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# LEGAL AID IN EUROPE

MINIMUM requirements  
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## INTRODUCTION

Every person accused of a crime has the right to be treated fairly by the criminal justice system, regardless of financial circumstances. Yet many countries across Europe fail to provide a fair and accessible system of legal aid—one of the most important tools for ensuring access for all to timely and good quality legal assistance.

As policy makers consider ways to sustain and improve legal aid systems, this paper provides the relevant current minimum standards at international law. The level of protection on legal aid should never fall below these minimum standards.

This brief focuses on the European Convention on Human Rights and the case law of the European Court of Human Rights. We also include principles and standards from the International Covenant on Civil and Political Rights, the UN Human Rights Committee, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, the European Committee for the Prevention of Torture, and the UN Subcommittee on Prevention of Torture.

One of the fundamental procedural rights of all people accused or suspected of crimes is the right to legal assistance at all stages of the criminal process.

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## OVERVIEW: THE RIGHT TO LEGAL AID

One of the fundamental procedural rights of all people accused or suspected of crimes is the right to legal assistance at all stages of the criminal process. But it is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied. Accordingly, people charged with crimes should be able to request free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves. This ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied their right to a fair trial because of their financial circumstances.

Legal aid also has broader benefits for the system as a whole. A functioning legal aid system, as part of a functioning criminal justice system, can reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts.<sup>1</sup>

The United Nations General Assembly recently adopted the world's first international instrument dedicated to the provision of legal aid. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>2</sup> ("the UN Principles and Guidelines") were approved on 20 December 2012. They enact global standards for legal aid, and invite States to adopt and strengthen measures to ensure that effective legal aid is provided across the world:

*"Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution".<sup>3</sup>*

The right to legal aid is established explicitly in Article 6(3)(c) of the European Convention on Human Rights ("ECHR") and in Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR"). The European Court of Human Rights ("ECtHR") has developed detailed rules about how legal aid should be provided, many of which have been affirmed by the UN Human Rights Committee applying the ICCPR.

Other European and international bodies have also set down rules of legal aid. The European Committee for the Prevention of Torture ("CPT") and the UN Subcommittee on Prevention of Torture ("SPT") have both repeatedly emphasized the importance of legal aid as a fundamental safeguard against intimidation, ill-treatment, or torture. The CPT and SPT have identified that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. In order to protect the vulnerable position of people in police custody, all States must develop an appropriate system of legal aid for those who are not in a position to pay for a lawyer.<sup>4</sup>

This document will draw on these various European and international sources to set out the minimum standards on six aspects of legal aid: (A) the scope of the right to legal aid through the application of the means and merits test; (B) the State's obligation to provide legal aid during the early stages of criminal proceedings; (C) the obligation on legal aid bodies to make decisions appointing lawyers fairly and without arbitrariness; (D) the right of people to choose their own legal aid lawyer; (E) the State's obligation to ensure the quality of legal aid services; and (F) practical requirements for implementing functioning and effective legal aid systems.

1 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System*, 3 October 2012, UN Doc. A/C.3/67/L.6, Introduction at para. 3.

2 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System*, 3 October 2012, UN Doc. A/C.3/67/L.6, at [http://www.uanet.org/sites/default/files/RES\\_GA\\_UN\\_121003\\_EN.pdf](http://www.uanet.org/sites/default/files/RES_GA_UN_121003_EN.pdf).

3 *The UN Principles and Guidelines*, Principle 1.

4 *Twelfth General Report on the CPT's activities covering the period 1 January to 31 December 2001*, 3 September 2002, at para. 41. See also: *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report on the visit to Armenia carried out by the CPT from 15 to 17 March 2008*, CPT/Inf (2010) 7, at para. 24; *Report on the visit to Austria carried out by the CPT from 14 to 23 April 2004*, CPT/Inf (2005) 13, at para. 26; *Report on the visit to Bulgaria carried out by the CPT from 10 to 21 September 2006*, CPT/Inf (2008) 11, at para. 27; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006) 20, at para. 23; *Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004*, CPT/Inf (2006) 11, at para. 21; *Report on the visit to Poland carried out by the CPT from 26 November to 8 December 2009*, CPT/Inf (2011) 20, at para. 26.

## SCOPE OF THE RIGHT TO OBTAIN LEGAL AID

A person has the right to free legal aid if two conditions are met. First, if he does not have sufficient means to pay for legal assistance (the “means test”), and second when the interests of justice so require (the “merits test”). These two conditions are set out in both Article 6(3)(c) of the ECHR and Article 14(3)(d) of the ICCPR.

### The Means Test

If a person does not have sufficient means to pay for their own lawyer, they will satisfy the first condition set down in Article 6(3) of the ECHR. The ECtHR has not provided a definition of “sufficient means”. Instead, the ECtHR takes all of the particular circumstances of each case into account when determining if the defendant’s financial circumstances required the granting of legal assistance.

The ECtHR has held, as a general rule, that it is for domestic authorities to define the financial threshold for the means test. While the ECtHR allows Member States a certain margin of appreciation in choosing how to implement means tests, there must be sufficient guarantees against arbitrariness in the determination of eligibility (discussed further below). In *Santambrogio v Italy*, the ECtHR found no violation of the Article 6(1) right of access to a court where an applicant was refused legal aid on the grounds that his means exceeded the statutory limit. The ECtHR determined that the refusal to grant legal aid was based on the law and that the Italian legal system afforded sufficient guarantees against arbitrariness in the determination of eligibility for legal aid.<sup>5</sup>

The defendant bears the burden of proving that he cannot afford to pay for legal assistance, but he does not have to prove his indigence “beyond all doubt”.<sup>6</sup> In *Pakelli v Germany*, the ECtHR relied on “some indications” that the applicant had been unable to pay for his lawyer, including tax-related statements, and the fact that the applicant had spent the previous

two years in custody while his appeal on points of law were pending. In the absence of indications to the contrary, the ECtHR was satisfied that the applicant was engaged in business on a small scale and that his financial situation was modest, in finding that he lacked the means to pay for a lawyer.<sup>7</sup>

The UN Principles and Guidelines have highlighted the importance of not applying a restrictively low or unfair means test, by urging States to ensure that “persons whose means exceed the limits of the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would have otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance”.<sup>8</sup> The UN Principles and Guidelines also state that the criteria for applying the means test should be “widely publicized” to ensure transparency and fairness.<sup>9</sup>

### Remittance or Reimbursement

While a requirement to reimburse legal aid costs may in some circumstances violate the fairness of the proceedings, the possibility that an accused may be required to repay the cost of legal aid at the end of the proceedings is not, in principle, incompatible with Article 6(3) of the ECHR. In *X v Germany*, the former European Commission of Human Rights found that Article 6(3)(c) does not guarantee a definitive exemption from legal aid costs. Instead, the State can pursue a defendant for reimbursement of the costs after the trial if the defendant’s economic situation improves and they are able to meet the costs.<sup>10</sup>

Requiring reimbursement or remittance of legal aid costs might be incompatible with Article 6 where the amount claimed from the applicant is excessive,<sup>11</sup> the terms of reimbursement are arbitrary or unreasonable,<sup>12</sup> or where no assessment of the applicant’s financial situation has been performed to ensure that their economic situation has improved and they are able to meet the costs.<sup>13</sup>

However, the ECtHR will carefully examine all the facts to determine whether a requirement to

5 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 55.

6 *Pakelli v Germany*, ECtHR, Judgment of 25 April 1983, at para. 34.

7 *Pakelli v Germany*, ECtHR, Judgment of 25 April 1983, at para. 34. See also: *Twalib v Greece*, ECtHR, Judgment of 9 June 1998, at para. 51.

8 *The UN Principles and Guidelines*, Guideline 1, at para 41(a).

9 *The UN Principles and Guidelines*, Guideline 1, at para 41(b).

10 *X v Germany*, no. 9365/81, European Commission on Human Rights Decision of 6 May 1982.

11 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 36; *Orlov v Russia*, ECtHR, Judgment of 21 June 2011, at para. 114.

12 *Morris v the United Kingdom*, ECtHR, Judgment of 26 February 2002, at para. 89.

13 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 36; *Morris v the United Kingdom*, ECtHR, Judgment of 26 February 2002, at para. 89; *Orlov v Russia*, ECtHR, Judgment of 21 June 2011, at para. 114; *X v Germany*, no. 9365/81, European Commission on Human Rights Decision of 6 May 1982.

reimburse costs adversely affected the fairness of the proceedings in the particular circumstances of a given case.<sup>14</sup> For example, in *Ognyan Asenov v Bulgaria* the ECtHR examined whether the possibility of being ordered to bear the costs of his defence in the event of a conviction had inhibited the applicant from asking the trial court to appoint a lawyer for him. The ECtHR found that the applicant had not felt inhibited and that it did not undermine his procedural rights.<sup>15</sup> In *Croissant v Germany*, the ECtHR held that the reimbursement order made against the applicant was not incompatible with Article 6 because the amounts claimed were not excessive, and the German system of legal aid normally remitted the greater part of the costs where they were high.<sup>16</sup>

### The Merits Test

The second condition set down in Article 6(3) of the ECHR and Article 14(3)(d) of the ICCPR is that “the interests of justice” must require legal aid to be provided. This means that indigent people are not guaranteed legal aid in every case. The State has some flexibility to decide when the public interest in the proper administration of justice requires that the defendant be provided with a legal aid lawyer. The ECtHR has identified three factors that should be taken into account when determining if the “interests of justice” necessitates free legal aid: the seriousness of the offence and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the defendant. All the factors should be considered together, but any one of the three can warrant the need for the provision of free legal aid.

### The Seriousness of the Offence and the Severity of the Potential Sentence

As a minimum guarantee, the right to legal aid applies whenever deprivation of liberty is at stake.<sup>17</sup> Even the possibility of a short period of imprisonment is enough to warrant the provision of legal aid. In *Benham v the United Kingdom*, the applicant had been charged with non-payment of a debt and faced a maximum penalty of three months in prison. The ECtHR held that this potential sentence was severe enough that the

interests of justice demanded that the applicant ought to have benefited from legal aid.<sup>18</sup>

In situations where deprivation of liberty is not a possibility, the ECtHR will look to the particular circumstances of the case and the adverse consequences of the conviction for a defendant. The distinction between cases that require legal aid because of the severity of the potential sentence and those that do not can be very fine. In *Barsom and Varli v Sweden*, the applicants complained that they were denied legal aid in proceedings in which they faced the imposition of tax surcharges of up to 15,000 euros. The ECtHR found that the denial of legal aid was acceptable, partly because the applicants were in a financial position to pay these sums to the Tax Authority without significant hardship, and because they did not face the risk of imprisonment.<sup>19</sup> In contrast, in *Pham Hoang v France*, the ECtHR held that the interests of justice required legal aid to be provided to the applicant. Part of the reasoning was because “the proceedings were clearly fraught with consequences for the applicant, who had been ... found guilty on appeal of unlawfully importing prohibited goods and sentenced to pay large sums to the customs authorities”.<sup>20</sup>

### The Complexity of the Case

Legal aid should be granted in cases that raise complex factual or legal issues. In *Pham Hoang v France*, another factor which led the ECtHR to conclude that legal aid should have been provided to the applicant was that he intended to persuade the domestic court to depart from its established case law in the field under consideration.<sup>21</sup> In *Quaranta v Switzerland*, although the facts were straightforward, the range of potential sentences open to the court was particularly complex, including the possibility of activating a suspended sentence or deciding on a new sentence. This complexity also warranted the provision of a legal aid lawyer to protect the accused’s interests.<sup>22</sup>

In contrast, the ECtHR has held that denial of legal aid was appropriate in cases that were factually and

14 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para 36.

15 *Ognyan Asenov v Bulgaria*, ECtHR, Judgment of 17 February 2011, at para 44.

16 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at paras. 35-37.

17 *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, at para. 59; *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, at para. 33; *Zdravka Stanev v Bulgaria*, ECtHR, Judgment of 6 November 2012, at para. 38; *Talat Tunç v Turkey*, ECtHR, Judgment of 27 March 2007, at para. 56; *Prezec v Croatia*, ECtHR, Judgment of 15 October 2009, at para. 29.

18 *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, at paras. 59 and 64.

19 *Barsom and Varli v Sweden*, ECtHR (dec.), Decision of 4 January 2008.

20 *Pham Hoang v France*, ECtHR, Judgment of 25 September 1992, at para 40.

21 *Pham Hoang v France*, ECtHR, Judgment of 25 September 1992, at para 40.

22 *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, at para. 34.

legally straightforward. For example, in *Barsom and Varli v Sweden*, the contentious issues primarily concerned an assessment of whether the applicant had submitted an incorrect or incomplete tax return. Given that there were no difficult legal questions to be argued, the ECtHR held that the absence of legal aid did not violate Article 6.<sup>23</sup>

### The Social and Personal Situation of the Defendant

Legal aid should generally be provided for vulnerable groups and for people who, because of their personal circumstances, may not have the capacity to defend the case themselves. The ECtHR will take into account the education, social background and personality of the applicant and assess them with regard to the complexity of the case. In *Quaranta v Switzerland*, the ECtHR held that the legal issues were complicated in themselves, but they were even more so for the applicant given his personal situation:

*“a young adult of foreign origin from an underprivileged background, he had no real occupational training and a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit”.*<sup>24</sup>

Legal aid should also be provided for people who have language difficulties. In *Biba v Greece*, the ECtHR found a violation of Articles 6(1) and 6(3)(c) where an undocumented immigrant who lacked the means to retain a lawyer before the Court of Cassation was not appointed a lawyer under legal aid. The ECtHR held that it would have been impossible for the applicant to prepare the appeal in the Greek courts without assistance, because he was a foreigner who did not speak the language.<sup>25</sup>

In contrast, in *Barsom and Varli v Sweden*, the ECtHR noted that both applicants had been living in Sweden for nearly thirty years, and were businessmen who owned and ran a restaurant. The ECtHR found that it was highly unlikely that they would be incapable of presenting their case related to tax surcharges without legal assistance

before the national court. The Court took particular consideration of the fact that the Swedish courts were obliged to provide directions and support to the applicants to present their case adequately.<sup>26</sup>

## LEGAL AID DURING PRELIMINARY INVESTIGATION

If the merits and means tests are fulfilled, legal aid should be available at all stages of proceedings, from the preliminary police investigation, through the trial, and to the final determination of any appeal. In particular, it is crucial that all people accused or suspected of crimes who are unable to afford a lawyer are provided with speedy access to legal aid during the early stages of the criminal process.<sup>27</sup>

The investigation stage is particularly important for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.<sup>28</sup> The ECtHR has also noted “the particular vulnerability of an accused at the early stages of the proceedings when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved”.<sup>29</sup> In order for the right to a fair trial to remain sufficiently practical and effective, Article 6(1) of the ECHR requires that suspects be given access to a lawyer, appointed by the State if necessary, before they are interrogated by the police.<sup>30</sup>

This was emphasized in the case of *Salduz v Turkey*, in which a minor was arrested, made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber of the ECtHR found that the applicant’s lack of access to a lawyer while he was in police custody violated Article 6(1) and 6(3)(c) of the ECHR. Neither the subsequent assistance of his legal aid lawyer nor the ability to challenge the statement during the following proceedings could cure the defects which had occurred during police custody.<sup>31</sup>

23 *Barsom and Varli v Sweden*, ECtHR (dec.), Decision of 4 January 2008.

24 *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, at para. 35.

25 *Biba v Greece*, ECtHR, Judgment of 26 September 2000, at para. 29.

26 *Barsom and Varli v Sweden* ECtHR (dec.), Decision of 4 January 2008.

27 See the Open Society Justice Initiative’s First Template Brief on the right to early access to legal assistance, available at: <http://www.opensocietyfoundations.org/briefing-papers/legal-tools-early-access-justice-europe>

28 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para 54.

29 *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 262.

30 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at paras. 54-55; *Shabelnik v Ukraine*, ECtHR, Judgment of 17 February 2009, at para. 57; *Pishchalnikov v Russia*, ECtHR, Judgment of 24 September 2009, at paras. 72-74 and 91; *Plonka v Poland*, ECtHR, Judgment of 30 June 2009, at paras. 40-42; *Adamkiewicz v Poland*, ECtHR, Judgment of 2 March 2010, at para. 89.

31 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para. 58.

Salduz has been followed in numerous subsequent rulings by the ECtHR, which form a clear and consistent line of jurisprudence that the use of evidence obtained from a suspect through interrogation or other investigative measures when the suspect does not have legal assistance – either privately funded or paid for by the State – will breach Article 6 of the ECHR.<sup>32</sup>

The UN Principles and Guidelines also highlight the critical importance of providing legal aid during the initial police investigation. They specify that whenever States apply a means test to determine eligibility for legal aid, they should ensure that “Persons urgently requiring legal aid at police stations, detention centers or courts should be provided preliminary legal aid while their eligibility is being determined”.<sup>33</sup>

In some circumstances, legal aid is also required for people who are questioned by the police, but who are not formally called suspects or accused persons. In *Nechiporuk and Yonkalo v Ukraine*, the applicant had been suspected of murder, although the police arrested him for a lesser drug offence and formally placed him in “administrative detention,” depriving him of a lawyer. The ECtHR held that despite his formal designation, he had in fact been treated as a criminal suspect and should have been given the rights under Article 6 of the ECHR, including unimpeded access to legal representation, assigned through official legal aid if need be.<sup>34</sup>

It is also clear that a person has a right to legal aid not only during any police interrogation but also in the course of other investigative acts. In *Berlinski v Poland*, the applicants’ request for a legal aid lawyer was ignored by the authorities, with the result that they had no defence lawyer for more than a year. The ECtHR found that denying the applicants with legal aid for this period of the investigation, during which procedural acts including medical examinations are carried out,

was a breach of Article 6(1) and 3 (c) of the ECHR.<sup>35</sup>

The requirement for provision of legal aid during the early stages is reinforced by the UN Principles and Guidelines, which explicitly require States to “endure that effective legal aid is provided promptly at all stages of the criminal process”,<sup>36</sup> including “all pretrial proceedings and hearings”.<sup>37</sup> Similarly, the Human Rights Committee has also found violations of Article 14(3)(d) and Article 9(1) where a suspect was not provided legal aid during initial police detention and questioning.<sup>38</sup>

## CHOICE OF LEGAL AID LAWYER

Article 6(3)(c) of the ECHR specifically sets out that a person charged with a crime has the right to “legal assistance of his own choosing”. However, the ECtHR has held that people who are given free legal aid do not always get to choose which lawyer is appointed to them. The right to be defended by a lawyer of one’s own choosing can be subject to limitations when the interests of justice require. In *Croissant v Germany*, the ECtHR held that the wishes of the applicant should not be ignored, but that the choice of lawyer – taking into consideration the interests of justice – is ultimately for the State:

*“notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes ... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice”.*<sup>39</sup>

32 *Salduz* has been followed by over 100 ECtHR rulings against multiple countries, for example: *Brusco v France*, ECtHR, Judgment of 14 October 2010, at para. 45; *Pishchalnikov v Russia*, ECtHR, Judgment of 24 September 2009, at paras. 70, 73, 76, 79, 93; *Plonka v Poland*, ECtHR, Judgment of 31 March 2009, at paras. 35, 37, 40; *Shabelnik v Ukraine*, ECtHR, Judgment of 19 February 2009, at para. 53; *Mader v Croatia*, ECtHR, Judgment of 21 June 2011, at paras. 149 and 154.

33 *The UN Principles and Guidelines*, Guideline 1, at para. 41(c).

34 *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 262.

35 *Berlinski v Poland*, ECtHR, Judgment of 20 June 2002, at para. 77.

36 *The UN Principles and Guidelines*, Principle 7, at para. 27.

37 *The UN Principles and Guidelines*, Guideline 4, at para. 44(c).

38 *Butovenko v Ukraine*, UNHRC, Decision of 19 July 2001, U.N. Doc. CCPR/C/102/D/1412/2005, at para. 7.6; *Gunan v Kyrgyzstan*, UNHRC, Decision of 25 July 2011, U.N. Doc. CCPR/C/102/D/1545/2007, at para. 6.3; *Krasnova v Kyrgyzstan*, UNHRC, Decision of 27 April 2010, U.N. Doc. CCPR/C/101/D/1402/2005, at para. 8.6; *Johnson v Jamaica*, UNHRC, Decision of 25 November 1998, U.N. Doc. CCPR/C/64/D/592/1994, at para. 10.2; *Levy v Jamaica*, UNHRC, Decision of 3 November 1998, U.N. Doc. CCPR/C/64/D/719/1996, at para. 7.2.

39 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 29. See also: *Lagerblom v Sweden*, ECtHR, Judgment of 14 January 2003, at para. 55, holding that Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced. See also *Dvorski v Croatia*, ECtHR, Judgment of 28 November 2011, at para 94, holding that an accused bearing the costs of his own lawyer has the right to choose save for “exceptional circumstances”.



In *Ramon Franquesa Freixas v Spain*, the applicant complained that his Article 6(3)(c) rights were violated because he had been assigned a lawyer specializing in labour law to defend him in a criminal case. The ECtHR held that his complaint was manifestly ill founded, because Article 6(3)(c) did not guarantee a defendant the right to choose which lawyer the court should assign him and because the applicant had failed to present any plausible evidence to support his assertion that the lawyer was incompetent.<sup>40</sup>

In appointing a legal aid lawyer, the State should consider the special needs of the applicant such as language skills. However, the ECtHR will look to the fairness of the proceeding as a whole, instead of setting down explicit rules for the appointment of legal aid lawyers.<sup>41</sup> In *Lagerblom v Sweden*, the applicant, who was from Finland, requested his legal aid lawyer be replaced by a lawyer who also spoke Finnish. The domestic courts rejected his request. The ECtHR upheld the ruling, finding that the applicant had enough proficiency in Swedish to communicate with his lawyer and that he had been provided with ample interpretation services. The ECtHR thus held that he has been able to participate effectively in his trial and the domestic courts were entitled to refuse him the lawyer of his choice.<sup>42</sup>

State regulations regarding the qualification of lawyers, including restrictions on who can appear before certain courts and rules of professional conduct, may also limit a person's choice of legal aid counsel without infringing their ECHR rights. In *Meftah and Others v France*, the ECtHR held that the special nature of the French Court of Cassation justified limiting the presentation of oral arguments to specialist lawyers.<sup>43</sup> Similarly, in *Mayzit v Russia*, the ECtHR found that Article 6 had not been violated where the defendant was denied his request to have his mother and sister represent him in a criminal case. The ECtHR accepted the state's argument that appointment of professional lawyers rather than lay persons served the interests of quality of the defence considering the seriousness of the charges and complexity of the case.<sup>44</sup>

## QUALITY OF LEGAL AID LAWYER

Mere appointment of a lawyer is not enough to fulfill the State's obligation to provide effective legal assistance. If the legal aid lawyer fails to provide effective representation, and this is manifest or is brought to the State authority's attention, then the State is under an obligation to intervene and rectify the failure.

The principle was set down in *Kamasinski v Austria*, where the ECtHR held:

*"a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes ... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way".*<sup>45</sup>

The ECtHR has stressed that if the State's obligation was satisfied by mere appointment of a lawyer, it "would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless".<sup>46</sup>

In situations where the failure is objectively manifest, the defendant does not need to actively complain or bring the failure to the State's attention. In *Sannino v Italy*, the domestic court assigned different lawyers to the applicant at each hearing, who were unprepared and unfamiliar with the case. The ECtHR held that the court had failed to ensure effective defence, even though the applicant did not complain about the situation to the court or to his lawyers.<sup>47</sup> These principles have been adopted and affirmed by the Human Rights Committee, applying Articles 9 and 14 of the ICCPR.<sup>48</sup>

40 *Ramon Franquesa Freixas v Spain*, ECtHR (dec.), Decision of 21 November 2000.

41 *Dvorski v Croatia*, ECtHR, Judgment of 28 November 2001, at paras 107-108

42 *Lagerblom v Sweden*, ECtHR, Judgment of 14 January 2003, paras. 60-62.

43 *Meftah and Others v France*, ECtHR, Grand Chamber Judgment of 26 July 2002, at paras. 42-44.

44 *Mayzit v Russia*, ECtHR, Judgment of 20 January 2005, at paras. 70-71.

45 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at para. 65. See also: *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 36; *Sannino v Italy*, ECtHR, Judgment of 27 April 2006, at para. 49; *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 60; *Daud v Portugal*, ECtHR, Judgment of 21 April 1984, at para. 38.

46 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33.

47 *Sannino v Italy*, ECtHR, Judgment of 27 April 2006, at para. 51. See also *Krylov v Russia*, ECtHR, Judgment of 14 March 2013, at para. 44.

48 *Aleksandr Butovenko v Ukraine*, UNHRC, Decision of 19 July 2001, U.N. Doc. CCPR/C/102/D/1412/2005 (2011), at para. 4.14.

## Failure to Act or Absenteeism

Absenteeism will generally be considered to be a failing that is manifest to the State. In *Artico v Italy*, the lawyer appointed to the applicant declined to represent him from the outset of the case, on the basis of his other commitments and his ill-health. Despite that, the Government failed to substitute the appointed lawyer with another legal representative. In finding a breach of Article 6(3), the ECtHR held that when an appointed lawyer is prevented from performing his duties and the authorities are aware of the situation, they have an obligation either to replace him or to make sure he fulfills his obligations.<sup>49</sup> Similarly, in the Human Rights Committee decision of *Borisenko v Hungary*, the Committee found a breach of Article 14(3) of the ICCPR where the legal aid lawyer failed to appear at the applicant's interrogation or his detention hearing. The Committee stated that it was incumbent upon the state party to ensure that legal representation was effective.<sup>50</sup>

Silence and failure to undertake basic functions can also be a manifest failure warranting State intervention. In *Falcao dos Santos v Portugal*, the lawyer attended court but remained silent; he did not cross-examine witnesses or otherwise intervene on the applicant's behalf.<sup>51</sup> The applicant repeatedly complained about his poor legal representation to the authorities. The ECtHR found that the authorities failed to guarantee real assistance, as opposed to mere "appointment" of the lawyer, and that they had a duty to intervene.<sup>52</sup>

In cases where the person has a disability, the domestic courts are required to exercise an enhanced duty of supervision of their legal aid lawyers to ensure proper and effective representation. In *M.S. v Croatia* (No. 2), where the applicant was confined in a psychiatric institution, the ECtHR held that the domestic court was required to take action to ensure that the applicant's interests were protected and that the legal aid lawyer was not merely a passive observer.<sup>53</sup>

A person does not lose their right to a legal aid lawyer

by failing to appear at their own court hearing. In *Petrina v Croatia*, the applicant did not attend his trial, and the applicant's legal aid lawyer notified the court that she would also be absent. The ECtHR held that it was incumbent on the national court to appoint a new legal aid lawyer and ensure they represented the applicant at the trial, to avoid "upsetting the equality of arms".<sup>54</sup>

## Conflicts of Interest

If the legal aid lawyer is acting under a conflict of interest, this will usually be a manifest failure warranting State intervention. In *Moldoveanu v Romania*, three co-defendants were represented by the same State appointed lawyer, despite the fact that their interests were contradictory: two of the defendants had confessed, while the third (the applicant to the ECtHR) had pleaded not guilty. Although the applicant did not complain about the ineffective legal aid, it did not relieve the authorities from their duty to ensure effective legal assistance.<sup>55</sup>

## Dissatisfaction with Performance of Lawyer

Mere dissatisfaction with the manner in which the lawyer runs the case, or minor errors or defects in the lawyer's work, are unlikely to lead to a situation in which the State is obliged to intervene. In *Kamasinski v Austria*, the applicant complained about the quality of his legal aid lawyer. However, unlike the lawyer in the *Artico* case, who "from the very outset ... stated that he was unable to act",<sup>56</sup> the applicant's lawyer took a number of steps prior to the trial, including visiting the applicant in prison, lodging a complaint against the decision to remand in custody, and filing motions for the attendance of witnesses.<sup>57</sup> Although the lawyer's work could be criticized, the ECtHR held that the circumstances of his representation did not reveal a failure to provide legal assistance as required by Article 6(3) or a denial of a fair hearing under Article 6(1) of the ECHR.<sup>58</sup>

However, in certain circumstances the ECtHR has held that the poor or defective work of the lawyer can

49 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33. See also *Shekov v Russia*, ECtHR, Judgment of 19 June 2014, at paras. 41-43.

50 *Borisenko v Hungary*, UNHRC, Decision of 14 October 2002, U.N. Doc. CCPR/C/76/D/852/1999, at para. 7.5. See also: *Saidova v Tajikistan*, UNHRC, Decision of 8 July 2004, UN Doc. CCPR/C/76/D/852/1999, at para. 6.8; *Collins v Jamaica*, UNHRC, 25 March 1993, U.N. Doc. CCPR/C/47/D/356/1989, at para. 8.2. Compare with: *Bailey v Jamaica*, UNHRC, 17 September 1999, U.N. Doc. CCPR/C/66/D/709/1996, at para. 7.2.

51 *Falcao dos Santos v Portugal*, ECtHR, Judgment of 3 July 2012, at paras. 12-18.

52 *Ibid*, at para. 45.

53 *M.S. v Croatia*, ECtHR, Judgment of 19 February 2015, at paras. 154-156.

54 *Petrina v Croatia*, ECtHR, Judgment of 13 February 2014, at para 56.

55 *Moldoveanu v Romania*, ECtHR, Judgment of 19 June 2012, at para. 75.

56 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33.

57 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at para. 66.

58 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at paras. 70-71.

amount to a “manifest failure”. In *Czekalla v Portugal*, the legal aid lawyer failed to comply with a “simple and purely formal” rule when lodging an appeal. As a result the appeal was dismissed. The applicant was in a particularly vulnerable position, as a foreigner who did not speak the language of the courts, and he faced a lengthy prison sentence. The ECtHR held that:

*“the State cannot be held responsible for any inadequacy or mistake in the conduct of the applicant’s defence attributable to his officially appointed lawyer ... however ... in certain circumstances negligent failure to comply with a purely formal condition cannot be equated with an injudicious line of defence or a mere defect of argumentation. That is so when as a result of such negligence a defendant is deprived of a remedy without the situation being put right by a higher court.”*<sup>59</sup>

The ECtHR held that the lawyer’s failure to comply with the rule when lodging the appeal was a manifest failure which called for positive measures by the State. The ECtHR further explained that “The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal inadmissible”.<sup>60</sup>

Similar rules have been set down by the Human Rights Committee applying Article 14(3) of the ICCPR. In *Smith and Stewart v Jamaica*, the Committee held that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the complainant and his lawyer time to prepare the defence (see below), or unless it should have been manifest to the court that the lawyers’ conduct was incompatible with the interests of justice.<sup>61</sup>

### Adequate Time to Prepare Defence

The failure of the State to ensure sufficient time and facilities for an officially appointed lawyer to prepare for a case violates Article 6(3) of the ECHR. In *Daud*

*v Portugal*, the legal aid lawyer was only appointed three days prior to the trial for a serious, complex case. The ECtHR held that it was manifestly evident to the State authorities that the legal aid lawyer did not have time to prepare for the trial, and that they should have intervened to ensure the quality of the defence.<sup>62</sup>

Similarly, in *Bogumil v Portugal*, the applicant was represented by a legal aid lawyer who took no action in the proceedings other than to ask to be released from the case three days before the trial. A replacement lawyer was assigned on the day the trial began and had only five hours in which to study the case file.<sup>63</sup> The ECtHR held that when a problem with legal representation is evident, the courts must take the initiative and solve it, for example, by ordering an adjournment to allow a newly appointed lawyer to acquaint himself with the case-file.<sup>64</sup>

The Human Rights Committee has similarly affirmed this principle in numerous cases. In *George Winston Reid v Jamaica*, a case in which the defendant faced the death penalty, the legal aid lawyer was not present during the preliminary hearings and had met the complainant only ten minutes before the start of the trial. The Committee held this was a manifest failure in violation of Article 14(3)(b) of the ICCPR.<sup>65</sup> In contrast, in *Hill v Spain*, the trial had been adjourned to allow the lawyer to prepare sufficiently, and the Committee thus held that there was no breach of Article 14(3).<sup>66</sup> The UN Principles and Guidelines also provide guidance on what is required for adequate time to prepare, stipulating that the effective legal aid requires “unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case file and adequate time and facilities to prepare their defence”.<sup>67</sup>

59 *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 65.

60 *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 68.

61 *Smith and Stewart v Jamaica*, UNHRC, Decision of 8 April 1999, U.N. Doc. CCPR/C/65/D/668/1995, at para. 7.2. See also: *Beresford Whyte v Jamaica*, UNHRC, Decision of 27 July 1998, U.N. Doc. CCPR/C/63/D/732/1997, at para. 9.2; *Glenn Ashby v Trinidad and Tobago*, UNHRC, Decision of 21 March 2002, U.N. Doc. CCPR/C/74/D/580/1994, at para. 10.4; *Bailey v Jamaica*, UNHRC, 17 September 1999, U.N. Doc. CCPR/C/66/D/709/1996, at para. 7.1, *Rastorguev v Poland*, UNHRC, 28 March 2011, U.N. Doc. CCPR/C/101/D/1517/2006, at para. 9.3.

62 *Daud v Portugal*, ECtHR, Judgment of 21 April 1984, at para. 42.

63 *Bogumil v Portugal*, ECtHR, Judgment of 7 October 2008, at para 27.

64 *Bogumil v Portugal*, ECtHR, Judgment of 7 October 2008, at para 49.

65 *George Winston Reid v Jamaica*, UNHRC, Decision of 14 July 1994, U.N. Doc. CCPR/C/51/D/355/1989, at para 14.2. See also *Robinson v Jamaica*, UNHRC, 30 March 1989, U.N. Doc. CCPR/C/35/D/223/1987, at paras. 10.2-10.3. *Glenford Campbell v Jamaica*, UNHRC, Decision of 7 April 1992, U.N. Doc. CCPR/C/44/D/248/1987, at para 6.5.

66 *Hill v Spain*, UNHRC, Decision of 2 April 1997, U.N. Doc. CCPR/C/59/D/526/1993 (1997), at para. 14.1.

67 *The UN Principles and Guidelines*, Principle 7, at para. 28.

## APPOINTMENT OF LEGAL AID LAWYERS

Although Article 6 of the ECHR does not apply directly to proceedings relating to domestic applications for legal aid, the ECHR is relevant to those proceedings to the extent that serious deficiencies in these proceedings may have a decisive impact on the right of access to a court.<sup>68</sup>

### Diligence

In dealing with legal aid requests, the responsible authorities or courts should act diligently. In *Tabor v Poland*, the ECtHR found a violation of Article 6(1) where the regional court rejected the applicant's request for legal aid in making a cassation appeal. The ECtHR found that the applicant's request for legal aid was not handled with the requisite degree of diligence since the regional court did not provide reasons for the rejection and issued its decision one month after the deadline for lodging a cassation appeal.<sup>69</sup> It made a similar finding in *Wersel v Poland* where the legal aid board communicated their refusal two days before the expiry of the time-limit for the submission of the applicant's appeal.<sup>70</sup>

### Free from Arbitrariness

The ECtHR also looks at whether the body responsible for appointing legal aid, as a whole, offers individuals "substantial guarantees to protect them from arbitrariness". The legal aid system may be considered to be arbitrary where the decisions of the legal aid body are unreviewable, or where the criteria and method of selection of cases eligible for the legal aid is unclear.<sup>71</sup> It may also be arbitrary if the composition of the body could be said to be biased.<sup>72</sup> In *Del Sol v France*, the ECtHR upheld the system for deciding legal aid cases because the Legal Aid Office was composed of judges, lawyers, civil servants and members of the public, as that "diversity ensured that it had due regard to the demands of the proper administration of justice and the rights of the defence".<sup>73</sup>

### Prospects of Success

When the domestic legal aid authority is determining if the merits of the case require legal aid to be provided, it is generally not acceptable for them to consider the applicant's prospects of success in the case. In *Aerts v Belgium*, the ECtHR found a violation of Article 6(1) where the applicant's request for legal aid was rejected because his appeal was ruled "ill founded" by the domestic Legal Aid Board. In that case, it was mandatory for the applicant to be represented by a lawyer for an appeal; he did not have the standing to submit the appeal himself. The ECtHR found that it was not for the Legal Aid Board to assess the applicant's prospects of success; rather, it was for the court to determine the issue. The ECtHR further found that by refusing the application on the ground that the appeal did not appear to be well founded, the Legal Aid Board impaired the very essence of the applicant's right to a tribunal.<sup>74</sup>

However, in limited circumstances during the appeals stage, the ECtHR has made exceptions to this rule. In *Monnell and Morris v United Kingdom*, the ECtHR held that the interests of justice do not automatically require free legal assistance whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6. Notably, in this case the likelihood of success was assessed by the lawyer who had represented the applicant at the trial. He advised that there were no reasonable prospects of successfully appealing, but both applicants ignored his advice. The ECtHR found no breach because the applicants had benefited from free legal assistance both at first instance trial and in being advised as to whether he had any arguable grounds of appeal.<sup>75</sup>

68 *Gutfreund v France*, ECtHR, Judgment of 12 June 2003, at para. 44.

69 *Tabor v Poland*, ECtHR, Judgment of 27 June 2006, at paras. 44-46. See also: *A.B. v Slovakia*, ECtHR, Judgment of 4 March 2003, at para. 61.

70 *Wersel v Poland*, ECtHR, Judgment of 13 September 2011, at para. 52. See also: *R.D. v Poland*, ECtHR, Judgment of 18 December 2001, at paras. 50-52.

71 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 54.

72 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 55. See also: *Del Sol v France*, ECtHR, Judgment of 26 February 2002, at para. 26.

73 *Del Sol v France*, ECtHR, Judgment of 26 February 2002, at paras. 17 and 26.

74 *Aerts v Belgium*, ECtHR, Judgment of 30 July 1998, at para. 60. Following the judgment Belgium changed its standard to "manifestly ill founded".

75 *Monnell and Morris v the United Kingdom*, ECtHR, Judgment of 2 March 1987, at paras. 63 and 67.

## PRACTICAL REQUIREMENTS FOR FUNCTIONAL LEGAL AID SYSTEMS

Recognizing the right to legal aid in legislation is not enough to ensure that the right is protected in daily practice. The right is underpinned by adequate funding, safeguards of independence, equity in the provision of legal aid, and strong partnerships with other criminal justice actors. The ECtHR and the Human Rights Committee have, on occasion, set down minimum standards about the practicalities of implementing a functional legal aid system. To complement this, the UN Principles and Guidelines provide detailed guidance, and the European Committee for the Prevention of Torture (“CPT”) and the UN Subcommittee on Prevention of Torture (“SPT”) have gone further than any other international or regional judicial body in providing practical recommendations for an efficient and well-designed legal aid system.

### Adequate Funding and Resources

States should ensure that their legal aid systems are well funded, have adequate financial and staffing resources, and have budgetary autonomy. The Human Rights Committee has stressed that “legal aid should enable counsel to prepare his client’s defence in circumstances that can ensure justice”, one of such circumstances being “provision for adequate remuneration for legal aid”.<sup>76</sup> The CPT and SPT have noted with concern the numerous examples of national legal aid management bodies being understaffed and under resourced, noting that excessive workloads and low fees for services have a discouraging effect on the legal aid lawyers.<sup>77</sup> Indeed, the SPT has noted complaints that legal aid lawyers in some States would not appear during the investigation unless paid an additional fee by their client, because of the low official fees for such services.<sup>78</sup> The SPT and CPT have recommended States review their funding arrangements to ensure

that enough money is provided to ensure the system operates effectively.<sup>79</sup>

The UN Principles and Guidelines go into detail about what measures a State should take to ensure adequate and sustainable funds are provided for legal aid throughout the country. These include “allocating a percentage of the State’s criminal justice budget to legal aid services”, identifying and putting in place “incentives for lawyers to work in rural areas and economically and socially disadvantaged areas”, and ensuring that the money provided to prosecution and legal aid agencies is “fair and proportional”.<sup>80</sup> As for human resources, the UN Principles and Guidelines recommend that States “make adequate and specific provision” for staffing the legal aid system and that where there is a shortage of lawyers, to support non-lawyers or paralegals to provide legal aid.<sup>81</sup>

### Independence

States should pay particular attention to ensuring the independence of legal aid lawyers from the police and prosecution. The UN Principles and Guidelines have stressed the importance of legal aid lawyers being able to do their job “freely and independently” without State interference.<sup>82</sup> The Principles and Guidelines recommend setting up a national body to coordinate legal aid, specifying that it must be “free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and should not be subject to the direction or control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure”.<sup>83</sup> They also recommend development of quality assurance mechanisms to ensure effectiveness, transparency and accountability in providing legal aid services.

The CPT has noted particular complaints that legal aid lawyers were “taking the side of the police, e.g. by trying to convince their clients to admit everything

76 *Reid v Jamaica*, UNHRC, Decision of 20 July 1990, U.N. Doc. CCPR/C/39/D/250/1987, at para. 13.

77 *Fifth Annual Report of the SPT covering the period January-December 2011*, 19 March 2012, U.N. Doc. CAT/C/48.3, at para. 78. See also: *Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003*, CPT/Inf (2007) 15, at para. 24; *Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999*, CPT/Inf (2001) 2, at para. 32.

78 *Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003*, CPT/Inf (2007) 15, at para. 24.

79 *Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003*, CPT/Inf (2007) 15, at para. 24; *Report on the visit to Croatia carried out by the CPT from 4 to 14 May 2007*, CPT/Inf (2008) 29, at para. 19; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006) 20, at para. 23; *Report on the visit to Poland carried out by the CPT from 8 to 19 May 2000*, CPT/Inf (2002) 9, at para. 23.

80 *The UN Principles and Guidelines*, Guideline 12.

81 *The UN Principles and Guidelines*, Guideline 13.

82 *The UN Principles and Guidelines*, Principle 2 at para. 16 and Principle 12 at para. 36.

83 *The UN Principles and Guidelines*, Guideline 59.

they were being suspected of".<sup>84</sup> The SPT has also highlighted the importance of States having a legal framework that allows for legal aid lawyers to have "functional independence and budgetary autonomy to guarantee free legal assistance for all detainees who require it".<sup>85</sup>

### Equity in Legal Aid

Legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime. The ECtHR has stressed that legal assistance is particularly crucial for people suspected of serious crimes, "for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to be the highest degree by democratic societies".<sup>86</sup> In addition, the CPT has recommended States abolish their systems whereby people who are charged under particular classes of criminal offences (for example, minor offences) are not entitled to legal aid.<sup>87</sup> Given the autonomous meaning of a "criminal charge" under the ECHR,<sup>88</sup> all people who are charged with crimes, even if minor, should have the right to apply for legal aid and address the means and merits tests rather than excluding whole categories of offences from the legal aid system.

Women, children and groups with special needs may also need special measures to ensure their access to legal aid is meaningful. The UN Principles and Guidelines require legal aid to be provided on a non-discriminatory basis, and be tailored to address the needs of these groups, as well as people living in rural or disadvantaged areas.<sup>89</sup> In *Anakomba Yula v Belgium*, the applicant was restricted from accessing legal aid

because she was not a Belgian national. The ECtHR found this to be discriminatory and a violation of Article 6 in conjunction with Article 14 of the ECHR.<sup>90</sup>

### Partnerships

States should work with a number of different criminal justice actors to ensure that legal aid is implemented in a practical and effective way. The UN Principles and Guidelines recommend that States establish partnerships with bar or legal associations to provide legal aid, as well as other legal service providers, such as universities, civil society and other groups and institutions.<sup>91</sup> The CPT has, in numerous Reports to Government, made recommendations to States to develop a "fully fledged and properly funded system of legal aid"<sup>92</sup> and noted that "this should be done in co-operation with the relevant bar associations".<sup>93</sup> The CPT has also recommended that in order to avoid delays, lawyers could be "chosen from pre-established lists drawn up in agreement with the relevant professional organisations"<sup>94</sup> and stressed the need for police to immediately inform the relevant legal aid provider of each fact of detention.<sup>95</sup>

Furthermore, the UN Principles and Guidelines specifically place accountability on police, prosecutors and judges, stating that it is their responsibility "to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid".<sup>96</sup>

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

85 *Fifth Annual Report of the SPT covering the period January-December 2011*, 19 March 2012, U.N. Doc. CAT/C/48.3, at para. 78.

86 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para 54.

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

88 *Engel and Others v the Netherlands*, ECtHR, Judgment of 8 June 1976, at para. 82, 83. See also: *Ezeh and Connors v the United Kingdom*, ECtHR, Grand Chamber Judgment of 9 October 2003, at para. 82. *Deweere v Belgium*, ECtHR, Judgment of 27 February 1980, at para. 42 and 46; *Eckle v Germany*, ECtHR, Judgment of 15 July 1982, at para. 73; *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 46-53.

89 *The UN Principles and Guidelines*, Principle 10.

90 *Anakomba Yula v Belgium*, ECtHR, Judgment of 10 March 2009, at paras. 37-39 (civil case).

91 *The UN Principles and Guidelines*, Principle 14, Guideline 11(d), Guideline 16.

92 *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report on the visit to Austria carried out by the CPT from 14 to 23 April 2004*, CPT/Inf (2005) 13, at para. 26; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006) 20, at para. 23; *Report on the visit to Poland carried out by the CPT from 5 to 12 June 2013*, CPT/Inf (2014) 21, at para 28.

93 *Report on the visit to the Slovak Republic carried out by the CPT from 24 March to 2 April 2009*, CPT/Inf (2010) 1, at para. 28; *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report to the Greek Government on the visit to Greece carried out by the CPT from 4 to 16 April 2013*, CPT/Inf (2014) 26, at para 29.

94 *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 13 April 1992, at para. 37.

95 *Report to the Ukrainian Government on the visit to Ukraine carried out by the CPT from 18 to 24 February 2014*, CPT/Inf (2015) 3, at para 52.

96 *The UN Principles and Guidelines*, Principle 3, at para. 23.

## CONCLUSION ON THE RIGHT TO LEGAL AID

Legal aid is a fundamental right of all people accused or suspected of crimes. It is particularly important for people during the early stages of criminal proceedings, as people in police custody are in a vulnerable position and are in most need of assistance. The ECtHR has set down detailed rules on when the interests of justice require legal aid to be provided, including the basic minimum rule that all people facing any period of imprisonment, however short, must be provided with legal aid. In addition, legal aid must be provided to people involved in serious or complex cases, as well as people who may not have the capacity to defend the case themselves because of their personal circumstances or vulnerability.

In appointing a legal aid lawyer, the State must be diligent, fair, and should consider the wishes of the suspect or accused person, and any special needs they might have. The State should pay close attention to the quality of the legal aid lawyer they appoint, because if the lawyer fails to provide effective representation, and this is manifest or is brought to the State's attention, then the State is under an obligation to intervene and rectify the failure.

The UN Human Rights Committee, applying the ICCPR, has affirmed that the right of legal aid is a universal standard afforded to all people accused or suspected of crimes. The European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have both repeatedly emphasized that a functioning and efficient legal aid system is a fundamental safeguard against intimidation, ill-treatment and torture.

On a practical level, the UN Principles and Guidelines are particularly useful for setting down specific recommendations as to how States can create and maintain an efficient legal aid system. States should ensure that their legal aid systems have adequate financial and staffing resources and have budgetary autonomy. Independence is crucial, both of the legal aid lawyers and of the managing legal aid authorities. Legal aid should be guaranteed for all people accused or suspected of a crime, irrespective of the nature of the particular crime, and special measures may be required to ensure groups with special needs have meaningful access to legal aid. A functioning and well-designed legal aid system requires the commitment of all of the actors in the criminal justice system, including lawyers, police, prosecutors, and judges.

The text of this document is available in English, French, German, Spanish, Italian, Hungarian, Dutch, Polish and Russian here: <http://osf.to/legal-aid-standards>

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