

### The Right to Effective Legal Representation

#### International Standards

##### Why is the right to effective counsel so important in death penalty cases?

Access to effective legal counsel is based on the fundamental right of the accused to a fair trial and is crucial in death penalty cases, where effective counsel can literally mean the difference between life or death. “In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the [International] Covenant [on Civil and Political Rights] have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).” [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶ 59, 90th Session, adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32]

##### The right to legal counsel is afforded to:

- \* Anyone who has been detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal counsel at all stages of the criminal justice process [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187, annex, ¶ 20 (28 March 2013)]
- \* Anyone who has been convicted and sentenced to death while the case is open for appeal or who seeks constitutional review of irregularities in their criminal trial [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶¶ 10, 51, 90th Session, adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32]

##### The accused has the right to:

- \* Be informed of the right to select legal counsel to defend him/herself.
- \* Choose legal counsel to defend him/herself OR defend him/herself in person.
- \* Free legal assistance assigned to the accused if the accused does not have sufficient means to pay out of pocket for the legal assistance [International Covenant on Civil and Political Rights, Art. 14(3)(d)]

##### Timely access to legal counsel is required:

- \* At all stages of the criminal justice process in a death penalty case; this standard is higher in death penalty cases than in any other criminal case. [“Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,” United Nations Economic and Social Council, resolution 1989/64, ¶ 1(a) 24 May 1989]
- \* “In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.” [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶¶ 38, 90th Sess., adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32]

- \* This includes periods of initial police detention, questioning and investigation; during trial; through any appeals; and during post-conviction pardon or clemency proceedings. [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶¶ 38, 51, 90th Sess., adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32]
- \* Appeals should be mandatory. [“Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,” United Nations Economic and Social Council, resolution 1989/64, ¶ 1(b) 24 May 1989]

**The quality of legal representation in death penalty case is crucial. International standards of legal representation require:**

**Privacy and Confidentiality**

- \* The accused must have adequate time and facilities to prepare his/her defense and to communicate with counsel [International Covenant on Civil and Political Rights, Art. 14(3)(b)]
- \* The accused must be able to meet with his/her counsel in private
- \* “Counsel provided by the competent authorities on the basis of [article 14, paragraph 3(d) of the International Covenant on Civil and Political Rights] must be effective in the representation of the accused.”
- \* “There is also a violation of [article 14, paragraph 3(d) of the International Covenant on Civil and Political Rights] if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.”
- \* All communications between the accused and his/her counsel are to be strictly confidential [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶ 38, 34, 90th Sess., adopted 23 Aug. 2007, UN Doc. CCPR/C/GC/32]

**Ethics**

- \* Counsel must be impartial to the state, such that counsel is free of restrictions, influence, pressure or undue interference from the state
- \* Counsel must be able to represent the accused in accordance with generally recognized professional ethics [UN Human Rights Committee, General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), ¶ 34, 90th Sess., adopted 23 Aug. 2007, UN Doc. CCPR/C/GC/32]

**Competent and Qualified Counsel**

- \* Counsel must be qualified to represent the client, including by having adequate training and experience.
- \* Counsel must have adequate time and resources to prepare all proceedings.
- \* Counsel must have access to information and case files [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Office on Drugs & Crimes 10: Principle 8 (2013)]

Free legal aid must be independent, non-discriminatory and need-based, though the State may determine the model of the legal aid system [Report of the Special Rapporteur on the Independence of Judges and Lawyers, Human Rights Council (15 Mar. 2013), ¶¶ 3, 32, 39, 50, 96]

## Regional Standards

|                                                          | Africa                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Americas                                                                                                                                                                                                                                                                               | Europe                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Middle East                                        |
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| <b>Region-wide treaty guaranteeing access to counsel</b> | African Charter on Human and Peoples' Rights (Banjul Charter)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | American Convention on Human Rights (ACHR)                                                                                                                                                                                                                                             | European Convention on Human Rights (ECHR)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Arab Charter on Human Rights (but not enforceable) |
| <b>Right to counsel</b>                                  | <p>Applies during criminal proceedings, and includes all stages of any criminal prosecution, preliminary investigations, administrative detentions, trial and appeal proceedings, executive clemency, commutation of sentence, amnesty or pardon [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section H(c), African Commission on Human and Peoples' Rights, 2003]</p> <p>The accused has the right to choose his/her own counsel [African Charter on Human and Peoples' Rights, 1981, Art. 7(1)(c)]</p> <p>Right begins when accused is first detained [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Guidelines)]</p> | <p>Applies to any person accused of a criminal offence</p> <p>The accused has the right to choose his/her own counsel or to defend him/herself personally</p> <p>If necessary, the State to provide counsel</p> <p>[American Convention on Human Rights, Articles 8(2)(d) and (e)]</p> | <p>Applies to everyone charged with a criminal offence and in civil cases*</p> <p>The accused has the right to choose his/her own counsel or to defend him/herself personally [European Convention on Human Rights (ECHR), Article 6(3)(c)]</p> <p>*Access to counsel may be restricted for "good cause" so long as the court determines the restriction hasn't deprived the accused of a fair hearing [Murray v. United Kingdom [GC], No 18731/91 (8 January 1996) at para 63]</p> <p>Requires informing the accused of the right to counsel <i>prior</i> to being questioned, immediately upon arrest, during investigative acts, or when the individual's position is significantly affected (e.g., becoming a suspect in a case), which may occur <i>prior</i> to a formal arrest [<i>Laska and Lika v. Albania</i>, Nos 12315/04 and 17605/04, (20 April 2010). <i>Salduz v. Turkey</i>, No 36391/02 (27 November 2008) at para 54; <i>Shabelnik v. Ukraine</i>, No 16404/03 (19 February 2009); <i>Sobko v. Ukraine</i>, No 15102/10 (17 December 2015)]</p> |                                                    |

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| <p><b>Legal Aid</b></p>                                                        | <p>Judicial body may not assign counsel if there is qualified counsel of the accused's own choosing is available</p> <p>Access to free legal assistance varies widely on the continent</p> <p>[Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Guidelines)]</p>                                                                                                                                                        |                                                                                                                                                      | <p>Free legal assistance assigned if the accused does not have sufficient means to pay [European Convention on Human Rights (ECHR), Article 6(3)(c),</p> <p>ECHR interpreted to require the State to provide free legal assistance in civil and criminal cases to indigent individuals when such assistance "is indispensable for effective access to court". [Airey v. Ireland, 9 October 1979, para. 26]</p>                                                                                                                                                                                                                                                                                             | <p>State parties are to ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights [Arab Charter on Human Rights 2004, Article 13(1)]</p> |
| <p><b>Confidentiality &amp; Privacy; Competent &amp; Qualified Counsel</b></p> | <p>Accused has the right to adequate time and facilities for the preparation of their defense and to communicate confidentially with counsel [Resolution on the Right to Recourse and Fair Trial]</p> <p>Various guidelines established by human rights organizations include provisions addressing the right to effective assistance of counsel (e.g., the State to ensure appointed counsel has requisite skill, training and experience for the assigned case)</p> | <p>Accused has the right to communicate freely and privately with his/her counsel</p> <p>[American Convention on Human Rights, Articles 8(2)(d)]</p> | <p>ECHR interpreted to as providing the accused with the right to communicate privately and confidentially with counsel</p> <p>Violated by: limiting communication to video link [<i>Gorbunov and Gorbachev v. Russia</i>, Nos 43183/06 and 27412/07, (1 March 2016); <i>Sakhnovsky v. Russia</i>, No 21272/03, (2 November 2010)]; opening letters between counsel and the accused [<i>Campbell v. United Kingdom</i>, No 13590/88 (25 March 1992)] ; allowing others to be in earshot of legal consultation [<i>Brennan v. United Kingdom</i>, No 39846/98, (16 October 2001)]; creating perception that confidentiality was compromised [<i>Khodorkovskiy v. Russia</i>, No 5829/04, (31 May 2011)]</p> |                                                                                                                                                                                                            |