



# Factsheet for Parliamentarians

18th World Day Against the Death Penalty

## The Right to Effective Legal Representation



### Introduction

Every individual is guaranteed a right to a fair trial – which includes access to effective legal counsel -, regardless of the offence they are accused of. However, capital cases make it all the more pivotal: receiving sound legal advice, being represented by a competent and engaged lawyer, and having the resources to explore all legal avenues and remedies can mean the difference between life and death.

While international law does not currently outright prohibit the use of capital punishment, it is abundantly clear on the fact that it can only be used in very exceptional circumstances and as an outcome to judicial proceedings which have stringently adhered to all fair trial guarantees. The United Nations Human Rights Committee considers for example that:

“the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 [which concerns the right to a fair trial] of the Covenant [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).”<sup>1</sup>

Yet, in most countries around the world, the access to effective legal representation, including in capital cases, is not guaranteed either in practice or/and in law. This is a serious concern: not only does it represent a grave violation of the human rights of the people facing the criminal justice system, but it also dramatically increases the risks of miscarriage of justice.

This is all the more concerning in the light of the highly disproportionate representation of poor or marginalized communities in capital cases: according to various studies cited by the UN Secretary General, 74% of those sentenced to death in India are economically vulnerable, almost 90% of those on death row in Malaysia live under the poverty line, and 58% of death row inmates in the United States of America are from

*Read the World Coalition against the Death Penalty and PGA's [Factsheet for Parliamentarians on Death Penalty and Poverty](#) to learn more about this issue.*

<sup>1</sup> UN Human Rights Committee (CCPR), General Comment No. 32 (Right to Equality Before Courts and Tribunals and to a Fair Trial), 23 August 2007, CCPR/C/GC/32, para. 59.

minorities and/or low-income backgrounds.<sup>2</sup> Thus, poor and unequal access to legal representation in capital cases only worsens the disproportionate effect of the death penalty on poor or marginalized communities and “increases social inequality in the criminal justice system”.<sup>3</sup>

This is why members of the World Coalition against the Death Penalty (WCADP) have decided to devote the 18<sup>th</sup> World Day against the Death Penalty to the issue of access to effective legal representation, to highlight how capital punishment is often the outcome of fundamentally unfair trials and thus an absolute and irreversible sentence to an uncertain and unsecure conviction. While both the WCADP and Parliamentarians for Global Action (PGA), under its [Campaign for the Abolition of the Death Penalty](#), strive to promote full abolition, it is pivotal for all stakeholders to shine a light on the norms and conditions in which the death penalty is used in practice.

**As parliamentarians, you will most certainly work alongside colleagues who may not be convinced abolitionists yet but are nonetheless committed to ensuring that the criminal justice system is as fair as possible, especially if it has the power of life or death.**

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<sup>2</sup> UN Human Rights Counsel (HRC), ‘Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty’, 22 August 2017, A/HRC/36/26, para. 14.

<sup>3</sup> Idem, para. 12 & 13.

## What is the right to effective legal representation?

The right to effective counsel is derived from provisions protecting the right to a fair trial, which exist in most human rights instruments:

### **Art. 14(3)(d) of the International Covenant on Civil and Political Rights**

“Everyone shall be entitled: [...] 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”.

### **Art. 6(3)(c) of the European Convention on Human Rights**

“Everyone charged with a criminal offence has the following minimum rights: [...] 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.”

### **Art. 8(2)(d) of the Inter-American Convention on Human Rights**

“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 [...] defend himself personally or to be assisted by legal counsel of his own choosing.”

### **Art. 13 of the Arab Charter on Human Rights**

“Everybody has the right to a fair trial in which sufficient guarantees are ensured [...]. State Parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights.”

### **Art. 7(1)(c) of the African Charter on Human and Peoples' Rights**

“Every individual should have the right to have his cause heard. This comprises [...] the right to defence, including the right to be defended by counsel of his choice.”

# Access to legal representation: ensuring everyone can get legal assistance

## Who has a right to legal representation?

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.<sup>4</sup>

The accused should be able to choose a counsel freely.<sup>5</sup> International law and many legal systems provide the accused with the opportunity to defend themselves if they so wish, but legal assistance should be provided to them “whenever the interests of justice require, and without payment by them in any such case if they do not have sufficient means for it.”<sup>6</sup> This means that **States must create, fund and implement legal aid (or legal assistance) programs**<sup>7</sup> and that safeguards must be in place to ensure that defendants’ decision to waive their right to legal representation are informed and voluntary.<sup>8</sup> A waiver can also always be revoked.

*“The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”<sup>9</sup>*

The right to legal representation must be notified to the concerned individual in a language they understand, upon arrest.<sup>10</sup> In addition to this formal notification, States should have programmes aimed at raising awareness about the right to a fair trial and its various components<sup>11</sup> and how their legal aid system works.

## When does the right to counsel apply?

The right to counsel applies to all stages of capital cases’ proceedings,<sup>12</sup> including at the time of arrest, initial police detention, the questioning and investigation, during trial and throughout all appeals, and for the purpose of post-conviction pardon or clemency proceedings.<sup>13</sup> Access

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<sup>4</sup> UN General Assembly (UNGA), Resolution 67/187, ‘United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems’, 28 March 2013, A/RES/67/187, para. 20 of Annex.

<sup>5</sup> African Commission on Human and Peoples’ Rights (AC°HRP), Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, 2003, DOC/OS/(XXX)247, N(2)(a).

<sup>6</sup> CCPR, General Comment No. 32, para. 38. See also AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, H(a).

<sup>7</sup> UNGA, Resolution 67/187, para. 15 of Annex.

<sup>8</sup> Idem, para. 43(b) of Annex.

<sup>9</sup> CCPR, General Comment No. 32, para. 10.

<sup>10</sup> AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, M(2)(b) and N(2)(d).

<sup>11</sup> AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, G(c).

<sup>12</sup> UN Economic and Social Council (ESC), Resolution 1989/64, ‘Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty’, 24 May 1989, para. 1.a.

<sup>13</sup> CCPR, General Comment No. 32, para. 38; CCPR, *LaVende v. Trinidad and Tobago*, Communication No. 554/1993, Views adopted on 29 October 1997 (CCPR/C/61/D/554/1193), para. 5.8; AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, H(c) and N(2)(c); European Commission of Human Rights (EC°HR), *Can v. Austria* (App. No. 9300/81), Report of the Commission, 12 July 1984, para. 54.

to counsel, whether privately retained or appointed through a legal aid program, should be prompt:<sup>14</sup> in some cases, for example when the individual is being held at the police station, preliminary legal aid should be provided if there are indications that they lack sufficient means to retain a private lawyer,<sup>15</sup> without having to provide heavy documentation beforehand. Finally, whenever legal aid is denied, an appeal should be available against it.

### What does legal representation mean?

During the pre-trial phase, the right to legal counsel includes having access to a lawyer of course, but also being provided with the time to consult confidentially with them as well as having them present during any questioning and being able to consult them throughout, even if they choose to exercise their right to remain silent.<sup>16</sup> The right to conduct confidential communications with counsel continues of course throughout trial, and is part of the right to adequate time and facilities to prepare the defense. Counsel should be able to call and present witnesses and evidence, as well as cross-examine them.

Being represented by counsel does not mean the defendant is not an active participant of his defense. They should for example be allowed to keep documents related to their case in their possessions while in custody.

### Who should benefit from legal aid?

While countries may set the parameters used to determine whether an individual is indigent, the gravity of the offence, the severity of the sentence,<sup>17</sup> or the complexity of the case<sup>18</sup> should be taken into consideration in determining whether it is in the interest of justice that the accused receives legal aid. In this respect, **capital cases, resulting from the most serious crimes and in the highest sentence, de facto qualify the indigent accused for legal assistance,**<sup>19</sup> as the UN Human Rights Committee concluded that “it is axiomatic that the accused [in capital cases] must be effectively assisted by a lawyer at all stages of the proceedings”.<sup>20</sup> In capital cases, legal assistance extends further than for other offences, and covers the process of seeking constitutional review.<sup>21</sup>

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<sup>14</sup> European Court of Human Rights (ECtHR), Grand Chamber, *Salduz v. Turkey* (App. No. 36391/02), Judgment, 27 November 2008, para. 52.

<sup>15</sup> UNGA, Resolution 67/187, para. 41(c) of Annex; UN Special Rapporteur on the independence of judges and lawyers, Annual report to the Human Rights Council, ‘Legal aid’, 15 March 2013, A/HRC/23/43, para. 54.

<sup>16</sup> UN Human Rights Council (HRC), Resolution 13/19, ‘Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers’, 15 April 2010, A/HRC/RES/13/19, para. 6; ECtHR, Second section, *Dayanan v. Turkey* (App. No. 7377/03), Judgment, 13 October 2009, para. 30-33; Inter-American Court of Human Rights (IACtHR), *Barreto Leiva v. Venezuela*, Judgment (Merits, Reparations and Costs), 17 November 2009, para. 62.

<sup>17</sup> AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, H(b); ECtHR, Chamber, *Quaranta v. Switzerland* (App. No. 12744/87), Judgment, 24 May 1991, para. 33.

<sup>18</sup> *Idem*, para. 34.

<sup>19</sup> AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, H(c).

<sup>20</sup> CCPR, General Comment No. 32, para. 38; AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, A(2)(f).

<sup>21</sup> CCPR, *Shaw v. Jamaica*, Communication No. 704/1996, Views adopted on 4 June 1998 (CCPR/C/62/D/704/1996), para. 7.6; Inter-American Commission on Human Rights (IACHR), The death penalty in

Legal aid must be provided without discrimination to all individuals who are on the territory of the State or find themselves under its jurisdiction, regardless of their nationality or statelessness.<sup>22</sup>

Information about how to access legal aid programs should be made accessible but a formal application should not be a hard requirement: for example, the African Court has found that “where the [defendant] is not informed of this right or does not invoke this right, the onus is on the judicial authorities to activate the right”.<sup>23</sup>

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the Inter-American System of Human Rights: From restrictions to abolition, 31 December 2011, OEA/Ser.L/V/II Doc.68I, p. 145.

<sup>22</sup> UN Special Rapporteur on the independence of judges and lawyers, Annual report to the Human Rights Council, ‘Legal aid’, para. 43; AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, G(a).

<sup>23</sup> African Court on Human and Peoples’ Rights (ACtHR), *Wilfred Onyango v. United Republic of Tanzania* (App. 006/2013), Judgment, 18 March 2016, para. 182.

## Access to an *effective* legal representation: making the rights of the accused a reality

### What constitutes *effective* legal representation?

Regardless of whether the counsel is privately retained or provided through a legal aid program, the legal representation provided should be *effective*: the right to a fair trial “guarantees the right of an accused to participate effectively in a criminal trial”.<sup>24</sup> Hence, it is not enough that the State formally appoints a legal counsel to the defendant, it must also take “positive actions” to guarantee that the legal representation provided is effective.<sup>25</sup>

This means that not only must the counsel themselves be trained, competent, and overall able to provide legal advice, but also that the criminal justice systems and the legal safeguards applied must allow for that assistance to be given to the accused.

### What qualities must a counsel have?

All lawyers, whether they are being paid directly by the accused or appointed through a legal aid program, must fulfil basic requirements of education and training, but also of ethics. They must notably be impartial to the State and free from influence or undue pressure and perform their legal representation in accordance with generally recognized professional ethics.<sup>26</sup> Although the structure adopted by States for their legal aid programs may differ, they must be autonomous and independent.<sup>27</sup>

Whenever a counsel is provided by the State through a legal assistance program, “blatant misbehaviour or incompetence [...] [on the part of the counsel] may entail the responsibility of the State”.<sup>28</sup> In capital cases, if the court is notified or if it is manifest that the defendant’s counsel is ineffective, it must ensure that counsel performs their duties or replace them.<sup>29</sup>

This puts the onus on the State authorities to ensure that legal aid programs are well-resourced and staffed with trained and competent lawyers. Defendants who need legal assistance should be appointed a lawyer with experience and competence adequate to the offence(s) at hand<sup>30</sup> - especially in capital cases, which may be complex and often last several years. It is also incumbent on the authorities to intervene, without the defendant having to make a request or

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<sup>24</sup> ECtHR, Grand Chamber, *Murtazaliyeva v. Russia* (App. No. 36658/05), Judgment, 18 December 2018, para. 91.

<sup>25</sup> ECtHR, Chamber, *Artico v. Italy* (App. No. 6694/74), Judgment, 13 May 1980, para. 36.

<sup>26</sup> CCPR, General Comment No. 32, para. 34; AC<sup>+</sup>HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, I(a), (b) and (h).

<sup>27</sup> UN Special Rapporteur on the independence of judges and lawyers, Annual report to the Human Rights Council, ‘Legal aid’, para. 50.

<sup>28</sup> CCPR, General Comment No. 32, para. 38.

<sup>29</sup> CCPR, *Pinto v. Trinidad and Tobago*, Communication No. 232/1987, Views adopted on 20 July 1990, CCPR/C/39/D/232/1987, para. 12.5.

<sup>30</sup> UNGA, Resolution 67/187, para. 45(c) of Annex; AC<sup>+</sup>HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, H(e).

complaint, if it is brought to their attention that the appointed counsel fails to provide effective legal representation.<sup>31</sup>

### **What must the criminal justice system provide?**

In addition to ensuring that every defendant receives the appropriate legal representation, States must also implement a criminal justice system that makes the full expression of the right to a fair trial possible and allows the defence to effectively make its case: for example, courts must be independent and impartial, all judicial officers properly trained and aware of their ethical duties with respect to the human rights of all parties,<sup>32</sup> and the principle of equality of arms respected.

This includes the right to have adequate time and facilities to prepare their defence,<sup>33</sup> which covers *inter alia*:

the possibility to meet in private and the confidentiality of communications between defendant and counsel;<sup>34</sup>

the right to have access to information and case files;<sup>35</sup> or

the right to present evidence, examine and cross-examine witnesses and evidence.<sup>36</sup>

The UN Economic and Social Council further found that defendants in capital cases should be afforded “special protections” and that the time and facilities provided to prepare their defences should be “above and beyond the protection afforded in non-capital cases”.<sup>37</sup>

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<sup>31</sup> IACHR, The death penalty in the Inter-American System of Human Rights: From restrictions to abolition, p. 123.

<sup>32</sup> AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, F(a)(i).

<sup>33</sup> International Covenant on Civil and Political Rights, Art. 14(3)(b); AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, I(d) and N(3).

<sup>34</sup> CCPR, General Comment No. 32, para. 34 and 38; AC°HRP, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, I(c) and N(3)(e).

<sup>35</sup> ECtHR, First Section, *Moiseyev v. Russia* (App. No. 62936/00), Judgment, 9 October 2008, para. 217.

<sup>36</sup> CCPR, General Comment No. 32, para. 39.

<sup>37</sup> ESC, Resolution 1989/64, para. 1.a.



## What can parliamentarians do? A look at some key-areas for progress

### Guarantee the right to a fair trial, with specific mention of the right to effective legal representation

“Since access to legal aid constitutes an essential procedural guarantee for the effective exercise of a number of human rights, the right to legal aid must be legally guaranteed in national legal systems at the highest possible level, possibly in the Constitution.”<sup>38</sup>

**Parliamentarians can table bills or amendments, or call on the government to do so, to guarantee – including in the Constitution – the right to a fair trial.**

**Parliamentarians can hold hearings with professionals of the criminal justice system, including judges, prosecutors, lawyers, legal aid professionals, members of law enforcement, representatives of victims, detainees, and civil society organisations**, in order to assess the main areas of concerns regarding fair trial rights and what reform of substantive and procedural criminal law would be needed.

### Establish and implement a national legal aid system

In States where a legal aid program does not yet exist or is lacking in some respects, **parliamentarians can table bills or amendments in order to establish a strong national legal aid programme**. While States may determine how such a program functions, they should guarantee that:

- \* Legal aid is provided at all stages of the proceedings, including extrajudicial proceedings;
- \* Legal aid is accessible to all defendants without discrimination;
- \* The criteria to be eligible for legal aid, especially those related to financial means (such as income thresholds), are clearly defined in advance and regularly revised to keep up with the economic situation of the country;
- \* State-appointed attorneys are adequately trained to work on capital cases.

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<sup>38</sup> UN Special Rapporteur on the independence of judges and lawyers, Annual report to the Human Rights Council, ‘Legal aid’ (2013), para. 51.

**Parliamentarians can use their prerogatives to support comprehensive and relevant training for attorneys representing a person who is at risk of being sentenced to death**, in order to ensure they have thorough training on how best to conduct this representation.

**Parliamentarians can hold hearings with professionals of the criminal justice system, including judges, prosecutors, lawyers, legal aid professionals, members of law enforcement, representatives of victims, detainees, and civil society organisations**, in order to assess its potential lacunas and where reforms and improvements would be needed.

**Parliamentarians can use their prerogatives to ensure that the criminal justice system, and especially the legal aid system, is properly funded**, including by providing adequate remunerations for court-appointed counsels, lump-sums to cover expert witnesses or other defence-related costs, and coverage for all appeals and legal recourses available.

### **Monitor the effective implementation of the right to legal representation**

**Parliamentarians can use their prerogatives to create monitoring and complaint mechanisms accessible to both defendants, their relatives and counsels**, to report instances where the right to effective legal representation has been impeded and infringed (for example by law enforcement officials preventing access to counsel in custody).

**Parliamentarians can use their prerogatives to promote the adequate training on human rights of all professionals of the criminal justice system**, including members of law enforcement, prosecutors, judges, penitentiary personnel, and lawyers.

### **Improve the public's understanding of the criminal justice system**

**Parliamentarians can raise awareness on the criminal justice system and legal assistance schemes and how to access them**, either themselves with their constituents, via public statements, or in liaising with relevant civil society groups.

**Parliamentarians can table bill or amendments designed to create public campaigns to raise awareness on the criminal justice system and to include such issues in civics education in school.**

**More generally, Parliamentarians can fight against the death penalty by:**

- \* Liaising with civil society groups to support their work and stay informed on developments;
- \* Attending events related to the abolition of the death penalty and show support as a member of parliament, especially on World Day against the Death Penalty (10 October);
- \* Ensuring that the topic of capital punishment remains a priority for the Executive Branch specially to support resolutions at the United Nations on a moratorium on the death penalty;
- \* Raising the issue of the death penalty in Parliament;
- \* Organising public debates, including in the relevant parliamentary committees;
- \* Raising awareness about the capital punishment with their constituents;
- \* Tabling parliamentary questions to their government on the use of death penalty;
- \* Reviewing draft legislation to assess its compliance with international standards;
- \* Introducing a resolution stating their Parliament's opposition to the death penalty in general, and in particular when applied unfairly;
- \* Advocating for the establishment of a parliamentary committee on human rights and the death penalty, and ensure that economic, social and cultural rights are included in the discussions;
- \* Joining an inter-parliamentary network, such as Parliamentarians for Global Action, to share best practices with their peers in other Parliaments;
- \* Taking part in social media campaigns and raising the issue of capital punishment in the medias in their capacity as a member of parliament.

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