesses

Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to witnesses of crime.

#### Principle 7. Prompt and effective provision of legal aid

States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

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.

#### Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence

States should introduce measures: (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; (...) (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;

The Principles and Guidelines address the right to legal aid at pretrial stage, during court proceedings, and at post-trial stage, and urge States to take measures to ensure legal representation at all these stages and to guarantee adequate time, facilities, and technical and financial support for everyone charged with a criminal offence to prepare his/her defence.<sup>91</sup>

It is noteworthy that the definition of legal aid presented by the Principles and Guidelines leaves out any reference to legal aid in civil or administrative cases. Nonetheless, the goals of ensuring fairness and inspiring trust in the justice system and in its results runs across all spheres of justice.<sup>92</sup> The Human Rights Committee has determined that the ICCPR Article 14 applies to both civil and criminal proceedings and that, although Article 14(3)(d) refers explicitly only to persons charged with criminal offences, the interests of fairness may require

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<sup>91</sup> See guidelines 4 (c) and (g), 5 (b), (c) and (d)., 6 (c) in UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution / adopted by the General Assembly*, 28 March 2013, A/RES/67/187, online: <<https://www.refworld.org/docid/51e6526b4.html>>.

<sup>92</sup> *supra* note 2 at 8.

States to provide free legal aid in civil matters.<sup>93</sup>

Indeed, an implied right to legal aid for civil and administrative proceedings has been increasingly recognised by courts, tribunals, and treaty-monitoring bodies as a key part of the right to a fair trial and due process.<sup>94</sup>

In addition, there has been increasing support for a broader definition of legal aid that includes not only the right to free legal assistance in criminal proceedings, as defined in article 14, paragraph (3) (d), of the ICCPR, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.<sup>95</sup> In this context, and recalling the resolution which adopted the Principles and Guidelines on

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<sup>93</sup> *supra* note 25, at para 10. See also, CESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, para 16, online: <http://www.refworld.org/docid/47a70799d.html>.

<sup>94</sup> *supra* note 79 at 9; see also Lois Leslie, *The Right to Legal Aid: Recommendations for Reform of BC's Legal Aid System in accordance with International Human Rights Obligations*, LRWC, 4 October 2018, online: <https://www.lrwc.org/the-right-to-legal-aid-submission-to-bc-legal-aid-services-review-report/>.

<sup>95</sup> UN General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 4 April 2013, A/HRC/23/43, at para 27, online: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/23/43/Add.2](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43/Add.2) >.

Access to Legal Aid in Criminal Justice System, the former Special Rapporteur on the Independence of Judges and Lawyers has emphasised that legal aid should include legal advice, assistance and representation, as well as legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.<sup>96</sup>

In their Global Study on Legal Aid, the United Nations Office on Drugs and Crime (UNODC) and the United Nations Development Programme (UNDP) have agreed that the definition of legal aid should include legal advice, assistance and/or representation at little or no cost to the person designated as entitled to it, as well as services provided by lawyers and paralegals in criminal and in civil and administrative matters to individuals who are poor, marginalized, or otherwise in need of special legal protection.<sup>97</sup> According to UNODC and UNDP, these services are necessary for vulnerable people to exercise their rights and they may include – but are not limited to – the provision of legal advice, representation in courts or proceedings under other State tribunals, assistance in drafting of documents and pleadings, mediation, assistance

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<sup>96</sup> *ibid* at para 26.

<sup>97</sup> *supra* note 2 at 8.

in navigating the rules and procedures of State administrative agencies.<sup>98</sup>

A broader approach to legal aid is also shared by the Human Rights Committee, which has expressly encouraged States to provide legal assistance for persons who lack sufficient means to pay for legal services.<sup>99</sup> Unaffordable judicial costs in civil proceedings directly hamper the right to access to justice of those individuals who cannot afford to pay for legal services. Consequently, ensuring legal assistance in both criminal and civil proceedings is particularly important for the principle of equality of arms, as each party must be given equal opportunities to contest arguments and evidence by the other party.

Although increasingly accepted as necessary to ensure fair trial guarantees, the provision of free legal aid for civil and administrative proceedings raises many resource-related questions, such as: who should provide legal aid; what the eligibility criteria should be for recipients; what kind of services should be included in civil legal aid provision; how the quality of these services can be monitored; what costs such services would entail; and who

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<sup>98</sup> *ibid* at 9.

<sup>99</sup> *supra* note 25 at para 10.



should pay for them.

While these questions are valid and must be addressed by States, it is important to also bear in mind the social costs of denying free legal aid for those unable to afford it. For instance, research has found that resources spent on preventing eviction through legal assistance saves taxpayers significant amounts in shelter costs and related social services.<sup>100</sup> Additionally, taking into account that law is a public good, protecting substantial and procedural rights often has social value that goes well beyond the benefits acquired by a single litigant.<sup>101</sup>

The range of legal aid services offered, their model of delivery, the actors who provide them, their funding sources and the eligibility criteria of recipients vary greatly from country to country. Despite these variations, it is important that States identify the legal aid needs and priorities of their population and the gaps in provision, so that existing services can be assessed and new ones can be formulated when necessary.<sup>102</sup> This assessment is crucial to

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<sup>100</sup> Deborah L. Rhode, “Whatever Happened to Access to Justice”, (2009) *Loy. L.A. L. Rev* 869 at 874, online: <https://digitalcommons.lmu.edu/llr/vol42/iss4/2/>.

<sup>101</sup> *ibid* at 891.

<sup>102</sup> *ibid* note 97 at 39.

understand how access to justice is guaranteed in practice by States and how fair trial and due process rights can be continually ensured through the right to counsel in general, and through access to legal aid in particular for those who are unable to afford legal services.

The line that separates the right to counsel from the right to legal aid may at times seem blurred, but it is important not to confuse the two. The right to counsel contains several components, including rights to timely and confidential access to a lawyer; to adequate time and facilities for the preparation of defence; to have counsel of choice; and to legal assistance without payment in case of lack of sufficient means to afford legal services. UN treaty bodies confirm that a right to legal aid is based on the principle of equality and the right of everyone to have equal access to the courts in criminal, civil and administrative matters. Failure of States to provide legal aid constitutes discrimination where individuals' financial situations place them in a position of inequality before the law.<sup>103</sup> Legal aid,

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<sup>103</sup> Lois Leslie, *"The Right to Legal Aid: Recommendations for Reform of BC's Legal Aid System in accordance with International Human Rights Obligations"*, LRWC 4 October 2018, online: <<https://www.lrwc.org/the-right-to-legal-aid-submission-to-bc-legal-aid-services-review-report/>>, citing Human Rights Committee General Comment No 32, at paras 8-9 and *General Comment No. 28: Article 3*

therefore, can be understood as an important element of the right to counsel, which aims at contributing to the elimination of obstacles that hinder access to justice to people unable to afford legal representation and access to the justice system.<sup>104</sup>

***b) Regional legal frameworks***

***African Human Rights System***

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa prescribes the duty of States Parties to ensure legal aid for women:

8. 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:

a) effective access by women to judicial and legal services, including legal aid;

b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;

Additionally, General Comment n. 4 on the African

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*(The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, at para 18; *Oló Bahamonde v. Equatorial Guinea* at para 9.4; *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, at para 17(b), online: <<http://www.refworld.org/docid/48abd56dd.html>>.

<sup>104</sup> *supra* note 95 at para 27.

Charter on Human and Peoples' Rights regarding the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (article 4) specifically identifies the obligation of State Parties to provide legal aid for victims. The General Comment also specifies what legal aid should entail:

24.State Parties are obligated to avail legal aid to victims in order for them to access effective redress. Legal aid should be broadly understood as encompassing legal representation, legal assistance, legal advice, legal education and information, mechanisms for alternative dispute resolution, and restorative justice processes.

The African Commission's Guidelines on Combatting Sexual Violence and its Consequences in Africa address the duty of States in providing free legal assistance and representation for victims of sexual violence:

40. 3. Legal assistance and legal representation

a. States must take the necessary measures to guarantee the availability and accessibility of legal assistance and legal representation at no cost for the victims of sexual violence in order to guarantee their effective right to justice.

b. To guarantee adequate, effective legal representation for the victims of sexual violence, States must take the necessary measures to create lists of legal counsels specialized in cases of sexual violence and make these lists available to victims. The right of victims to freely choose their legal representative must be guaranteed. Furthermore, States are encouraged to put in

place centres providing legal assistance and legal representation to victims of sexual violence and to promote the involvement of national bar associations in processing such cases.

c. Beginning from the preliminary investigation phase, States must take measures to ensure that victims benefit from the assistance of an interpreter specialized in the follow-up of cases related to acts of sexual violence, as necessary and where the victims wish it.

d. States must allocate sufficient financial and human resources to ensure the proper functioning of the legal assistance and legal representation system.

The African Commission's Principles and Guidelines and Peoples' Rights while Countering Terrorism in Africa address free legal assistance in the context of right of arrested and detained persons to choose their own legal representation:

3.b. Any individual arrested or detained shall be treated in accordance with relevant regional and international human rights standards, in particular the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa. This includes, but is not limited to:

(...)

(iii) Right to Legal Representation: Any individual arrested or detained, or who is not deprived of liberty but who is suspected of, or charged with, an offence, has the right to defend him or herself through legal representation of his or her choosing at all stages of a criminal, administrative, or any other form of legal proceeding. The accused shall have 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 if he

or she does not have sufficient means to pay for it. (...)

The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa address the duties of States with regard to the provision of legal aid services, giving details of how this provision should be materialised:

8.a. States should establish a legal aid service framework through which legal services for persons in police custody and pre-trial detention are guaranteed.

b. Legal services may be provided by a number of service providers including lawyers, paralegals and legal clinics, depending on the nature of the work and the requisite skills and qualifications. States should take steps to ensure sufficient access to quality legal services and, in particular, that sufficient lawyers are trained and available.

c. Reference in these Guidelines to services provided by persons other than lawyers shall not in any way be a substitute for the right to access to and assistance by a qualified lawyer. Where the services of a lawyer are not available, States shall make every effort to ensure that services available from suitably qualified legal service providers can be accessed by detainees under conditions that guarantee the full respect of the rights of the detainees as set out in international law and standards.

d. All persons detained in police custody enjoy the following rights in relation to legal assistance:

i. Access without delay to lawyers and other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process.

ii. Confidentiality of communication, including meetings, correspondence, telephone calls and other forms of

communications with lawyers and other legal service providers shall be respected. Such communications may take place within the sight of officials, providing that they are conducted out of the hearing of officials. If this confidentiality is broken, any information obtained shall be inadmissible as evidence.

iii. Detainees shall be provided with the means to contact a lawyer or other legal service provider of their choice or one appointed by the state. State legal assistance should be provided if the detainee does not have sufficient means or if the interests of justice require, for example given the gravity, urgency or complexity of the case, the severity of the potential penalty, and/or the status of the detainee as vulnerable or otherwise protected under Part 7 of these Guidelines.

(...)

vi. Legal service providers should possess the requisite skills and training as required under national law for the provision of legal assistance and services. Depending on the system in place, this includes lawyers, and where appropriate also other legal advisors, legal assistants, paralegals and those running legal clinics.

And when it comes to arrested and detained children:

31.g. Children shall be guaranteed the right to the presence of lawyer, or other legal services provider, of their choice and, where required, access to free legal services, from the moment of arrest and at all subsequent stages of the criminal justice process. Legal assistance shall be accessible, age appropriate and responsive to the specific needs of the child.

The Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights also deal with legal aid, first in relation to vulnerable and disadvantaged groups and then to victims of

forced evictions:

23. In addition, the State must ensure that persons within its jurisdiction, particularly members of vulnerable and disadvantaged groups, enjoy effective access to quality legal services. Measures to be taken in this regard include the establishment of comprehensive and effective legal aid schemes.

(...)

79. The right to housing imposes, amongst others, the following obligations on States parties to: Minimum Core Obligations

(...)

ii. Ensure that adequate and effective legal or other appropriate remedies are available to any persons who are threatened with, undergo, remain vulnerable to, or defend against forced evictions. These include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and protection from eviction during the period that their case is being examined before a national, regional or international legal body;

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa go deep into the obligation of States to provide legal aid and legal assistance both in criminal and in civil matters:

H.a. 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.

b. The interests of justice should be determined by considering:



i. in criminal matters:

1. the seriousness of the offence;
2. the severity of the sentence.

ii. in civil cases:

1. the complexity of the case and the ability of the party to adequately represent himself or herself;
2. the rights that are affected;
3. the likely impact of the outcome of the case on the wider community.

c. 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.

(...)

The Principles and Guidelines on the Right to a Fair Trial identify different stakeholders that could assist in the provision of legal assistance when the availability of lawyers is low:

H.f. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:

- i. 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;
- ii. 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.

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.

h. States should, in conjunction with the legal profession and non-governmental 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.

i. Para-legals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.

j. Non-governmental organizations should be encouraged to establish legal assistance programmes and to train para-legals.

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.

Reinforcing the importance of free legal aid for access to justice, the African Union created a Legal Aid Fund of Human Rights Organs to provide legal assistance to indigent applicants before the Human Rights Organs of the Union. The Fund is guided by the principles of effectiveness, sustainability, credibility and accessibility and it operates as a needs-based legal aid system.<sup>105</sup>

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<sup>105</sup> African Union, *Statute on the Establishment of Legal Aid Fund for*

The jurisprudence of the African Union human rights system affirms States' duties to provide legal aid as a basic fair trial right. In *Onyango and others v. Tanzania*,<sup>106</sup> a case involving the kidnapping and abduction of a group Kenyan citizens by the Tanzanian Police on several criminal charges, the African Court on Human and Peoples' Rights noted that given the seriousness of the charges against the complainants, the State was under the obligation to provide them with legal aid or at least inform them of their right to legal aid when it became clear they were not legally represented. The Court ruled that the complainants were entitled to legal aid at all stages of proceedings and that legal aid must be enjoyed whether requested by the accused or not and that the onus to activate this right is on the judicial authorities. The Court concluded the State failed to comply with its obligations under the Banjul Charter to provide the complainants with legal representation.

### *Inter-American Human Rights System*

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*the African Union Human Rights Organs*, 30 January 2016, online: <<https://au.int/en/treaties/statute-establishment-legal-aid-fund-african-union-human-rights-organs>>.

<sup>106</sup> *Onyango and others v. Tanzania*, Application (2016) AfCHPR n. 006/2013, online: <<https://en.african-court.org/index.php/55-finalised-cases-details/859-app-no-006-2013-wilfred-onyango-nganyi-9-others-v-united-republic-of-tanzania-details>>.

The American Convention on Human Rights specifically addresses the right to legal aid when dealing with fair trial guarantees of persons accused of a criminal offence:

8.2.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;

Although the Convention leaves the decision on whether legal aid should be paid or not up to States' domestic legislation, the Charter of the Organisation of American States records the agreement of all member states, including those not party to the American Convention on Human Rights, to ensure adequate legal aid:

45. 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) Adequate provision for all persons to have due legal aid in order to secure their rights.

Moreover, the Inter-American system has recognised the importance of legal aid by creating a Victims' Legal Assistance Fund for those who have submitted briefs before the Inter-American Court of Human Rights. The Rules for

the Operation of the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights prescribe that:

2. Alleged victims who wish to access the Victims' Legal Assistance Fund shall so inform the Court in the brief containing pleadings, motions, and evidence. These alleged victims must indicate, by means of a sworn affidavit and other probative evidence that will satisfy the Tribunal, that they lack the economic resources necessary to cover the cost of litigation before the Inter-American Court, and state precisely the aspects of their participation in proceedings that require use of the resources of the Victims' Legal Assistance Fund.

The Inter-American Court of Human Rights has emphasised that the lack of legal assistance from a public defender constitutes a violation of the right to defence. In *Suárez-Rosero v. Ecuador*,<sup>107</sup> a case involving *incommunicado* detention, the Court noted that Mr. Suárez-Rosero was denied adequate opportunity to prepare his defence because he did not have the legal assistance of a public defender and, once he was able to obtain legal counsel of his own choosing, he was unable to communicate with counsel freely and privately. The Court concluded that the State violated Article 8.2(c), (d) and (e) of the American Convention on Human Rights.

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<sup>107</sup> *Suárez-Rosero v. Ecuador*, Merits, (1997) IACtHR series C, n. 35, online: <[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_35\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf)>.

In *Desmond McKenzie and Others v. Jamaica*, the Court recognized that protections under 8(2)(d) and 8(2)(e) of the American Convention on Human Rights must be guaranteed at all stages of the accused's criminal proceedings in addition to the trial itself, and that compliance with these provisions are matters of fundamental justice, especially in cases involving capital offences.<sup>108</sup> Thus, the Court held the State had violated article 8 of the Convention when the trial judge of the case refused the request of the applicants for legal representation.<sup>109</sup>

### European Human Rights System

The European Convention on Human Rights addresses the right to free legal assistance when dealing with the right to a fair trial. The Convention requires State Parties to pay for legal assistance when justice requires legal representation.

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

(...)

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<sup>108</sup> *Desmond McKenzie and Others v. Jamaica*, (1999) IACHR No. 41/00 at para 304, online: <<http://hrlibrary.umn.edu/cases/41-00.html>>.

<sup>109</sup> *ibid* at 305.

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;

Several other European instruments address legal assistance, though not all specify that such assistance should be provided free of charge, as exemplified by Article 27 of the European Convention on the International Validity of Criminal Judgements.

Article 27 For the purpose of lodging an opposition and for the purpose of the subsequent proceedings, the person sentenced in absentia or by an *ordonnance pénale* shall be entitled to legal assistance in the cases and on the conditions prescribed by the law of the requested State and, where appropriate, of the requesting State.

Likewise, the European Convention on the Legal Status of Migrant Workers emphasises the duty of States to provide legal assistance to migrant workers in both civil and criminal proceedings but states that such assistance should be on the same conditions as for the nationals of the concerned States. There is no specific provision as to whether such assistance should be free of charge:

26.2 Each Contracting Party shall provide migrant workers with legal assistance on the same conditions as for their own nationals and, in the case of civil or criminal proceedings, the possibility of obtaining the assistance of an interpreter where they cannot understand or speak the language used in court.

Other instruments specify the duty of States to

provide free legal assistance to those unable to pay for counsel. Some instruments guarantee the right to legal aid even if the person requesting it is not a national of the country where he/she is requesting assistance, so long as he/she is the national of another contracting party to the instrument.

#### The European Convention on Establishment (individuals):

“seeks to ensure that a favourable basis is established for the treatment by one Contracting Party of nationals of another Contracting Party in the matter of entry, residence and expulsion; and that nationals of a Contracting Party who are in the territory of another Contracting Party are accorded treatment generally equal to that which the latter Party accords to its own nationals in... judicial and administrative guarantees for individuals;”

#### The Protocol to the Convention prescribes that:

45. This article secures to nationals of the Contracting Parties entitlement to free legal assistance in the territory of any other Party under the same conditions as the nationals of the latter Party.

Likewise, the European Convention on State Immunity determines that:

21.3 Where proceedings are instituted before a court of a State in accordance with paragraph 1:

(...)

d the party invoking the judgment shall be entitled to legal aid



under conditions no less favourable than those applicable to nationals of the State who are domiciled and resident therein.

A variety of other instruments contain provisions establishing the duty of States to provide free legal assistance. For instance, the European Convention on the Exercise of Children's Rights requires that legal aid and advice shall be provided in accordance with internal law in relation to matters regarding the right to apply for the appointment of a special representative and the appointment of a representative when holders of parental responsibilities are precluded from representing the child:

14. Where internal law provides for legal aid or advice for the representation of children in proceedings before a judicial authority affecting them, such provisions shall apply in relation to the matters covered by Articles 4 and 9.

The Council of Europe Convention on Action against Trafficking in Human Beings also requires States to guarantee free legal assistance to victims of human trafficking, including in its internal law:

15.2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

31.3 Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

Additionally, the Council of Europe Convention on

Preventing and Combating Violence against Women and Domestic Violence requires States to provide free legal aid to victims, but only as provided by the States' internal law:

57. Legal aid Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.

The Council of Europe Convention against Trafficking in Human Organs also contains a provision on free legal aid for victims who are party to a criminal proceeding:

19.3. Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

Similarly, the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health provides that:

20.3. Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

While the Additional Protocol to the European Convention on Information on Foreign Law does not contain a specific provision on free legal assistance, the Preamble acknowledges the desirability of providing access to legal aid and advice in civil and commercial matters:

Considering that, with a view to eliminating economic obstacles to legal proceedings and permitting persons in an economically weak position more easily to exercise their rights in member States, it is also desirable to extend the system established by the Convention to the field of legal aid and advice in civil and commercial matters;

It is clear that the right to free legal assistance is widely recognised by the European human rights system as necessary component of rights enforcement and fair trial rights -- so much so that the Council of Europe has created a system for transferring legal aid applications from one contracting party to another. The European Agreement on the Transmission of Applications for Legal Aid recognises that legal aid is key to remedy economic obstacles to civil proceedings and prescribes that:

1. Every person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil, commercial or administrative matters in the territory of another Contracting Party may submit his application in the State where he is habitually resident. That State shall transmit the application to the other State.

The Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid reinforces States' commitment to cooperate with each other in respect of application for legal aid:

2. Co-operation between Parties 1 The Parties undertake promptly to afford each other the widest measure of mutual

assistance in respect of applications for legal aid in civil, commercial or administrative matters which fall within the jurisdiction of the competent authorities of the requested Party.

The jurisprudence of the European Court of Human Rights also affirms State duties to respect and ensure the right to legal aid. In *Benham v. The United Kingdom*,<sup>110</sup> a case involving imprisonment due to tax default, the Court considered whether the interests of justice required that the complainant be provided with free legal representation at the hearing before the magistrates. The Court ruled where deprivation of liberty is at stake the interests of justice demand that a defendant have free legal representation during proceedings. Hence, the Court concluded the State violated article 6, paragraphs 1 and 3(c), of the European Convention on Human Rights.

The instruments and jurisprudence of the European human rights system demonstrate recognition of the right to free legal assistance not only in criminal matters and when the interests of justice so require, but also in civil, administrative, and commercial proceedings. This demonstrates an important advancement in the protection of human rights in the region and reinforces the notion that

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<sup>110</sup> *Benham v. United Kingdom*, (1996) ECHR 19380/92, online: <<https://www.icj.org/wp-content/uploads/2014/11/ECtHR-CASE-OF-BENHAM-v.-THE-UNITED-KINGDOM-1996-ENG.pdf>>.

free legal assistance is key as a right in itself and as a right to help promote and protect other rights.

## IV – REMEDIES FOR VIOLATIONS OF THE RIGHT TO COUNSEL

International human rights law provides the right to an effective remedy for all persons whose rights and freedoms have been violated.<sup>111</sup> Lack of access to effective remedies can contribute to devastating consequences for victims and impunity for perpetrators.<sup>112</sup> Remedies are key to promoting justice and should be proportional to the gravity of the violations suffered.

Remedies can take the form of *restitution*, which attempts to restore the victim to the original situation before the violation occurred; *compensation*, which is provided for economically assessable damage, including physical or mental harm, lost opportunities, material or

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<sup>111</sup> Lois Leslie, “*The Right to Dissent: International law obligations to respect, protect and fulfil the right to participate in public affairs by engaging in criticism, opposition and dissent*”, LRWC April 2017, at p. 31, 153, online: <[lrwc.org/the-right-to-dissent-international-law-obligations-to-respect-protect-and-fulfill-the-right-to-participate-in-public-affairs-by-engaging-in-criticism-opposition-and-dissent-handbook](http://lrwc.org/the-right-to-dissent-international-law-obligations-to-respect-protect-and-fulfill-the-right-to-participate-in-public-affairs-by-engaging-in-criticism-opposition-and-dissent-handbook)>.

<sup>112</sup> Lawyers’ Rights Watch Canada, “Consular protection and diplomatic intervention: International law duties to provide access to remedies for human rights violations against Canadians abroad”, Submission to the Standing Committee on Foreign Affairs and International Development, Parliament of Canada, (12 March 2018), online: <<https://www.lrwc.org/ws/wp-content/uploads/2018/03/LRWC.DiplomaticConsularProtection.Report.12-March-2018.pdf>>.

moral damages and costs for assistance; *rehabilitation*, which includes medical, psychological, legal and social care; *satisfaction*, which include measures to put an end to violations, disclosure of the truth, official declarations restoring the dignity of the victim, public apology, etc; and *guarantees of non-repetition*, which includes measures to prevent further violations.<sup>113</sup>

Fundamental elements of a remedy include access to competent authorities to claim their rights as well as the redress that victims receive as compensation for the violation suffered.<sup>114</sup> Therefore, remedies must incorporate the right to equal and effective access to justice, including the right to counsel; unhindered access to administrative and other bodies and mechanisms to seek redress; adequate, effective and prompt reparation for the violation suffered; and adequate access to information concerning violations

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<sup>113</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, Principles 19-23, online: <<https://www.refworld.org/docid/4721cb942.html>>.

<sup>114</sup> International Center for Transitional Justice, “Focus: ICTJ and the Right to a Remedy” (December 2009), online: <<https://www.ictj.org/sites/default/files/ICTJ-Global-Rights-Remedies-2009-English.pdf>>.

and reparations mechanisms.<sup>115</sup>

The major international and regional human rights treaties require States to provide an effective remedy to victims of human rights violations. By becoming a party to these international and regional instruments, States commit to respect, protect, and ensure human rights, and to provide effective remedies for violations.

The ICCPR establishes States' obligations to ensure victims of human rights violations have an effective remedy:

2.3. Each State Party to the present Covenant undertakes:

(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;

(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;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The Human Rights Committee, in its general comment n. 31, notes that without an obligation to prevent

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<sup>115</sup> *ibid* note 113, Principles 11(a), (b), (c), and 12.



the recurrence of human rights violations, the purposes of the ICCPR would be defeated.<sup>116</sup> The Committee also reminds States Parties of the interrelationship between the positive obligations imposed under article 2 of the Covenant and the need to provide effective remedies in the event of a breach of human rights.<sup>117</sup>

The Universal Declaration of Human Rights also provides for the right to an effective remedy, by establishing that:

8. 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.

Other international human rights instruments that guarantee the right to a remedy for victims of human rights violations include the: International Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and, the Convention on the Rights of the Child.<sup>118</sup> Regional instruments also

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<sup>116</sup> UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, at para 17, online: <<https://www.refworld.org/docid/478b26ae2.html>>.

<sup>117</sup> *ibid* at para 8.

<sup>118</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol.

contain provisions on the right to an effective remedy, as exemplified by the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights.<sup>119</sup>

States may ensure victims of human rights violations have remedy through different means. The most common mechanism for realising the right to an effective measure is through competent national tribunals. However, some States have established additional human rights enforcement systems which often include the creation of a human rights commission to investigate claims of violations. States sometimes also create specific adjudicative bodies to hear cases, or establish administrative bodies, like ombudspersons, to monitor and

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660, p. 195, at Articles 6, 14, and 39, online: <https://www.refworld.org/docid/3ae6b3940.html>>; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3, online: <https://www.refworld.org/docid/3ae6b38f0.html>>.

<sup>119</sup> “*Banjul Charter*” *supra* note 47 at Articles 7, 25 and 13, respectively; Organization of American States (OAS), *American Convention on Human Rights*, “*Pact of San Jose*”, Costa Rica, 22 November 1969, online: <https://www.refworld.org/docid/3ae6b36510.html>>; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, online: <https://www.refworld.org/docid/3ae6b3b04.html>>.

ensure the country's compliance with international or regional human rights provisions.<sup>120</sup>

The Human Rights Committee has highlighted the importance of States establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.<sup>121</sup> The Committee notes that a failure by a State Party to the ICCPR to investigate allegations of violations can in and of itself result in a separate breach of the Covenant.<sup>122</sup>

It is relevant to note, however, that full remediation of violations by State actors can depend on the existence of national resources that allow for appropriate compensation to be awarded to victims. The availability of such resources should therefore be encouraged and strengthened by States.

Besides enabling and ensuring access to competent national tribunals to review and redress the violation of human rights, States must also engage in efforts to prevent such violations. Therefore, passing legislation that provides

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<sup>120</sup> United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, "International Norms and Standards Relating to Disability", (2004) online: *United Nations Department of Economic and Social Affairs – Disability* <<http://www.un.org/esa/socdev/enable/comp103.htm>>.

<sup>121</sup> *supra* not 116, at para 15.

<sup>122</sup> *ibid* at para 15.

for the protection of human rights and specifies adequate remedies for violations, as well as the means by which victims can seek redress, is key to give effect to the right to remedy. In the result, a network of governmental, non-governmental, and international actors is important to ensure the implementation of international human rights norms and standards in domestic legislation, since the elaboration of human rights legislation depends largely on States' political will.<sup>123</sup>

When national mechanisms to seek redress for human rights violations fail, victims may resort to international and regional channels through which they can seek to have violations determined and remedies recommended. As seen in this guide, some UN treaty bodies provide a procedure through which victims can seek determination of violations by State actors and a recommendation for remediation. Regional human rights systems also offer mechanisms, such as human rights commissions and courts, whose main function is to ensure States' compliance with human rights obligations and to call for their commitment in providing victims of violations with effective remedies. It is important to remember that to access some of these

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<sup>123</sup> *supra* note 120.

procedures, victims must exhaust domestic remedies.

Ensuring that human rights are guaranteed for every person in every country depends on wide public knowledge of protected rights. This means that individuals must learn about their rights and know about the mechanisms they can activate to seek redress when violations have taken place. It is only when individuals understand their rights and responsibilities and the obligations of their governing authorities that they can monitor and push for legislation, policies, and practices in line with international human rights law and standards.<sup>124</sup> It is thus paramount that individuals understand how they can have their right to a remedy fulfilled and where they can turn to seek redress.

There are different ways of seeking redress for injustices, and having the support of legal counsel is crucial to empower victims. Although it is the duty of States to provide education on human rights in order to ensure the enjoyment of protected rights by everyone, as prescribed by the Universal Declaration of Human Rights and several

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<sup>124</sup> Lawyers' Rights Watch Canada, "The Right to Know Our Rights: International Law Obligations to Ensure International Human Rights Education and Training" (May 2012), online: <[https://www.lrwc.org/ws/wp-content/uploads/2012/05/The.Right\\_to\\_Know\\_Our\\_Rights.May2012online1.pdf](https://www.lrwc.org/ws/wp-content/uploads/2012/05/The.Right_to_Know_Our_Rights.May2012online1.pdf)>.

human rights treaties, civil society in general and NGOs in particular also have an important role in raising people's awareness on their rights and on the channels through which they can seek redress for violations.<sup>125</sup> Civil society also has a key role in monitoring rights violations and holding States accountable for not complying with their international obligations.

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<sup>125</sup> *supra* note 120.

## V – CONCLUSION

A fair legal system based on the rule of law can only exist when the right to counsel is duly promoted and respected. The right to counsel is essential as a right in itself, because it ensures fair trial and due process guarantees, and as a right that helps fulfil other fundamental rights, such as the right to liberty and the right to life.

There are many obstacles to the right to counsel that threaten not only the fulfilment of this and other rights, but also the integrity and legitimacy of entire legal systems. A person's lack of knowledge of his/her right to counsel, the lack of resources to afford legal advice and representation, the limited availability of legal aid, and the complexity of the legal system and the lack of understanding thereof are just some of the main hindrances that people who come in contact with the legal system face when seeking the determination of rights and obligations.

There are many potential ways to strengthen and give meaning to the right to counsel,<sup>126</sup> but ultimately it is up to States to ensure that the right to counsel and other

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<sup>126</sup> Supra note 31 at 615.

fundamental rights are protected. Regardless of the differences in legal systems around the world, the full implementation of human rights obligations by a State can only be achieved if those obligations are enforced by judicial, administrative, legislative, and other internal decisions or actions.

States have a specific interest in ensuring that those involved in the administration of laws and legal systems have appropriate knowledge of the right to counsel and have the conditions to implement it. As vital agents of administration, judges, prosecutors, lawyers, paralegals, law enforcement agents, clerks, and others, must understand and uphold human rights, by ensuring fairness, transparency, and accountability. All actors in the legal system share a responsibility in ensuring that the right to counsel and other fair trial and due process guarantees are respected.

Facilitating training for judges, lawyers, prosecutors, police, prison authorities, and other legal system workers in human rights that includes the importance of the right to counsel and other fair trial guarantees is also necessary to fulfil the international obligations of States. However, while important, training is only part of the solution, as the



legal system workers also have the conditions to work properly and to meet the needs of the population. For instance, if case-loads are too high, even well-trained lawyers will not be able to effectively represent their clients.<sup>127</sup> For this reason, strengthening the right to counsel also requires adequate funds for the proper functioning of the legal system, including the promotion of free legal assistance for anyone who is unable to afford to pay for legal services.

It is incumbent on the respective authorities and State institutions to put in place legislation and policies to ensure that the right to counsel and other fair trial and due process guarantees are enshrined in national legislation and practice. Countries that lack legislation guaranteeing the right to counsel should reform their domestic laws to ensure they reflect the protections contained in the international and regional human rights instruments which they have ratified.

Awareness-raising initiatives to increase wide public knowledge of human rights are also crucial to educate people on their rights and to teach them how to seek for help when violations occur. Recognizing that everyone

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<sup>127</sup> *ibid.*

must have their right to counsel guaranteed is particularly important in any judicial or extrajudicial procedure aimed at determining rights and obligations. Therefore, lawyers, bar associations, civil society organisations, access to justice commissions, scholars, judges, professionals in other areas whose clients need representation, and individuals who come in contact with the legal system may all engage in efforts to promote the right to counsel.<sup>128</sup>

Awareness-raising is also important when it comes to the international and regional human rights complaint mechanisms that exist to help individuals seek determination and remediation of violations. Teaching individuals about these mechanisms, how they work, and how they can help them claim their rights is an important way to legally empower them.

All these ways in which the right to counsel can be promoted and enhanced need to be combined with judicial accountability and with mechanisms to monitor the quality of legal representation to make sure that the right to counsel is effective and serves the important purpose of protecting fundamental rights and freedoms. Data collection and

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<sup>128</sup> Clare Pastore, “A Civil Right to Counsel: Closer to Reality”, (2009) 42:4 Loy. L.A. L. Rev. 1065 at 1074, online: <<https://digitalcommons.lmu.edu/llr/vol42/iss4/7/>>.

analysis on the right to counsel, with special focus to its implementation and outcomes, can be extremely helpful to assess access to the law and the protection of the law in States and to inform necessary policy and legislative changes.

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