



Factsheet for Police Personnel

18th World Day Against the Death Penalty

The Right to Effective Legal Representation



Access to a trained counsel is paramount in capital cases

Access to effective and trained legal representation can be the difference between life and death for capital defendants. One of the most basic tenets of criminal justice systems around the world is that accused persons are innocent until proven guilty. Without legal representation, though, capital defendants struggle to defend themselves against the state's charges. Defence lawyers are necessities, not luxuries, in these proceedings.¹ Indeed, the African Court on Human and Peoples' Rights has noted that the essence of legal representation is to "ensure a fair judicial process and avoid the possibility of miscarriage of justice."² A capital defendant's access to effective legal representation at all stages of proceedings is therefore paramount.

International law protects all defendants' right to a fair trial.³ Capital defendants need legal representation to ensure that this right is adequately protected. Most capital defendants do not have a detailed understanding of the laws under which they are tried, either procedural or substantive. Without this understanding, they cannot defend themselves, appeal their convictions or sentences, or ensure that they are fairly treated by the state. Moreover, access to counsel is necessary to counterbalance the resources that the state invests in prosecutions. Governments devote considerable resources to try capital defendants and prosecution lawyers are deemed essential to protect the public's interest in an orderly and just society.⁴ Yet almost all capital defendants cannot afford counsel to protect their own interests and rights.⁵ It is for these reasons that international law and most domestic systems safeguard all capital defendants' right to counsel, at least at trial.

The right to counsel is rendered empty if counsel's representation is not effective. In adversarial systems of criminal justice in particular, effective legal representation is the cornerstone of ensuring a defendant's right to a fair trial. The nature of the trial setting, which depends on contesting presentations by both prosecution and defence to arrive at fair and accurate results, means that any defendant who does not have access to counsel to make a strong presentation of their case cannot be assured a fair trial.⁶

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Here, the Supreme Court of the United States held that indigent criminal defendants who are charged with a felony have the right to counsel, noting that "lawyers in criminal courts are necessities, not luxuries."

² *Onyango v. The Republic of Tanzania*, App. 006/2013, Afr. Ct. H.P.R., ¶ 182 (18 Mar. 2016).

³ See ICCPR Article 7 etc.

⁴ See *Gideon v. Wainwright*, *supra* note 1, at 344.

⁵ Capital Punishment in Context, *Representation in Capital Cases* (last visited 20 May 2020) <https://capitalpunishmentincontext.org/issues/representation>; Death Penalty Information Center, *Representation* (last visited 20 May 2020) <https://deathpenaltyinfo.org/policy-issues/death-penalty-representation>.

⁶ *Gideon v. Wainwright*, *supra* note 1, at 344.

Our family sold their few possessions in order to hire counsel to represent us. However, before the day of trial, he absconded and we faced trial without counsel. We were convicted for a crime that we did not commit and served 21 years in prison.

We attempted to appeal, but without counsel, our appeal was never heard. When we finally obtained counsel through the resentencing project, we were able to present, for the first time, the true evidence of the facts of our case.

His assistance made all the difference to us and we are finally home with our families.



John Nthara and Jamu Banda (with Officer Dzinyemba) leaving prison. Photo provided by John Nthara and Jamu Banda.

– John Nthara and Jamu Banda, Malawi

In the pre-trial phase, the assistance of counsel enables a capital defendant to protect their rights and begin to prepare their defence.⁷ For defendants who are detained, the assistance of counsel enables them to challenge their detention and to safeguard against ill-treatment.⁸ The police are important actors in ensuring capital defendants' right to counsel before trial. In the trial phase, counsel's zealous advocacy is essential to the presentation of the defendant's case, to contesting the prosecution's narrative, and to protecting the defendant. Beyond trial, counsel serves a similar advocative and protective role. These rationales apply in any criminal case, but are critical in a capital case. A defendant's access to counsel to understand the charges brought against them, navigate the legal system, and adequately defend themselves is all the more important when the defendant's very life is at stake.

International law protects capital defendants' right to counsel

All capital defendants have the right to access counsel. Most international and regional human rights instruments provide for the right to legal representation in criminal proceedings as part of the right to a fair trial.⁹ For example, Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that every person is entitled "to defend himself in person or through legal assistance of his own choosing . . . and to have legal assistance assigned to him, in any case where the interests of justice so require." Article 7(1)(c) of the African Charter on Human and Peoples' Rights (ACHPR) similarly guarantees a defendant's right to a defence.

International, regional, and national bodies have found that the right to counsel encompasses the right to effective and substantial counsel. A prerequisite of effective counsel is that counsel must be independent and free to advocate on behalf of their client. This is complicated by

⁷ See Amnesty International, *Fair Trial Manual, Second Edition*, 43 (2014).

⁸ *Id.*

⁹ ICCPR, article 14(3)(d); Statute of the International Criminal Court, article 67(1)(d); European Convention for Human Rights (ECHR), article 6(3)(c); Charter of Fundamental Rights of the European Union, article 47; American Convention on Human Rights (ACHR), article 8(2)(d); African Charter on Human and Peoples' Rights (ACHPR), article 7(1)(c).

government control over the legal profession, as is the case in Saudi Arabia.¹⁰ In addition, a state's mere appointment of a defence lawyer is not sufficient to guarantee that the defendant receives effective assistance.¹¹ Rather, as the United Nations Human Rights Committee has stated on multiple occasions, the right to effective counsel requires defence lawyers to have access to all of the resources needed to carry out their role.¹² This means that defence lawyers must prepare a defence¹³ and must have adequate time and facilities to prepare this defence, as articulated in the ICCPR and in European, American, and African human rights instruments.¹⁴ The U.N. Economic and Social Council has made clear that these obligations are critical in death penalty cases.¹⁵

What constitutes adequate time and facilities depends on the circumstances of the case. By their very nature, capital cases are complex and demanding, requiring time and a team to prepare. The demands of capital cases necessitate that if, during the course of the proceedings, a new attorney is appointed, the new attorney must have enough time to prepare the defence, postponing the trial if necessary.¹⁶ Defence lawyers must also have the requisite experience to handle a capital case. In spite of these international legal obligations, some capital defendants are represented by lawyers who are denied the resources to take on death penalty cases. A study in the United States, for example, found that death row inmates in Texas had a one in three chance of being executed without having their case investigated by a competent attorney.¹⁷

Moreover, states must provide full and free legal assistance to indigent defendants in capital cases.¹⁸ Indigent defendants have the right to legal aid even during emergencies and armed conflict, as recognised by the Arab Charter.¹⁹ Lawyers provided by the state have the same obligations to provide effective assistance as their hired counterparts. This requirement is especially important given that many capital defendants are indigent, so receive state-appointed counsel, and given the seriousness and finality of the death penalty.

Capital defendants have a right to counsel during police interrogation and while in police custody. All suspects and accused persons, whether or not they are detained, should have access to counsel from the very start of a criminal investigation—from the moment that they are deprived of their liberty. The Inter-American Court of Human Rights has stated that a

¹⁰ See Amnesty International, *Affront to Justice: Death Penalty in Saudi Arabia*, 17 (2008), <https://www.amnesty.org/download/Documents/56000/mde230272008en.pdf>.

¹¹ *Artico v. Italy*, 6694/74 Eur. Ct. H.R., 13 May 1980; *Kamasinski v. Austria*, 9783/82 Eur. Ct. H.R., 19 Dec. 1989; *Daud v. Portugal*, 22600/93 Eur. Ct. H.R., 21 Apr. 1998.

¹² See, e.g., *H.C. v. Jamaica*, Comm. No. 383/1989, U.N. Doc. CCPR/C/45/D/383/1989, ¶ 6.3 (H.R.C. 28 July 1992); *Hendricks v. Guyana*, Comm. No. 838/1998, U.N. Doc. CCPR/C/75/D/838/1998, ¶ 6.4 (H.R.C. 28 Oct. 2002); *Brown v. Jamaica*, Comm. No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997, ¶ 6.6 (H.R.C. 11 May 1999).

¹³ *Diocles William v. United Republic of Tanzania*, App. No. 016/2016, Afr. Ct. H.P.R., ¶ 63 (21 Sept. 2018).

¹⁴ ICCPR, article 14(3)(b); ECHR, article 6(3)(b); ACHR, article 8(2)(c); African Commission on Human and Peoples' Rights v. Libya, App. No. 002/2013, Judgment (Merits), ¶ 94 (6 June 2016). See also Statute of the International Criminal Court Statute, art. 67(1)(b).

¹⁵ ECOSOC Resolution 1989/64, ¶ 1(a).

¹⁶ *C.f. Goddi v. Italy*, App. No. 8966/80 Eur. Ct. H.R. (9 Apr. 1984); *Daud v. Portugal*, App. No. 22600/93 Eur. Ct. H.R., (21 Apr. 1998); *Bogumil v. Portugal*, App. No. 35228/03 Eur. Ct. H.R., (7 Oct. 2008).

¹⁷ See Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf.

¹⁸ African Commission, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ¶ H(c) (2003) [hereinafter African Commission Guidelines]. See ICCPR article 14(3)(d); Statute of the ICC, article 67(1)(d); ECHR, article 6(3)(c); Charter of Fundamental Rights of the European Union, art. 47; ACHR, article 8(2)(e); UN Basic Principles on the Role of Lawyers, 1990, ¶3.

¹⁹ Arab Charter Article 4(2). See also Amnesty International, *Fair Trial Manual*, *supra* note 7, at 46–47.

suspect or accused person must have access to counsel from the moment when an investigation related to them is ordered, and particularly when they make a statement.²⁰ The European Court of Human Rights has also stated that accused persons must be allowed legal assistance as soon as they are placed in custody, including during the initial stages of a police investigation.²¹

All people should have the assistance of counsel during police questioning, even if they exercise their right to remain silent.²² A suspect's rights are prejudiced if incriminating statements made during police questioning whereby the suspect was denied access to a lawyer are used to support the suspect's conviction.²³ In addition, the European Committee for the Prevention of Torture has clarified that the right to counsel applies even before a person has formally been declared a suspect, including if they are called to a police station as a witness.²⁴

Based on available information, on appeal, Mr. Fardin Hosseini's attorney denied the charges against his client, relying on legal evidence. Noting that there was absolutely no evidence tying Mr. Hosseini to the charges brought against him, [the attorney] emphasized that the testimony of Mr. Vahab Amiri, Mr. Hosseini's brother-in-law, against the latter, was obtained in the absence of a lawyer under unbearable duress and torture and was denied before the judge. Mr. Hosseini's attorney further emphasized: "My client expressly stated at Kermanshah Province Criminal Court that [his brother-in-law's] confessions contained in the case file were obtained in special circumstances, when he had been tortured, and that he had objected to said confessions that had been obtained under duress, torture, and threat of anal insertion of a bottle."

– Testimony of Fardin Hosseini, provided the Abdorrahman Boroumand Center

Such is the importance of access to counsel that when it is denied or ineffective, a capital defendant's death sentence cannot stand. The U.N. Human Rights Committee has concluded that violations of the ICCPR's fair trial guarantees, such lack of access to effective legal representation, violate *ipso facto* Article 6 of the ICCPR—the right to life—as the death sentence is considered arbitrary.²⁵ Similarly, the African Commission has concluded that death sentences imposed after an unfair trial are arbitrary, stating that "if the particular proceedings in which the death penalty is imposed have not stringently met the highest standards of fairness, then the subsequent application of the death penalty will be considered a violation of the right to life."²⁶ Access to counsel is essential in capital trials to protect defendants from arbitrary death sentences.

²⁰ Barreto Leiva v. Venezuela, Inter. Am. Ct. H.R., Judgment (Merits, Reparations and Costs), ¶ 62 (17 Nov. 2009).

²¹ Dayanan v. Turkey, App. No. 7377/03 Eur. Ct. H.R., ¶¶ 30–32 (2009).

²² Amnesty International, *Fair Trial Manual*, *supra* note 7, at 44.

²³ *Id.*, at 45.

²⁴ *Id.*

²⁵ See Human Rights Committee, *General Comment No. 36: Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, U.N. Doc. CCPR/C/G/36, ¶ 41 (30 Oct. 2018). See also Ally Rajabu v. United Republic of Tanzania, App. No. 007/2015, Afr. Ct. H.P.R., ¶ 100 (28 Nov. 2019).

²⁶ African Commission, *General Comment No. 3, On the African Charter On Human and Peoples' Rights: The Right to Life, Article 4*, ¶ 24 (2015).

As police officers, what can you do?

Police officers have a critical role in ensuring that suspects and future capital defendants are not denied their right to legal representation. As a prerequisite, you should not be hostile with a suspect for seeking counsel and should not block suspects from seeing counsel; persons in your custody have a right to legal representation.

As the right to counsel encompasses the right to adequate time and facilities for counsel to prepare a defence, you should allow suspects to meet with their lawyers.²⁷ Counsel will need to meet with persons suspected of capital offences for a number of reasons, including to ensure that the person's rights are not being violated in custody and to advise them on their best interests as a suspect of a crime.

You should facilitate a suspect's communication with their lawyer, whether retained or appointed, without delay, inception, or censorship. Deliberately withholding or delaying a suspect's access to legal representation is inconsistent with international law.

To uphold a suspect's right to effective legal representation, you must also ensure that they can communicate with their lawyer in confidence.²⁸ All professional consultations and communications between a lawyer and their client are confidential, including communications made while a person is arrested on a criminal charge. As such, you must provide adequate space for lawyers and their clients to meet and communicate privately. This includes telephone communications. You also should not monitor a suspect or detainee's communications with their lawyer. To ensure the confidentiality to which a suspect is entitled, but taking security needs into account, international standards specify that lawyer-client consultations may take place within sight, but not within hearing, of law enforcement officials.²⁹

Lawyers may give suspects and detainees documents related to their case. Detainees have the right to keep such documents in their possession and you should not hinder them from doing so.³⁰

Resources

Amnesty International, *Fair Trial Manual, Second Edition* (2014)

<https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>

Cornell Center on the Death Penalty Worldwide, *Legal Representation* (last updated 28 June 2012)

<https://www.deathpenaltyworldwide.org/publication/legal-representation/legal-representation-html>

Cornell Center on the Death Penalty Worldwide, *Death Penalty Database* (last visited 29 May 2020)

<https://dpw.pointjupiter.co/search.cfm>

²⁷ See Amnesty International, *Fair Trial Manual*, supra note 7, at 45–46, 48.

²⁸ *Id.*, at 48.

²⁹ *Id.*, at 49.

³⁰ *Id.*