18th World Day Against the Death Penalty

The Right to Effective Legal Representation

DETAILED FACTHSEET

The Advocates FOR HUMAN RIGHTS

WORLD COALITION AGAINST THE DEATH PENALTY

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Introduction

Access to effective counsel is based on the fundamental right to a fair trial and is critically important in capital cases, where effective counsel can literally mean the difference between life and death.

> "Perhaps the most important factor in determining whether a defendant receives the death penalty is the quality of representation he or she is provided."[1]

> "[I]t is axiomatic that legal assistance be available in capital cases. This is so even if, the unavailability of private counsel is to some degree attributable to the [accused] himself, and even if the provision of legal assistance would entail an adjournment of proceedings."[2]

Amnesty International recorded at least 657 executions worldwide in 2019, though this number does not include "the thousands of executions believed to have been carried out in China," which maintains the number of executions as a state secret.[3] The 10 states with the most executions in 2019 are listed below:

State	Number of Executions
China	1,000*
Iran	251+
Saudi Arabia	184
Iraq	100+
Egypt	32
United States	23
Pakistan	14+
Somalia	12+
South Sudan	≥11+
Yemen	7

This detailed factsheet explores the international and regional standards for access to effective counsel and the impact such standards have on death penalty cases. Although access to counsel is generally recognized as a right necessary to safeguard against abuses in the criminal justice system, the extent to which this right is guaranteed or available in practice varies considerably across the globe. Access to counsel has a significant influence on trial procedures, sentencing, and the likelihood that an accused will receive the death penalty.

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[1] Death Penalty and Poverty – Detailed Fact Sheet, World Coalition Against the Death Penalty, 15th World Day Against the Death Penalty, 2017.

[2] Robinson v Jamaica, para. 10.3, UN HR Committee Comm'n No 223/1987, March 30, 1989.

[3] Global Report, Death Sentences and Executions 2019, International, available at: https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF, April 2020.

This factsheet is divided into two main parts. The first part provides a general overview of the global and regional standards for access to counsel as it relates to the death penalty. The second part provides a deeper look into the quality of representation afforded by the right to counsel, including the scope and timeliness of representation, privacy and confidentiality, the influence of poverty, and standards governing attorney competence and quality.

This note was prepared by the World Coalition Against the Death Penalty in partnership with The Advocates for Human Rights, thanks to data provided by the law firm Goodwin Procter LLP.

1. General Right to Counsel

The right to counsel in criminal proceedings is recognized by several global and regional instruments, which have been defined and interpreted through treaty bodies and regional and national court systems. Some of these instruments are international treaties that are legally binding on states that have ratified them. Other instruments provide a set of principles or guidelines for states to follow but are not legally binding.

1.1. Global Instruments

1.1.1. Treaties

International Treaty	No. of Member States[4]	Access to Counsel Provisions
International Covenant on Civil and Political Rights (ICCPR)	173	An accused in criminal proceedings "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..." [5]
Convention Against Torture (CAT)	170	Guarantees "the right promptly to receive independent legal assistance." [6]
Convention on the Rights of the Child (CRC)	196	"States Parties shall ensure that... Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance..." [7]

[4] These human rights treaties apply directly only to countries that have ratified or acceded to them. To see whether a country has ratified or acceded to a particular treaty, consult Status of Ratification Interactive Dashboard, UN Office of the High Commissioner for Human Rights, available at https://indicators.ohchr.org/.

[5] ICCPR, Article 14(3)(d).

[6] The Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, U.N. Doc. CAT/C/GC/2, Jan. 24, 2008.

[7] United Nations Convention on the Rights of the Child, Article 37(d).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)	55	"In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees: to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing; to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay..." [8]

1.1.2. Principles and Guidelines[9]

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the UN General Assembly, affirms that "anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process."[10]

The right to legal assistance is proclaimed by several other United Nations instruments, including the Basic Principles on the Role of Lawyers,[11] the Standard Minimum Rules for the Treatment of Prisoners,[12] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[13]

1.1.3. Specific Guidance for Capital Cases

The UN Economic and Social Council encouraged Member States to afford "special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defense, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases."[14]

[8] United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 18(3).

[9] These principles, guidelines, and rules are non-binding, but reflect a consensus about generally accepted principles applicable to all countries, regardless of treaty ratification status.

[10] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187, annex (28 March 2013) [Principles and Guidelines], online: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf.

[11] Basic Principles on the Role of Lawyers, Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

[12] Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council resolutions 663 C (XXIV) and 2076 (LXII), para. 93, May 13, 1977.

[13] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173, principle 17, para. 2, December 9, 1988.

[14] "Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," United Nations Economic and Social Council, resolution 1989/64, May 24, 1989.

Member states should "ensure that each defendant facing a possible death sentence is given all guarantees to ensure a fair trial, as contained in Article 14 of the International Covenant on Civil and Political Rights..."[15]

Lack of effective legal representation during any stage of a criminal proceeding violates the right to a fair trial and, if the proceeding leads to a death sentence, "would render the sentence arbitrary in nature," in violation of the right to life.[16] Being denied access to counsel may rise to the level of a grave violation of the right to fair trial and can also render a person's detention arbitrary.[17]

1.2. Regional Instruments

The table below lists the estimated number of executions that occurred in 2017 in Asia, the Middle East, Africa, the Americas, and Europe, as reported by Amnesty International.[18] The table also indicates whether each region has its own legally binding and enforceable treaty guaranteeing access to counsel in capital cases, as discussed in more detail below.

Region	Executions in 2017	Is there a region-wide treaty guaranteeing access to counsel?	Is the region-wide treaty enforceable?
Asia	1,000s*	No	N/A
Middle East	≥ 547	Yes	No
Africa	≥57	Yes	Yes
Americas	22	Yes	Yes
Europe	≥ 2	Yes	Yes

* The number of executions in China, Vietnam, and North Korea are state secrets, so the exact number of executions is unknown.

1.2.1. Americas

The American Convention on Human Rights (ACHR) provides that every "person accused of a criminal offense has the right to... defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel"; and the "inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law..."[19]

[15] "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Economic and Social Council, resolution 1996/15, July 23, 1996.

[16] Human Rights Committee, General Comment No. 36: Article 6: right to life, UN Doc. CCPR/C/GC/36, ¶ 41 (3 Sept. 2019).

[17] See, e.g., UN Working Group on Arbitrary Detention, al-Gaoud et al. v. Libya, Op. No. 4/2016, ¶¶ 42-44.

[18] Amnesty International Global Report: Death Sentences and Executions 2017, Amnesty International, 2018.

[19] American Convention on Human Rights, Articles 8(2)(d) and (e).

Members of the Organization of American States have agreed to "dedicate every effort to the application of... [a]dequate provision for all persons to have due legal aid in order to secure their rights."[20]

1.2.2. Africa

The African Charter on Human and Peoples' Rights (Banjul Charter) states that in criminal proceedings, every individual shall have the right to defense, including the right to be defended by counsel of his choice.[21] For capital cases, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Guidelines) states that the "interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon."[22]

1.2.3. Europe

According to the European Convention on Human Rights (ECHR), "[e]veryone charged with a criminal offence has the right to "defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...[23]

The European Court of Human Rights (ECtHR), which supervises the enforcement of the ECHR, recognizes that "the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial."[24] Access to counsel puts the accused "in a far better position as regards enforcement of all his other rights, partly because his chances of being informed of those rights is greater and partly because a lawyer will assist him in having his rights respected."[25] The right to have access to counsel, however, is not unlimited and may be restricted for "good cause," so long as the court asks whether "the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."[26]

1.2.4. Asia

Despite being the continent with the highest number of annual executions, there are no organizations or conventions that operate across Asia to protect or promote human rights. Asian countries vary considerably in their approaches to protecting and promoting human rights.[27]

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[20] Charter of the Organization of American States, Article 45(i), adopted June 10, 1993.

[21] African (Banjul) Charter on Human and Peoples' Rights, Article 7(1)(c), adopted June 27, 1981.

[22] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section H(c), African Commission on Human and Peoples' Rights, 2003.

[23] European Convention on Human Rights (ECHR), Article 6(3)(c), June 1, 2010.

[24] Krombach v. France, No 29731/96, (13 February 2001) at para 89.

[25] EC, Commission, Green Paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (Brussels: EC, 2003), online: http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52003DC0075.

[26] Murray v. United Kingdom [GC], No 18731/91 (8 January 1996) at para 63.

[27] https://en.wikipedia.org/wiki/Regional_human_rights_regimes.

1.2.5. Middle East

The Middle East has no regional system for protecting human rights and is home to some of the world's top executioners, including Iran, Saudi Arabia, and Iraq. The Arab Charter on Human Rights, a regional treaty that entered into force in 2008, provides:

> Everybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations. State Parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights.[28]

However, unlike comparable treaties in the Americas, Africa, and Europe, described above, the Arab Charter on Human Rights currently lacks any enforcement mechanism and there is no specific court in place to interpret and enforce the treaty.[29]

[28] Arab Charter on Human Rights 2004, Article 13(1).

[29] Human Rights Law Research Guide: Arab States, The University of Melbourne, available at: https://unimelb.libguides.com/human_rights_law/regional/arab, February 17, 2020.

2. Quality of Representation

2.1. Scope and Timeliness of Access to Counsel

In death penalty cases, quality legal assistance is vital at all stages of the legal process – from the moment the defendant is arrested, through the trial and any appeals, and during post-conviction pardon or clemency proceedings.

The UN Human Rights Committee has consistently held that Article 14(3)(d) of the ICCPR requires that the accused be granted timely access to counsel, unless it can be shown that there are compelling reasons to restrict access.[30] This right requires the accused to have access to a lawyer at all stages of criminal proceedings, including the initial period of police detention, questioning, and investigation.[31] As the right to counsel is "an important element of the guarantee of a fair trial and an application of the principle of the equality of arms," its denial may, in the context of the wider proceedings, constitute a violation of the right to a fair trial.[32]

Despite the nearly universal recognition of the right to counsel, many countries have different interpretations of when the right arises and what judicial proceedings it covers. Further, how this right is upheld in practice varies considerably as a result of numerous factors, which are explained in detail below.

2.1.1. United States

The U.S. Constitution states that, "in all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense."[33] This right, however, is granted only in criminal cases and attached at the initiation of formal adversarial proceedings, when the defendant has heard the charges against him.[34] Once attached, the defendant has the right to counsel at all critical stages of the trial. The defendant also has the right to counsel on appeal only if the jurisdiction provides a nondiscretionary first appeal.[35] There is no right to counsel for discretionary second appeals.[36]

The U.S. system creates certain loopholes in death penalty cases where defendants can be left without legal representation at critical times. For example, the right to counsel does not begin until after the arraignment process, when the defendant has appeared before the court.[37]

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[30] Centre for Civil & Political Rights (hereinafter "CCPR"), General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), 90th Sess, adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32, (citing ICCPR Article 14(3)(b)).

[31] *Id.*

[32] *Id.*

[33] U.S. Const. amend. VI.

[34] Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008).

[35] Douglas v. California, 372 U.S. 353 (1962); Halbert v. Michigan, 545 U.S. 605 (2005).

[36] Halbert, 545 U.S. at 607-08.

[37] See Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008). Under Miranda v. Arizona 384 U.S. 436 (1966), an individual in police custody cannot be interrogated by the police without being informed of his rights. This right is derived from the 5th amendment, not the 6th amendment which guarantees an individual the right to an attorney. There are many common misconceptions about an individual's Miranda right. First, the right only applies when being interrogated by the police while involuntarily in police custody. They do not apply when the individual is arrested or if the individual voluntarily talks to the police. Second, the right must be invoked. If the individual does not request an attorney, the police can continue to question the individual after reading the individual his or her

Accordingly, there is no right to counsel after arrest and prior to arraignment, when evidence is being collected and witnesses are being questioned.[38] This gap in access to counsel directly violates the guarantees set out in the ACHR.[39] *Barreto Leiva v. Venezuela* holds that ACHR Article 8(2)(d) implicitly recognizes that access to counsel must be prompt and available to an individual at the start of a criminal investigation.[40] If the right to defense arises when an investigation into an individual is ordered, the accused must have access to legal representation from that moment onwards. Otherwise, the right to defense is limited and a procedural imbalance leaves the individual unprotected before the punishing authority.[41]

The right to counsel is not guaranteed in all appeals and does not extend to post-conviction proceedings. For example, one estimate suggests that about 14% of death row inmates in California are currently without counsel for their direct appeals.[42] In the state of Alabama, death row inmates have no right to counsel in post-conviction proceedings.[43] This is alarming considering that "[p]erhaps the most important factor in determining whether a defendant receives the death penalty is the quality of representation he or she is provided."[44]

2.1.2. Europe

The Council of Europe takes a broader view of the right to counsel. The ECtHR, which enforces the ECHR, has consistently held that timely or prompt access to legal counsel requires "individuals [to] be informed of [the] right [to counsel] prior to being questioned, immediately upon arrest, during investigative acts, or when the individual's position is significantly affected (e.g., becoming a suspect in a case), which may occur prior to a formal arrest."[45] Accordingly, the ECtHR has found a violation of Article 6(3)(c) of the ECHR when the right to timely access to counsel is denied.[46] Moreover, under *Airey v. Ireland*, the right to counsel extends to both criminal and civil cases.[47] This is significant from the perspective of the death penalty because, as seen in the U.S. context, the appeal processes and habeas corpus petitions may fall outside the right to counsel in criminal cases.

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rights. Finally, even if an individual invokes the right to an attorney, the effect of the invocation only requires the police to stop the interrogation until an attorney is present. It does not require the police to provide an attorney to the individual. Under the 6th amendment, only at the arraignment process does the right to counsel officially begin in the United States.

[38] See supra, footnote 49.

[39] American Convention on Human Rights ("Pact of San Jose"), art. 8(2)(d)-(e), Nov. 22, 1969.

[40] Leiva v. Venezuela, Judgment, Inter-Am. Ct. H.R. (Nov. 17, 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_206_ing.pdf.

[41] Samantha Black, International Law Right to Timely and Confidential Access to Counsel, Lawyers' Rights Watch Canada (Jan. 23, 2017), https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report.

[42] Cornell Center on the Death Penalty Worldwide, Death Penalty Representation, http://www.deathpenaltyinfo.org/death-penalty-representation.

[43] *Id.*

[44] *Id.*

[45] Black, supra.

[46] *Id.*

[47] Airey v. Ireland, European Ct. of Human Rights (Oct. 9, 1979), Application no. 6289/73, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57420%22]}.

2.1.3. Africa

The African Commission recognizes that "the efficiency of justice is a major component of fair trial and of [e]ffective remedies."[48] The right to timely access to counsel is implied in Article 7(1)(c) of the Banjul Charter and was confirmed by the African Guidelines, which state:

This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings. The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available. [49]

Although the Charter and the Guidelines clearly delineate an immediate right to counsel upon arrest, the African Commission on Human and Peoples' Rights (ACHPR) has often been inconsistent in its application. In *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, for example, the complainants were arrested and detained for over a year without access to legal assistance.[50] The ACHPR found violations of Articles 1, 5, 6 and 7 of the Banjul Charter. [51]

By comparison, in *Gabriel Shumba v. Republic of Zimbabwe*, a Zimbabwean human rights lawyer was arrested by the government and deprived of access to counsel, while being subjected to physical and psychological torture.[52] In finding no violation of Article 7(1)(c) of the Banjul Charter, the ACHPR stated that it was "aware that the Victim did not immediately have legal representation following his arrest, but such a representation came at least two days later." [53]

African countries often struggle with competing interests in their efforts to guarantee access to counsel. One example is Ethiopia, a rural country that retains use of the death penalty. Article 20 of the Ethiopian Constitution guarantees individuals accused of a crime the rights to (1) a public trial, (2) be informed of the charges brought against them, (3) a presumption of innocence, (4) access of the evidence brought against them, (5) access to counsel at the state's expense, and (6) the right to an appeal.[54] Despite these guarantees, many Ethiopian villagers who are detained by the government fail to exercise their constitutional rights because they either do not know their rights or do not have adequate legal resources to exercise them.[55] In a country of around 55 million people, there are only about 2,000 attorneys, 800 of which represent the government.[56]

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[48] Black, supra.

[49] Principles & Guidelines on the Right to a Fair Trial & Legal Assistance in Africa, African Comm'n on Human & Peoples' Rights.

[50] Hadi & Ors v. Republic of Sudan, Communication No. 368/09, [2018] ACHPR 3 (June 4, 2014).

[51] *Id.*

[52] Shumba v. Zimbabwe, Communication No. 288/2004, [2012] ACHPR, available at https://www.achpr.org/public/Document/file/English/288_04_gabriel_shumba_v_zimbabwe.pdf.

[53] *Id.*

[54] Constitution of the Federal Democratic Republic of Ethiopia, available at https://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf.

[55] Rita A. Fry & Gregory W. O'Reilly, Developing the Right to Counsel in Ethiopia, 80 Judicature 112 (1996).

[56] *Id.*

2.1.4. Asia

2.1.4.1. Japan

In Japan, state-appointed defense lawyers are not appointed until after a judge has made a detention decision, which means the defendant can have no legal representation between arrest and detention, contrary to other regions of the world.[57] Similar to the United States, the right to state-appointed counsel is available only for certain kinds of crimes that are punishable by death, life imprisonment, or imprisonment for more than three years.[58] Issues can arise in situations where a defendant was tried for a lesser crime first. For example, the suspect can be arrested, detained, and investigated for the lesser crime first, without access to counsel, and the prosecution can then use the stain of the first conviction to help convict the defendant of the greater offense. Further, once convicted, the defendant does not have a right to state-appointed counsel on appeal or retrial.[59] Some inmates resign themselves to their death sentences, even when they believe the sentences are unjust, simply because they cannot afford to pay for the assistance of defense counsel.

2.1.4.2. Cambodia

In 2010, the Cambodian government expressed a commitment to protecting basic human rights but recognized that this would take time to achieve, given the devastation that the previous Khmer Rouge regime had on the country's legal system.[60] Even 20 years after the fall of the Khmer Rouge regime, very few legal professionals remain.[61] Consequently, lengthy pretrial detentions, abuse of detainees, and lack of legal representation are all common problems in Cambodia.[62] Although Cambodian law requires detainees to have access to representation for detentions exceeding 24 hours, such legal representation is not always realized, primarily due to the "critical shortage of trained lawyers."[63] In 2009, the country had about 15 million people but only 751 lawyers.[64]

2.1.4.3. China

In 2017, China enacted criminal reforms referred to as the "Supreme People's Court and Ministry of Justice Measures for Implementing Pilot Project Work on Having Defense Counsel in All Criminal Cases," which put an emphasis on ensuring greater access to counsel.[65] Prior

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[57] The Death Penalty in Japan, The Death Penalty Project 25 (2013).

[58] *Id.*

[59] *Id.*

[60] Aurora E. Bewicke, Asian Developments in Access to Counsel: A Comparative Study, Northwestern J. Int'l Hum. Rts. 27 (2011), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1124&context=njihr.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Jeremy Daum, The Right to an Attorney [And Your Attorney's Rights] in China, China Law Translate (Oct. 16, 2017), https://www.chinalawtranslate.com/en/the-right-to-an-attorney-and-your-attorneys-rights/#_edn1; and Measures for Implementing Pilot Project Work on Having Defense Counsel in All Criminal Cases, China Law Translate (Oct. 12, 2017), https://www.chinalawtranslate.com/en/measures-for-implementing-pilot-project-work-on-having-defense-counsel-in-all-criminal-cases/.

to this change, only about 30–50% of criminal defendants were represented by counsel.[66] Under the new reforms, however, failure to appoint counsel presents grounds for retrial.

Article 2 of the reforms guarantees individuals the right to retain an attorney. However, Article 3 states that this right attaches three days after the court has accepted the case.[67] This is after the government has conducted its investigation into whether or not it wants to pursue a conviction of the individual.[68] Under Article 5, up to three additional days can pass after the right attaches and before an attorney is appointed by a legal aid institution.[69]

To fully understand the right to counsel in China, however, one needs to understand the context in which attorneys operate. First, there is an ongoing and disturbing rate of state interference with criminal defense attorneys, in which well-respected law firms can be searched and lawyers can be disbarred, detained, or even abducted.[70] When formally prosecuted, lawyers are sometimes denied access to their families or the legal counsel of their choosing.[71] Repressive rules of professional conduct limit the ability of lawyers to do their jobs effectively and restrict their civil rights.[72]

Second, attorneys are not independent advocates for the accused but are "socialist legal workers."[73] Lawyers in criminal cases are a part of the criminal justice system first and their clients' representatives second.[74] Their job is to facilitate the trial process by clearly presenting the facts and guiding the correct application of the law.[75] Lawyers who make cases more complicated by obfuscating the facts or introducing uncertainty are unwelcome.[76] For this reason, defense attorneys are not allowed to participate in criminal interrogations. These realities can significantly diminish the effectiveness of even the most competent attorneys.

2.1.4.4. Singapore

The Singapore constitution guarantees that an arrested person "shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."[77] The constitution, however, does not indicate when, exactly, the accused's right to legal representation begins. In the case of *Jasbir Singh*, the court interpreted this right to attach within a reasonable time after arrest.[78] In determining what constitutes a reasonable time, the court must balance the right to legal representation with the time needed

[66] Daum, supra note 80.

[67] Measures for Implementing Pilot Project Work on Having Defense Counsel in All Criminal Cases, supra note 82.

[68] *Id.*

[69] *Id.*

[70] Daum, supra note 80.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Singapore Constitution, Article 9(3).

[78] Jasbir Singh v PP (1994), 1 SLR(R) 782.

by police to carry out their investigation.[79] This means the accused may be detained without access to counsel until well after the investigation has begun – up to 19 days in some cases.

2.1.4.5. Iran

Access to counsel in Iran is dependent on both how far along the individual is in the criminal procedure and the crime the individual is accused of committing. Iran updated its code of criminal procedure in 2015, marking a significant improvement over the prior 1999 code by including several articles dealing with the right to access a lawyer after arrest. Article 48 opened the door to access to counsel for all defendants, beginning at the time of arrest: "[t]he accused can demand the presence of a lawyer from the start of detention."[80] Under these revisions, the lawyer can meet with the detainee while paying due attention to the confidentiality of the investigations and negotiations. The meeting should last no longer than one hour and lawyers can provide their written observations for documentation in the case file.[81] The code does not clearly specify officials' obligations to grant immediate in-person access to lawyers or to allow lawyers to be present during interrogations. Moreover, Article 180 of the Prisons Organization Regulations authorizes judicial officials to deny visits and correspondence with detainees where those officials regard such access to not be in the interest of "good trial proceedings."[82] In practice, lawyers are not present during interrogations, and cases too often rely on confessions that defendants make in the absence of lawyers.[83]

Further, in the note to its Article 48, the new code also significantly limits the right to counsel of one's own choosing in cases of crimes against national security and "organized" crimes (which are subject to the death penalty, life imprisonment, amputation, and other severe punishments) by requiring defendants to select legal counsel during interrogations from among lawyers approved and announced by the Head of the Judiciary.[84] The determination of which crimes constitute "organized crimes" appears to be left entirely to the discretion of officials in the Office of the Prosecutor, without any oversight by an impartial and independent body.[85]

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[79] Is It a Constitutional Right to Have Access to a Lawyer Immediately After Being Arrested?, Singapore Government (Nov. 21, 2013), https://www.gov.sg/article/is-it-a-constitutional-right-to-have-access-to-a-lawyer-immediately-after-being-arrested.

[80] Flawed Reforms: Iran's New Code of Criminal Procedure, Amnesty Int'l (2016), https://www.amnestyusa.org/files/flawed_reforms_-_irans_new_code_of_criminal_procedure.pdf. However, Article 191 of the Code of Criminal Procedure authorizes investigating judges to issue a blanket ban on access to case files at the pre-trial phase, including for lawyers, where they deem access to such files "contrary to the necessity of discovering the truth" or in cases involving national security charges, which can carry the death penalty. Such orders are to be communicated to lawyers and defendants in person, and can be challenged in court for a period of three days. Courts are obligated to hear such challenges in an "exceptional" time frame.

[81] *Id.*

[82] *Id.* English translation of the Prisons Organization Regulations by Abdorrahman Boroumand Center: https://www.iranrights.org/library/document/3736

[83] For example, a semi-official news source interviewed police officers in Tehran in early 2018 and reported that when suspects are brought in for investigation, lawyers are nowhere to be seen. One interviewed officer showed his hostility toward the involvement of lawyers at this stage: "The lawyer can teach the accused not to say anything, or to talk in a way that creates hang-ups in the course of the investigation. The police cannot permit the investigation to be hindered." "If You Are Arrested for Murder and You Don't Have Money," Iran Students' News Agency, 1 Feb. 2018, https://www.isna.ir/news/96111106756.

[84] Flawed Reforms: Iran's New Code of Criminal Procedure, Amnesty Int'l (2016), https://www.amnestyusa.org/files/flawed_reforms_-_irans_new_code_of_criminal_procedure.pdf.

[85] *Id.*

2.2. Access to Counsel During Pardon or Clemency Proceedings

At least 29 countries have some form of pardon or clemency procedure, which typically requires the convicted to submit an application before being granted a hearing.[86] Access to counsel at this stage is vital to ensure that the application is prepared properly and that the individual has competent advocacy during the hearing. However, some countries do not guarantee access to counsel during pardon or clemency proceedings.[87]

In addition to appealing through domestic avenues for clemency, attorneys play a role in helping individuals seek clemency in regional and international tribunals. For example, in 2004, Mexico appealed to the International Court of Justice to request an order to stay the execution of five Mexican citizens who had been sentenced to death in Texas.[88] The court ruled that the U.S. violated the 1963 Vienna Convention on Consular Relations because it had not provided Mexican inmates access to their home country's consular officials prior to their trials.[89] Similarly, the ECtHR has frequently intervened in death penalty cases where the rights of the individual were not being protected by domestic courts.[90]

While international tribunals provide another venue for clemency in death penalty cases, gaining access to such courts is not easy. For example, only states can file claims in the International Court of Justice, and thus individuals must convince their own governments to file and pursue such claims.[91] Such efforts can require significant legal expertise and effort. The chances of success in an international tribunal are minimal without the assistance of competent legal professionals.

2.3. Privacy and Confidentiality

2.3.1. Global Instruments

The ICCPR provides an accused with the right "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." As the UN Human Rights Committee explained:

Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.[92]

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[86] Death Sentences and Executions 2018, Amnesty Int'l Global Report 1, 11 (2019), available at https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF; Pardon, Wikipedia https://en.wikipedia.org/wiki/Pardon#Constitutional_basis (last visited Apr. 8, 2020).

[87] E.g., United States, infra p. 9.

[88] International Court of Justice Orders US to Stay 5 Executions, Death Penalty Info. Ctr. (July 16, 2008), https://deathpenaltyinfo.org/news/international-court-of-justice-orders-us-to-stay-5-executions.

[89] *Id.*

[90] See infra p. 10.

[91] How the Court Works, Int'l Ct. of Justice, https://www.icj-cij.org/en/how-the-court-works (last visited Apr. 8, 2020).

[92] General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), 90th Sess, adopted 23 Aug. 2007, UN Doc CCPR/C/GC/32 §93 (citing ICCPR Article 14(3)(b)).

States are urged "to guarantee effective assistance by legal counsel for death row inmates at all stages of the proceedings and to ensure the strict confidentiality of all meetings with their lawyers."[93]

According to the Human Rights Committee, failing to permit an accused to meet with his attorney in private "to prepare his defense" constitutes a violation of the ICCPR.[94]

2.3.2. Americas

Unlike other comparable treaties, the ACHR recites an explicit right to private communications with counsel.[95] This right can be violated when defense attorneys have "difficulty conferring in private with their clients."[96]

2.3.3. Africa

While African Commission case law has not extensively addressed the right to confidential communication with an attorney, the Commission determined that such a right is provided by Article 7(1)(c) of the Banjul Charter. The Commission's Resolution on the Right to Recourse and Fair Trial states that "[i]n the determination of charges against individuals, the individual shall be entitled" to "[h]ave adequate time and facilities for the preparation of their defense and to communicate in confidence with counsel of their choice."[97]

The Commission found this right to be violated in one instance when the accused were permitted to communicate with counsel only "through bars of the court room, in the presence of and within earshot security officials."[98]

2.3.4. Europe

While the ECHR does not explicitly address the right to communicate privately and confidentially with an attorney, the ECtHR has interpreted the ECHR as providing this right. The Court explained that:

[An] accused's right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.[99]

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[93] Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Report of the Secretary-General, U.N. Doc. E/2015/49, Apr. 13, 2015.

[94] Nazira Sirageva v Uzbekistan, No. 907/2000, December 12, 1999.

[95] American Convention on Human Rights, Article 8(2)(d) (stating "[e]very person accused of a criminal offense has the right to... communicate freely and privately with his counsel")

[96] See Castillo Petruzzi et al. v. Peru, Inter-Am Ct HR, May 30, 1999; see also Suárez-Rosero v Ecuador (1997), Inter-Am Ct HR, November 12, 1997.

[97] Resolution on the Right to Recourse and Fair Trial, African Commission, ACHPR/Res.4(XI)92, March 1992.

[98] Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt, No. 334/06, 2011.

[99] S v Switzerland, Nos 12629/87; 13965/88 (28 November 1991) at para 48.

The following restrictions on private and confidential communications with counsel have been found to violate the ECHR:

- limiting communication to a video link;[100]
- opening letters sent between the parties;[101]
- allowing others to be within earshot of a consultation;[102] and
- creating a perception that confidentiality has been compromised.[103]

Further, the European Agreement Relating to Persons Participating in Proceedings of the ECtHR states that persons under detention "shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Court, or any proceedings resulting therefrom."[104]

2.4. Legal Aid and Poverty

Because a defendant's financial resources often determine the extent and quality of available legal representation, access to counsel and poverty are undeniably intertwined.[105] In situations where the individual is unable to afford the cost of legal representation, it falls on the state to provide access to counsel through legal aid programs.[106] The indigent defendant's right to free legal assistance is a hallowed tenet of access to counsel and is recognized by most international and regional human rights organizations.[107]

2.4.1. Access to Legal Aid Under the Law

2.4.1.1. International Human Rights Treaties

The origins of free access to counsel in international law date back to the late 1940s and the Universal Declaration of Human Rights. Article 8 of the Universal Declaration of Human Rights, which was later reaffirmed in Article 2, subparagraphs 3(a) and (b) of the ICCPR, recognizes the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights set out in international treaties, the Constitution or the law.[108] Moreover,

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[100] See Gorbunov and Gorbachev v. Russia, Nos. 43183/06 and 27412/07, March 1, 2016; and Sakhnovskiy v. Russia, No. 21272/03, November 2, 2010.

[101] Campbell v. United Kingdom, No. 13590/88, March 25, 1992.

[102] Brennan v. United Kingdom, No. 39846/98, October 16, 2001 (stating that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c)").

[103] Khodorkovskiy v. Russia, No 5829/04, May 31, 2011.

[104] Article 3 § 2 (c), The European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights.

[105] Bruce Western, Mass Incarceration, Macrosociology and the Poor, Am. Acad. Pol. & Soc. Sci. (Apr. 2013).

[106] Access to Justice, U.N. & the Rule of Law, https://www.un.org/ruleoflaw/thematicareas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.

[107] Extreme Poverty and Human Rights, Communication No. A/67/278, U.N. Gen. Assembly, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/67/278&referer=/english/&Lang=E para 60.

[108] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); ICCPR art. 2(a).

Articles 14 and 15 of the ICCPR provide for the right to a fair trial.[109] These guarantees, however, are toothless if they do not provide the means by which indigent individuals can gain access to legal services. "It is axiomatic that" Article 14 of the ICCPR "requires States parties to provide legal assistance to indigent defendants in any case where the interests of justice so require."[110]

In its general comment No. 32 (2007), the Human Rights Committee acknowledged that "the availability or absence of legal assistance often determines whether a person can access the relevant proceedings or participate in them in a meaningful way."[111] The Committee determined that States may even be obligated to provide free legal assistance "where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the cost of legal assistance to pursue such a remedy."[112] In particular, Article 14 of the ICCPR has been interpreted by the UN Human Rights Committee as requiring States to provide legal assistance to people sentenced to death who seek constitutional review of irregularities in their criminal trials but do not have adequate means to cover the costs of legal assistance.[113]

2.4.1.2. Americas

Article 8 of the ACHR provides for "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing," and, if necessary, for "the right to be assisted by counsel provided by the state."[114]

2.4.1.3. Africa

While Article 7 of the Banjul Charter provides for "the right to defense, including the right to be defended by counsel of his choice," access to free legal assistance varies substantially across the continent.[115] In some states, the right to counsel has manifested in the guarantee of free legal aid and has been enshrined in the constitution. For example, in Article 294 (I) of the Constitution of Ghana, a "person is entitled to legal aid in connection with any proceedings relative to this Constitution if he has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings."[116]

The chart below lists the African countries that retain the death penalty and indicates whether each country's constitution (i) expressly guarantees free legal aid, (ii) expressly guarantees free legal aid when justice requires, (iii) expressly guarantees legal assistance at the defendant's expense, (iv) expressly guarantees legal assistance but does not specify who pays, or (v) includes no explicit guarantee of legal assistance.[117]

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[109] ICCPR art. 14–15.

[110] Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Report of the Secretary-General, U.N. Doc. E/205/49 (Apr. 13, 2015).

[111] General Comment No. 32. (Right to Equality Before Courts and Tribunals and to a Fair Trial), 90th Sess, adopted 23 Aug. 2007, U.N. Doc CCPR/C/GC/32 (citing ICCPR Article 14(3)(b)).

[112] *Id.*

[113] *Id.*

[114] American Convention on Human Rights ("Pact of San Jose"), art. 8, Nov. 22, 1969.

[115] African (Banjul) Charter on Human and Peoples' Rights, art. 7(1)(c), 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982).

[116] Ghana Const. of 1992, art 294 (I), https://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst26.html.

[117] See Access to Legal Aid in Criminal Justice Systems in Africa, U.N. Office on Drugs & Crime (2011), https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf; Botswana

Constitutional Guarantee	Countries
Free Legal Aid	Cape Verde, Egypt, Ethiopia
Free Legal Aid When Justice Requires	Gambia, Kingdom of Eswatini (Swaziland), Liberia, Malawi, Mauritius, Sudan, Uganda, Zambia
Legal Assistance at Defendant's Expense	Botswana, Kenya[118]
Legal Assistance but Unclear Who Pays	Burkina Faso, DRC, Ghana, Lesotho, Mali, Nigeria, Sierra Leone
No Explicit Guarantee of Legal Assistance	Algeria, Cameroon, Central African Republic, Chad, Equatorial Guinea, Eritrea, Morocco, Niger, Tanzania, Tunisia, Zimbabwe

2.4.1.4. Europe

The ECtHR has adopted a similar position to the ICCPR. Although Article 6 of the European Convention does not explicitly require States to provide free legal assistance in both civil and criminal matters, the Court held that Article 6 entitles "indigent applicants... to free counsel when such assistance is indispensable for effective access to the courts and a fair hearing."[119]

In *Airey v. Ireland*, the ECtHR found a violation of Article 6(1), where the applicant was unable to obtain a judicial separation from her husband without legal assistance.[120] The Court found that she had effectively been denied access to the courts, highlighting the complexity of the proceedings and the fact that marital disputes often entail emotional involvement that is scarcely compatible with the degree of objectivity required for advocacy in court.[121]

The Court held in *Quaranta v. Switzerland* that, when deciding whether legal assistance is required for the interest of justice to be met, domestic courts must consider the seriousness of the offense, the complexity of the case, and the ability of the defendant to provide his or her own representation.[122]

Const. at Ch. II, 10(2)(d); Burkina Faso Const. at Art. 4; Cape Verde Const. at Art. 33 (3); DRC Const. at Art. 19; Egypt Const. at Art. 67; Ethiopia Const. at Art. 52; Gambia Const. at Ch. IV, 24(3)(d); Ghana Const. at 19(2)(f); Kenya Const. at Art. 77(2); Lesotho Const. at Ch. II, 12(2)(d); Liberia Const. at Art. 21(d)(ii)(e); Malawi Const. at Ch. IV, 42(1); Mali Const. at Art. 9; Mauritius Const. at Ch. II, 10(2)(d); Nigeria Const. at Ch. IV, 36(6); Sierra Leone Const. at 23(5)(c); Sudan Const. at 34(6); Kingdom of Eswatini (Swaziland) Const. at Arts. 16(2) and 21(2)(c); Uganda Const. at Art. 28(3)(d); and Zambia Const. at Art. 18(2)(d).

[118] Although not guaranteed by the constitution, Kenya has a Legal Aid Act that provides for legal aid at the expense of the State for charges that carry the death penalty.

[119] Report of the Special Rapporteur on the independence of judges and lawyers, Human Rights Council (15 Mar. 2013), ¶ 38, UN Doc. A/HRC/23/43.

[120] Airey v. Ireland, European Ct. of Human Rights (Oct. 9, 1979), Application no. 6289/73, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57420%22]}.

[121] *Id.*

[122] *Id.*

2.4.1.5. Middle East

Article 12 of the Arab Charter on Human Rights establishes that "[a]ll persons are equal before the courts and tribunals" and that "[e]ach State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights."[123]

The Saudi government claims to provide publicly funded, court-appointed attorneys for criminal defendants. However, as of 2016, Amnesty International indicated that defendants were not usually provided with lawyers in criminal trials, and those defendants who received access to counsel were provided a short amount of time to prepare their cases and were, in some instances, not allowed to visit with counsel to prepare a defense.[124]

In Iran, Article 190 of the Code of Criminal Procedure makes mandatory the presence of a court-appointed attorney in cases regarding crimes punishable by death and life imprisonment, where the defendant does not introduce an attorney themselves at the stage of preliminary investigations.[125] There is no public defender office in Iran's justice system. For decades, the government failed to perform its responsibility, per the 1977 Law for the Creation of the Lawyer's Support Fund, to earmark funds for compensation of court-appointed and pro-bono lawyers.[126] In 2019, for the first time, the government budget included such a line, though as of March 2020 it had reportedly not been paid.[127] Faced with little or no pay, some lawyers show little interest in defending clients, and in some capital cases, court-appointed attorneys do not read case files before trial.[128]

2.4.1.6. Asia

Under Article 39A of the Constitution of India, the "State shall... provide free legal aid... to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."[129]

2.4.2. Legal Aid in Practice

In practice, most countries lack the resources to provide free legal aid to each and every defendant, and it is therefore up to the state to ensure that available legal support goes to those who are most likely to be adversely affected by a lack of access to counsel, particularly the impoverished, the vulnerable, and the marginalized. Exorbitant legal costs have proportionally greater effects on low-income sectors, and the impossibility of paying for legal aid or of meeting the costs associated with a court case has been regarded as a form of discrimination in cases where a person's financial situation places him or her in a position of

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[123] Arab Charter on Human Rights, adopted by the Council of the League of Arab States on May 22, 2004, http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf.

[124] Saudi Arabia: Mass death Sentences in 'Spy Trial' a Travesty of Justice, Amnesty Int'l (Dec. 6, 2016), https://www.amnesty.org/en/latest/news/2016/12/saudi-arabia-mass-death-sentences-in-spy-trial-a-travesty-of-justice/.

[125] Flawed Reforms: Iran's New Code of Criminal Procedure, Amnesty Int'l (2016), https://www.amnestyusa.org/files/flawed_reforms_-_irans_new_code_of_criminal_procedure.pdf.

[126] Bar Association head Isa Amini stated that even the official compensation amount (200,000 tomans) has been woefully small. IRNA, October 5, 2018 https://www.irna.ir/news/83122225.

[127] Official site of the Iranian Bar Association, March 8, 2020 http://vokalapress.ir/?p=1779.

[128] *Id.*

[129] India Const. of 1949, art. 39A, available at https://www.india.gov.in/my-government/constitution-india.

inequality before the law.[130] This is especially true for individuals facing the death penalty. For example, in Nigeria, "one of the most intractable problems in death penalty administration is the severe lack of competent and adequately compensated counsel for indigent defendants and death row inmates seeking appeals."[131] Nigeria's situation demonstrates two distinct problems with legal aid: (1) insufficient resources to provide legal assistance to indigent individuals; and (2) the level of qualification of the appointed attorney, an issue discussed in detail in the next section.

To combat this type of discrimination, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems list the following models for the provision of legal aid: public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals, and others.[132] It is ultimately up to the individual State to identify the model that can maximize access to free legal aid, but the system should be independent, non-discriminatory, and needs-based. One recommendation by the UN Human Rights Council is the enactment of legal aid legislation that mandates legal aid to indigent defendants, provides a source of funding for aid programs, and sets out clear qualifying criteria to receive legal aid.[133]

2.4.2.1. Different National Legal Aid Systems

2.4.2.1.1. State-run legal aid programs

In state-run legal aid programs, which are established and administered solely by the state, lawyers operate as if they were civil servants paid by the state to provide free legal assistance. The biggest issue with these types of systems is ensuring that they are autonomous and free from political or judicial interference. In certain Latin American states, autonomy is accomplished through the establishment of public defenders who receive government funding but are otherwise separate from the government as a whole.[134]

State-run legal aid programs, however, can struggle immensely to accomplish their goals. For example, in Guatemala, a country that retains the death penalty, the public defender's office struggles with both case load and political independence. In 2016, the average public defender was assigned 119 cases per year, and there were only 589 public defenders for the entire country, resulting in one public defender per 25,000 people.[135] Only 139 of these public defenders were permanent state employees, while the rest were private volunteers.[136] Further, the process used to select Guatemala's director of the Institute for Public Criminal Defense

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[130] See generally, UN document, "Extreme poverty and human rights ». Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/67/278&referer=/english/&Lang=E.

[131] Nigeria: Waiting for the Hangman, Amnesty Int'l 18 (2008), available at https://www.amnesty.org/download/Documents/52000/afr440202008en.pdf (citing Presidential Commission on Reform of the Administration of Justice (2007)).

[132] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Human Rights Council (Mar. 15, 2013), https://www.ohchr.org/en/issues/judiciary/pages/idpindex.aspx.

[133] *Id.*

[134] *Id.*

[135] Guatemala's Justice System: Evaluating Capacity Building and Judicial Independence, WOLA (June 2019), https://www.wola.org/wp-content/uploads/2019/07/Informe_cam_english_final7.1.pdf.

[136] *Id.*

was influenced by public interest groups, involved limited civil society participation, and failed to fully assess each candidate's "honorability," as required under Guatemalan law.[137]

2.4.2.1.2. Partnerships with non-State legal aid service providers

Other legal aid programs rely on a combination of public and private funding and involve the state supporting and establishing standards for the development of legal aid programs, while local non-profit organizations provide legal services to the community, through clinics or other outreach. In some cases, the services are provided outright by these charities, which are later reimbursed by the state. The greatest concern under these systems is a lack of monitoring, which can lead to corruption, ineffective assistance, and incomplete coverage of indigent individuals.[138]

In the Netherlands, the legal aid system relies on both (i) a network of publicly funded legal aid centers, which employ salaried staff lawyers who provide legal services to clients, and (ii) private lawyers, who are paid by the State to provide services directly to qualifying low-income clients.[139]

2.5. Competent and Qualified Counsel

To protect the rights of those facing the death penalty, such individuals require not only access to counsel, but also access to counsel that is competent, qualified and effective. "Effective defense counsel is an important element in the right to a fair trial in capital cases."[140] This is especially important in an adversarial system where an accurate determination of guilt or innocence requires effective advocacy on both sides. If the advocacy is inferior on one side, the fairness of the trial can be called into question.

"Effective [access to counsel] includes, but is not limited to, unhindered access to legal aid providers, confidentiality of communications, access to information and to case files, and adequate time and facilities to prepare legal cases, as well as the provision of legal advice and education, and mechanisms for alternative dispute resolution. Persons who are deprived of their liberty should be informed, prior to any questioning, of their right to legal aid and of other procedural safeguards."[141] While some of these factors are discussed above, the discussion in this section is focused on how states ensure effective counsel in death penalty cases.

Even when the state has provided counsel during all stages of the legal process, and has not otherwise tried to interfere in the attorney-client relationship, a lack of competent or qualified legal assistance can still lead to wrongful death sentences. A 2011 examination of Kentucky's capital punishment system found an error rate of more than 60%.[142] This same study found

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[137] *Id.*

[138] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Human Rights Council (Mar. 15, 2013), https://www.ohchr.org/en/issues/judiciary/pages/idpindex.aspx.

[139] *Id.*

[140] Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Report of the Secretary-General, U.N. Doc. E/205/49 (Apr. 13, 2015).

[141] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Office on Drugs & Crimes 10: Principle 7 (2013).

[142] American Bar Ass'n Releases Assessment of Kentucky's Death Penalty, Death Info. Ctr. (Dec. 7, 2011), https://deathpenaltyinfo.org/news/studies-american-bar-association-releases-assessement-of-kentuckys-death-penalty.

that at least ten of the 78 people sentenced to death in Kentucky since 1976 were represented by defense counsel who were subsequently disbarred.[143] Similarly, in an investigation by a Philadelphia newspaper, "lawyers found to have provided ineffective assistance of counsel are routinely appointed to new cases," and some even become judges.[144] Moreover, "deficient legal work extends to appellate cases, where the very lawyers hired to correct the errors of others themselves prove ineffective."[145] Appellate lawyers have been known to file legal challenges that cite little or no case law and/or have grammatical errors, and some have missed key filing deadlines or failed to appear for court hearings.[146]

The causes of ineffective assistance of counsel can take several forms. In some situations, the lawyer is simply not qualified to represent the client, for example, due to a lack of training or experience. In other cases, however, the lawyer may have inadequate time and resources to prepare for trial, or may be faced with excessively short procedural deadlines. Moreover, the most skilled attorneys are often unmotivated to take on the complexities and high-stakes nature of death penalty cases either because of how unattractive the case is in comparison to other opportunities, or because the attorney will not receive fair compensation for his or her work.

The following table describes the factors that can limit the effectiveness of counsel in death penalty cases.

Factor	Explanation
Lack of Human Resources	Many countries lack robust legal markets and have a limited number of defense attorneys available (e.g., a single public defender for 100,000 people), which can make finding qualified attorneys difficult.[147] Further, a lack of support staff, administrators, paralegals, and investigators can hinder the attorneys' abilities to do their jobs effectively.
Case Overload	Defense attorneys often face large caseloads and are unable to give each individual the attention his or her case deserves, often resulting in missed filings or overlooked vital facts that would prove a defendant's

[143] *Id.*

[144] Pennsylvania's Death Penalty System in Need of 'Immediate Reform,' Death Penalty Info. Ctr. (Nov. 1, 2011), https://deathpenaltyinfo.org/news/studies-ii-pennsylvanias-death-penalty-system-in-need-of-immediate-reform.

[145] *Id.*

[146] *Id.* See also Amnesty International, Fatally Flawed: Why Malaysia Must Abolish the Death Penalty (2019), https://www.amnesty.org/download/Documents/ACT5010782019ENGLISH.pdf; Carole Berrih & KontraS, Dehumanized: The Prison Conditions of People Sentenced to Death in Indonesia (2019), http://www.ecpm.org/wp-content/uploads/rapportindon%C3%A9sie_gb.pdf; Foreign Policy Centre, Iran Human Rights Review: Due Process, (Feb. 2017), at 44-45, https://fpc.org.uk/wp-content/uploads/2017/02/IHRR-Due-Process.pdf; The Rights Practice, Respect for Minimum Standards? Interim Review of the Death Penalty in China (Feb. 2019), at 29-30, https://www.rights-practice.org/Handlers/Download.ashx?IDMF=90e3b1e6-1a56-4cfa-8911-3c262bd731a3%20; FIDH & Human Rights Commission of Pakistan, Punished for Being Vulnerable: How Pakistan executes the poorest and the most marginalized in society (Oct. 2019), http://hrcp-web.org/hrcpweb/wp-content/uploads/2019/10/Punished-for-being-vulnerable_FIDH-HRCP.pdf.

[147] *See* e.g. Guatemala's Justice System: Evaluating Capacity Building and Judicial Independence, WOLA (June 2019), https://www.wola.org/wp-content/uploads/2019/07/Informe_cam_english_final7.1.pdf.

	innocence.[148] Attorneys facing large caseloads may be forced to triage cases and focus on cases having the greatest chance of success.[149] Time constraints imposed by the judicial system can result in further deficiencies in quality legal representation, particularly when the right to an attorney attaches only at a later stage in the legal process.[150]
Lack of Technology, Resources, and Experts	In countries with limited access to technology, experts or other resources that could assist in proving a defendant's innocence, defendants may be unable to present a complete defense.
Lack of Communication Between Defense Counsel and Prosecutors	Communication and good relations between the defense and prosecution is necessary for effective advocacy, even in adversarial judicial systems, where such communication can result in (i) plea deals that avoid death sentences or (ii) charges being dropped altogether. Systemic and cultural barriers within a country's legal system can prevent good relationships from forming between the defense and prosecutor. In some countries, defense attorneys are demonized and/or prosecutors are discouraged from working with the other side.[151]

While one might assume that market forces would prevent incompetent attorneys from continuing to be employed, defendants are often left with no other option. In situations where counsel is appointed by the state, for example, the accused may have no right to select the counsel of his or her choice and, as a result, be assigned incompetent counsel.[152]

It is often left to the states to provide protections against ineffective assistance of counsel through both judicial supervision and judicial remedies, as described below for various regions.

[148] *See* e.g. In re Muto, 739 N.Y.S.2d 67 (N.Y. App. Div. 2002).

[149] For example, the Innocence Project, which defends death row inmates, has a two-part review process whereby they attempt to filter out cases with a low probability of winning. Volunteer Opportunities, Cal. Innocence Project, https://californiainnocenceproject.org/about-the-project/volunteer-opportunities/ (last visited Apr. 20, 2020).

[150] See e.g. Is It a Constitutional Right to Have Access to a Lawyer Immediately After Being Arrested?, Singapore Government (Nov. 21, 2013), https://www.gov.sg/article/is-it-a-constitutional-right-to-have-access-to-a-lawyer-immediately-after-being-arrested; see also Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008).

[151] See e.g. Jeremy Daum, The Right to an Attorney [And Your Attorney's Rights] in China, China Law Translate (Oct. 16, 2017), https://www.chinalawtranslate.com/en/the-right-to-an-attorney-and-your-attorneys-rights/#_edn1.

[152] Disparities in Legal Representation in Harris County, Texas, Death Penalty Info. Ctr. (Oct. 20, 2009), https://deathpenaltyinfo.org/news/studies-disparities-in-legal-representation-in-harris-county-texas. Scott Phillips, a professor in the Department of Sociology and Criminology at the University of Denver, recently published a study that revealed disparities in who receives the death penalty inTexas. Phillips studied the 504 death penalty cases that occurred between 1992 and 1999 in Harris County (Houston and surrounding areas). Harris County is the largest jurisdiction in the United States to use a court-appointment system for selecting lawyers to defend indigent defendants. Phillips's research showed stark differences between the defendants who were represented by hired counsel and those who were not, regardless of their socio-economic status. His study revealed that "those who can hire counsel for the entire case, or even a portion of the case, appear to be treated in a fundamentally different manner than those who cannot." For the 504 death penalty cases examined, hiring counsel for the entire case eliminated the chance of a death sentence and resulted in more acquittals, and hiring counsel for at least a portion of the case substantially reduced the chance of a death sentence.

2.5.1. United States – The Strickland Regime

In 1984, the Supreme Court of the United States held in *Strickland v. Washington* that the right to counsel guaranteed under the sixth amendment includes the right to effective assistance of counsel.[153] This case opened the door for death row inmates to have their convictions overturned through a habeas petition, claiming ineffective assistance of counsel. To succeed on such a claim, the defendant must show (1) that the trial lawyer's performance fell below an "objective standard of reasonableness" and (2) that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[154] Although *Strickland* provides the framework under which courts evaluate claims, the courts have not specifically defined a set of performance standards for capital defense attorneys.

Both the U.S. Department of Justice and the American Bar Association have published criteria to be used in evaluating trial counsel.[155] These guides cover recommendations for the counsel appointment process, financial resources, workload management, and the standards for attorneys at each stage of the process. Each guide stresses the importance of creating higher standards and more training for attorneys who could be placed in a situation where they are defending a client facing the death penalty and the need for jurisdictions to develop specific death penalty plans to service these attorneys.

The adequacy of this judicial review process is receiving mixed results. According to one study, five innocent men were released from death row in 2019, whereas four likely innocent men were executed.[156]

In one case, the Inter-American Commission on Human Rights concluded that the United States violated a defendant's right to a fair trial "because evidence that might have mitigated the sentence imposed was not produced at trial."[157] The Commission stated that:

The fundamental due process and fair trial requirements for capital trials include the obligation to afford adequate legal representation, and that the failure to develop and present potentially mitigating evidence in a capital case would constitute inadequate representation, the Commission has analyzed the information presented by both parties as to trial preparation, and specifically the failure to seek, develop or present elements that were in fact available in mitigation of the gravity of the crime. As a consequence of this failure on the part of the state-appointed counsel in a crucial phase of the process, the Inter-American Commission concludes that the United States violated [the defendant's] right to due process and to a fair trial.[158]

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[153] Strickland v. Washington, 466 U.S. 668 (1984).

[154] *Id.*

[155] Compendium of Standards for Indigent Defense Systems, U.S. D.O.J. Office of Justice Programs (Dec. 2000), https://capitalpunishmentincontext.org/files/resources/representation/DOJCapitalRepStds.pdf.

[156] The Death Penalty in 2019: Year End Report, Death Penalty Info. Ctr. (Dec. 17, 2019), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report.

[157] The Secretary-General, Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. Doc. E/205/49 (Apr. 13, 2015).

[158] *Id.*

According to the Commission, "in cases involving the death penalty, the State has an enhanced obligation to guarantee that no evidence favorable to the accused is withheld, as this could change the outcome of the trial and give rise to an arbitrary deprivation of life."[159]

2.5.2. European Court of Human Rights (ECtHR)

The ECtHR also evaluates the effectiveness of counsel, but at a more systemic or state level. The ECtHR has authority only over states, meaning that an individual cannot usually file an application with the ECtHR on grounds that the assistance provided by counsel was ineffective, but must instead allege that the state itself failed to uphold its responsibility of providing effective assistance of counsel.[160] In *Kamasinski* v. *Austria*, the ECtHR refrained from examining whether the particular attorney had provided effective assistance and concluded that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed to provide legal aid.[161] In general, ECtHR case law regarding ineffective assistance of counsel indicates that the court considers Article 6(3)(c) of the ECHR to be breached only when counsel fails to perform a duty, provided that this failure is manifest and sufficiently brought to attention to national competent authorities.[162] Unlike the United States, the defendant need not prove that the outcome would have been different.

2.5.3. Africa

Several guidelines by human rights organizations in Africa include provisions specifically addressing the right to effective assistance of counsel. It is unclear, however, how these guidelines are enforced in practice because of the lack of judicial and bureaucratic infrastructure, funding, and legal professionals, which is typical in poorer and developing nations.

According to the Pre-Trial Right in Africa Guide to International Human Rights Standards,

> [T]he authorities, and particularly the courts, must ensure and protect the right of individuals to the effective assistance of counsel. When an individual is represented by appointed counsel*, the authorities must ensure that the lawyer assigned has the requisite training, skills and experience and competence to represent the individual in the particular case*. If appointed counsel is not effective, the court or other responsible authorities must ensure that either counsel performs their duties or is replaced.[163]

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa states that:

> Professional associations of lawyers shall co-operate in the organization and provision of services, facilities and other resources, and shall ensure that: (i) when legal assistance is

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[159] *Id.*

[160] Anneli Soo, An Individual's Right to the Effective Assistance of Counsel versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?, 2010 Juridica Int'l L. Rev.: U. Tartu 252 (2010), https://www.juridicainternational.eu/?id=14592.

[161] Kamasinski v. Austria, Application No. 9783/82, Eur. Ct. Hum. Rights (1989), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57614%22]}; and Artico v. Italy, Application No. 6694/74, Eur. Ct. Hum. Rights (1980), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57424%22]}.

[162] *See*, supra.

[163] Pre-Trial Rights in Africa: A Guide to International Human Rights Standards, Int'l Comm'n Jurists (Sept. 2016), https://www.refworld.org/docid/586e6ec34.html (emphasis added). *

> provided by the judicial body, *lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person*...[164]

According to the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa,

> [L]egal services may be provided by a number of service providers including lawyers, paralegals and legal clinics, depending on the nature of the work and the requisite skills and qualifications. States should take steps to ensure sufficient access to *quality legal services* and, in particular, that *sufficient lawyers are trained and available*.[165]

Further,

> *[L]egal service providers should possess the requisite skills and training as required under national law for the provision of legal assistance and services*. Depending on the system in place, this includes lawyers, and where appropriate also other legal advisors, legal assistants, paralegals and those running legal clinics.[166]

[164] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union (2003), http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf (emphasis added).

[165] Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, African Commission on Human and Peoples' Rights (July 28, 2016), https://www.refworld.org/docid/5799fac04.html (emphasis added).

[166] *Id.*