



# Factsheet for Defense Lawyers

18th World Day Against the Death Penalty

## The Right to Effective Legal Representation



### Access to a trained counsel is paramount in capital cases

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

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

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

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

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

<sup>3</sup> See ICCPR Article 7 etc.

<sup>4</sup> See *Gideon v. Wainwright*, *supra* note 1, at 344.

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

<sup>6</sup> *Gideon v. Wainwright*, *supra* note 1, at 344.

*“We were arrested for the death of a man who died in a tragic accident. We had tried to help him, but instead we were arrested and charged with murder, despite a total lack of evidence. Because they knew we were innocent, our families were determined to help us, even though they are poor. Our families sold their few possessions in order to hire counsel to represent us. However, before the day of trial, he absconded and we faced a capital trial without counsel.*



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

*We were convicted for a crime that we did not commit and served 21 years in prison. We attempted to appeal, but without counsel to speak for us, our appeal was never heard. When we finally obtained counsel through the Malawi resentencing project, we were able to present, for the first time, the true evidence of the facts of our case. His assistance made all the difference to us and we are finally home with our families.”*

– John Nthara and Jamu Banda, Malawi

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

## **International law protects capital defendants’ right to counsel**

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

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

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

<sup>8</sup> *Id.*

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

government control over the legal profession, as is the case in Saudi Arabia.<sup>10</sup> In addition, the jurisprudence of the European Court of Human Rights makes clear that a state's mere appointment of a defence lawyer is not sufficient to guarantee that a defendant receives effective assistance.<sup>11</sup> Rather, as the United Nations Human Rights Committee has stated on multiple occasions, the right to effective counsel requires states to equip defence lawyers with the requisite resources to carry out their role.<sup>12</sup> This means that defence lawyers must prepare a defence<sup>13</sup> and must have adequate time and facilities to prepare this defence, as articulated in the ICCPR and in European, American, and African human rights instruments.<sup>14</sup> The U.N. Economic and Social Council has made clear that these obligations are critical in death penalty cases, calling on governments to provide "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases."<sup>15</sup>

What constitutes adequate time and facilities depends on the circumstances of the case and the stage of the proceedings. By their very nature, capital cases are complex and demanding, requiring time and a team to prepare. The demands of capital cases necessitate that if, during the course of the proceedings, a new attorney is appointed, the court must allow enough time for new counsel to prepare the defence, postponing the trial if necessary.<sup>16</sup> Defence lawyers must also have the requisite training and experience to handle a capital case. In spite of these international legal obligations, some capital defendants are represented by lawyers who do not have the expertise or resources to take on death penalty cases. A study in the United States, for example, found that death row inmates in Texas had a one in three chance of being executed without having their case investigated by a competent attorney and without having critical elements of their defence presented in court.<sup>17</sup>

Moreover, states must provide full and free legal assistance to indigent defendants when justice so requires.<sup>18</sup> The interests of justice always require legal assistance for an indigent defendant in any capital case, including at pre-trial stages, trial, appeal, clemency, commutation of sentence, amnesty, and pardon.<sup>19</sup> Defendants without adequate financial resources always have the right to legal aid, including during emergencies and armed conflict, as recognised by the Arab Charter.<sup>20</sup> The importance of legal aid cannot be understated.

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

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

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

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

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

<sup>15</sup> ECOSOC Resolution 1989/64, ¶ 1(a).

<sup>16</sup> *C.f. Goddi v. Italy*, 8966/80 Eur. Ct. H.R., 9 Apr. 1984; *Daud v. Portugal*, 22600/93 Eur. Ct. H.R., 21 Apr. 1998; *Bogumil v. Portugal*, 35228/03 Eur. Ct. H.R., 7 Oct. 2008.

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

<sup>18</sup> ICCPR article 14(3)(d); Statute of the ICC, article 67(1)(d); ECHR, article 6(3)(c); Charter of Fundamental Rights of the European Union, art. 47; ACHR, article 8(2)(e); UN Basic Principles on the Role of Lawyers, 1990, ¶ 3.

<sup>19</sup> African Commission, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ¶ H(c) (2003) [hereinafter African Commission Guidelines].

<sup>20</sup> Arab Charter Article 4(2). See also Amnesty International, *Fair Trial Manual*, *supra* note 7, at 46–47.

Where a state fails to provide legal aid, defendants risk being executed without ever receiving legal counsel. For example, in South Sudan, the availability of legal aid is “virtually non-existent” as there is “no functioning system of legal aid.”<sup>21</sup> This has meant that virtually all executed inmates have not been represented by counsel before being sentenced to death.<sup>22</sup>

Lawyers provided by the state have the same obligations to provide effective assistance as their hired counterparts. As such, the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa clarify that state-appointed lawyers must “be qualified to represent and defend the accused” and “have the necessary training and experience corresponding to the nature and seriousness of the matter.”<sup>23</sup> This requirement is especially important given that many capital defendants are indigent, so receive state-appointed counsel, and given the seriousness and finality of the death penalty.

In line with their international obligations, states must provide lawyers with the resources necessary to represent capital clients, irrespective of the state’s financial obligations. These resources include funds for prison visits, accessing the client’s files, and mitigation investigations. Some states fall short of these requirements. In Tanzania, for example, lawyers sometimes have to use their own funds to visit their incarcerated clients and in Kenya, lawyers have drawn on their personal funds to pay for processes such as file collection.<sup>24</sup>

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

### **As a defence lawyer, what can you do?<sup>27</sup>**

Defence lawyers can provide capital defendants with access to effective legal counsel. Whether you work for a legal aid bureau and are assigned capital clients or take on capital clients pro bono, once you commit to representing a capital client, you have a responsibility to provide your client with effective counsel.

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<sup>21</sup> Cornell Center on the Death Penalty Worldwide, *Death Penalty Database: South Sudan* (last updated April 2013) <https://dpw.pointjupiter.co/country-search-post.cfm?country=South+Sudan#f34-6>.

<sup>22</sup> *Id.*

<sup>23</sup> African Commission Guidelines, *supra* note 19, at ¶ H(e).

<sup>24</sup> Attorney testimony on file with author.

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

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

<sup>27</sup> For this section see Death Penalty Worldwide, *Representing Individuals Facing the Death Penalty: A Best Practices Manual* (2013).

## Providing high quality legal representation involves several essential prerequisites:

1. You must be independent and free to advocate zealously on behalf of your client.
2. You must have enough training and experience to handle a capital case. Wherever possible, you should seek assistance from other lawyers, investigators, and experts to supplement your experience. Capital representation requires a team approach.<sup>28</sup>
3. You should limit your caseload to a level at which you are able to provide high quality representation.

In addition, the right to adequate time and facilities to prepare a defence applies directly to you. You must have enough time and resources to defend your client, and it is your duty to vigorously assert this right. Where you are not given enough time—for example, if you are appointed to represent your client on the day of trial and have no opportunity to meet with them beforehand—you should ask the court for more time and to postpone the trial. If your argument is unsuccessful, it is imperative that you document your objection in writing and on the record.<sup>29</sup> This may serve as the basis for a successful appeal.



Gatambia Ndung'u. Photo provided by Gatambi

*I am a firm protagonist of the right to a fair trial, which includes the right of access to counsel by a suspect during the inquiry into the commission of an offence as well as effective representation of accused persons in court. Unfortunately, it is not unusual for murder suspects – who are generally the only capital offenders who are ever even offered state-funded counsel – to meet with their lawyers for the first time in court during plea taking, meaning counsel and client have little time, if any, to discuss the case, much less for the lawyer to do thorough investigation and research.*

*In one case, I found myself in this very situation, having been asked to represent a client on the day of trial after the falling out with a lawyer the court had initially appointed to my client. I met the client for the first time in the courtroom holding cells before court could begin and gathered little information relevant to the prosecution witness scheduled for that day's hearing. Gladly, the witness was not a complex one and I believe my cross examination went on well. Thereafter, I was able to arrange prison visits and even engage my client's witnesses to for corroborative evidence that favoured the case. In the end, my client escaped the hangman's noose after his murder charge was reduced to that of manslaughter upon conviction. In such like scenarios, many accused persons can avoid getting the death penalty or on the very bare minimum, get lower sentences, if counsels can have more time with their clients.*

– Gatambia Ndung'u, lawyer from Kenya

## Pre-trial

Effective representation is not limited to the trial phase. You should engage as your client's advocate at the earliest stage possible, including at pre-trial detention hearings, bond hearings, and plea negotiations. Not only does your client have a right to effective representation in the

<sup>28</sup> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *Guideline 4.1, The Defense Team and Supporting Services*, (2003) [http://www.lb9.uscourts.gov/webcites/10documents/Smith\\_guidelines.pdf](http://www.lb9.uscourts.gov/webcites/10documents/Smith_guidelines.pdf).

<sup>29</sup> See Death Penalty Worldwide, *supra* note 27, at 12 for the specific information you should include.

pre-trial phase, but you will be able to develop a stronger relationship with your client if you meet with them earlier. Remember that effective representation requires you to develop a relationship of trust with your client. Your client is entrusting you with their life and you may be their only link to the outside world.

At the pre-trial phase, you have a duty to advocate for your client's release before trial with the least restrictive conditions possible. Where pre-trial detention is unavoidable, you should try to lessen the impact that detention will have on your client by advocating for your client's health and welfare needs while detained.<sup>30</sup>

## Trial

One of the most important parts of providing effective legal representation to a capital client is your pre-trial investigation. Before your client goes to trial, you must investigate the alleged crime, frame a theory of the case, and build a mitigation strategy.

Investigation is critical because it can corroborate a client's innocence or affirmative defence. Where you concede that your client committed the alleged act, investigation remains critical for the purposes of mitigation and can affect your client's charges. As such, all capital defence lawyers must engage in a thorough investigation of the circumstances surrounding the crime, as well as your client's personal and familial background. You should use all of the resources at your disposal to aid your investigation, including experts, investigators, and psychiatrists. Where investigators are unavailable, paralegals, law students, or non-governmental organisations may be able to assist. Where psychiatrists are unavailable, nurses and other professionals with mental health training may be able to help.

For countries that do not separate the culpability phase of a trial from the sentencing phase, such as Pakistan, you should also present mitigating evidence during trial. Mitigating evidence is evidence that argues that even if your client is guilty, the client's individual circumstances and the circumstances of the crime do not merit the death penalty. As such, your pre-trial investigation should incorporate your mitigation strategy and should look into any factors that could affect your client's sentence. Be especially mindful of complex family history, mental health complications, and physical or sexual abuse, among other factors.<sup>31</sup>

During the trial, you have an added responsibility to ensure that courts rigorously observe and uphold due process for your client. Just as with your non-capital cases, you must safeguard your client's right to a fair trial before an impartial tribunal to the best of your ability and available resources.<sup>32</sup>

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<sup>30</sup> See *id.* at 20–22.

<sup>31</sup> See *id.* Chapters 5 and 8 for a detailed exploration of mitigating factors.

<sup>32</sup> See *id.* Chapter 7 for more detail on what your client's fair trial rights encompass.

*I have seen how expert testimony can make the difference between a death sentence and a much-reduced term of years.*

*In one case, the client had committed a grave offense and admitted to it. However, it was clear that he was not mentally culpable for the crime. Thanks to multiple mental health assessments and the pro bono support from a forensic psychiatrist, the team were able to determine that the client had a rare chromosomal abnormality that rendered him incapable forming the intent required for the crime. He was released into the custody of his family and is doing very well with their support*



Chipiliro Lulanga. Photo fournie par Chipiliro Lulana

– Chipiliro Lulanga, Legal Support Officer, Malawi.

## Sentencing

Providing access to effective counsel for your client requires you to take advantage of every opportunity to argue against imposing the death penalty on your client. A sentencing hearing, for those countries that have bifurcated trials, is one such opportunity.

The purpose of sentencing proceedings is for you to present mitigating evidence. You must prepare your mitigation strategy early, as it must be consistent with the theory of the case presented in the culpability phase of trial. At sentencing, mitigation helps to convince the decision-maker that, even if your client is guilty, they do not merit the death penalty. You should be sure to investigate both the circumstances of the crime and the client's individual circumstances to build your mitigating evidence.

## Appeal

The scope of your client's ability to have their sentence and conviction reviewed by higher tribunals varies from one jurisdiction to another, but your client nevertheless retains their right to access effective counsel after sentencing. In spite of this, the right to counsel on appeal is far from universal and without access to a lawyer, many death-sentenced prisoners simply never have the capacity to file an appeal.

To provide effective counsel at the appeal stage, you should inform yourself of the relevant grounds for appeal in your jurisdiction, looking to domestic, regional, and international instruments, and should familiarise yourself with procedural deadlines for filing your client's appeal. Where possible, you should continue to meet with your client, seek to obtain the full record of your client's trial proceedings and, if you were not trial counsel, you should get a copy of the file kept by your client's previous lawyer. If your client did not have effective legal representation at trial, this can also form the basis of an appeal.

“Nothing for the defense, Your Honor.”

*That statement was made by a court-appointed defense attorney at the penalty phase of a capital trial – the time for the attorney to show why his Black client’s life was worth sparing.*

*To be clear, the attorney’s statement was not attributable to a lack of available mitigation. The client was a teenager with intellectual limitations, his childhood was defined by trauma and neglect, and he was not the shooter in the murder for which he was convicted.*

*Nevertheless, “Nothing for the defense, Your Honor.” And the client was sentenced to death. This story is not unique. Many capital cases involve problems with representation, and sentencing decisions often turn more on the defendant’s race and class than on the actual facts of the case. Fortunately, there are reasons to be hopeful. Several states have abolished the death penalty in recent years, and several others have enacted reforms regarding capital representation, which have led to declines in new death sentences. These are positive steps, but there is much more work to be done.*

– Patrick Mulvaney, Managing Attorney, Capital Litigation, at the Southern Center for Human Rights, United States of America

## Resources

Death Penalty Worldwide & World Coalition Against the Death Penalty, *Representing Individuals Facing the Death Penalty: A Best Practices Manual* (2013)

<http://www.deathpenaltyworldwide.org/wp-content/uploads/2017/06/Representing-Individuals-Facing-the-Death-Penalty-A-Best-Practices-Manual.pdf>

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

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

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

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