

Right to legal aid in the international and EU law

Quality and training, the way to effective legal aid & respect of fair trial

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Introduction

International &
supranational law

Conclusion

- Right to legal aid → essential
 - Not sufficient financial resources to meet
 - The costs of a court case, including legal interpretation & translation
 - Legal presentation
- National law – civil & criminal proceedings
- International law, regional, EU-law
 - United Nations (UN)
 - Council of Europe (CoE)
 - European Union (EU)

UN

Universal Declaration of Human Rights (UDHR) (1948)

- Civil & criminal
- **Equality** is fundamental (Preamble, art.7,8 &10)
 - to the enforcement of fundamental freedoms
 - to equality before the law, effective remedies for human rights violations and fair trials in the determination of rights
- **No explicit right to legal aid** be represented
 - → countries to strengthen their justice systems to make these promises a reality for every human being

UN

The International Covenant on Civil and Political Rights (ICCPR) 1966

- **Equal** before the law, without any discrimination to the equal protection of the law (Art.26)
- **Equal and effective** protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or **social origin, property, birth or other status** (Art.26)
 - → Criminal & civil and political rights
 - → **Equal & Effective protection**

UN

The International
Covenant on Civil and
Political Rights
(ICCPR) (1966)

- **Equal** before the courts and tribunals (Art. 14.1)
- **Explicit** right to **legal aid in criminal matters – free legal aid**
 - any criminal charge: minimum guarantees, in **full equality**
 - 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;**(Article 14.3.d)

UN

Human Rights Committee

General Recommendation 32

- right to **legal assistance**
- → the availability or absence of legal assistance often determines whether or not a person can **access the relevant proceedings or participate in them in a meaningful way.**
- → Article 14 ICCPR explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d)
 - States are encouraged to provide **free legal aid** in other cases, for *individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.*

UN

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

- **Not expressly** addressing the right to **legal assistance**
- **No discrimination** of any kind as to race, colour, sex, language, religion, political or other opinion, national or **social origin, property, birth or other status** (Art.2)
- **CESCR General comment 7.** (General Comments) - n°15
 - **Legal aid has to be available where possible**

UN

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965)

- ... no racial discrimination notably in the enjoyment of the following rights (Art. 5)
 - (a) The right to **equal treatment** before the tribunals and all other organs administering justice;
 - (d) Other civil rights,
 - Everyone - **effective** protection and remedies, (Art.6)
- ➔ An implicit duty to provide legal aid when it is necessary to do so to ensure the enjoyment by all of protected rights

UN

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

- The legal protection of women on an **equal** basis (Article 1 & 2)
- **Without** any act of **discrimination**
- → must provide **civil legal aid necessary to the fulfilling of that obligation**
- **the CEDAW Committee - General Recommendation 33 – Women's Access to Justice – Legal Aid (2015)**
 - Guidelines on strengthening **access to legal aid services for women**
 - Ensure that **legal aid** and **public defense providers** are competent, gender-sensitive, respect confidentiality and are granted adequate time to defend their clients; (E 37b)
 - **Information and awareness-raising programmes** for women about the existence of **legal aid** and public defense and the **conditions for obtaining** them. Information and communications technology should be used effectively to facilitate such programmes; (E37c)
 - Develop **partnerships** with **competent non-governmental providers of legal aid** and/or train **paralegals** - **information and assistance** in navigating judicial and quasi-judicial processes and traditional justice systems; (E37d)

UN

United Nations
Convention on the
Rights of the Child
(1989, CRC)

Deprived of liberty - Right to **legal assistance** (art.37)

- Access to “**legal or other appropriate assistance**” to enable the child to prepare his or her defence (Art. 40)
- **Free assistance** of an **interpreter** (Art. 40,2,b vii)
- **Committee on the Rights of the Child**
General Comment 10: Children’s Rights in Juvenile Justice (2007)
 - **legal or other appropriate assistance** in the **preparation and presentation** of his/her defence ... should be **free of charge**
- **The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990, the Havana Rules)**
 - children be entitled to legal assistance “and be enabled to apply **for free legal aid, where such aid is available**[.]”
 - the **right to legal aid is** triggered by arrest or the status of awaiting trial

UN

The Convention on the Rights of Persons with Disability (2007)

- **Access to justice**
 - Provisions for persons with disabilities
 - **Effective** access to justice for persons with disabilities on an equal basis with others ... in all legal proceedings, including at investigative and other preliminary stages (Art. 13)
- → **An implicit duty to provide legal aid when** it is necessary to do so to ensure the enjoyment by all of protected rights

- The International Convention on the Protection of the Rights of **All Migrant Workers** and Members of their Families (2003)
 - the right of those facing **criminal** charges to consult with “counsel of their own choosing,” to be informed of this right and to receive **legal assistance without payment** “where the interests of justice so require ... if they do not have sufficient means to pay.”
- The Convention relating to the **Status of Refugees** (1951)
 - access the courts
 - refugee shall enjoy in the Contracting State in which he [or she] has his [or her] habitual residence the same treatment as a national **in matters pertaining to access to the courts**, including **legal assistance** and exemption from cautio judicatum solvi (Art. 16)

UN

Body of Principles for
the Protection of all
Persons under any
Form of Detention or
Imprisonment (GA-
43/173 -19 December
1988)

- Legal counsel
 - If a detained person does not have a legal counsel of his own choice,
 - he shall be entitled
 - to have a legal counsel assigned to him by a judicial or other authority in all cases where the **interests of justice** so require
 - and **without payment by him if he does not have sufficient means to pay** (Principle 17 2)

UN

Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (1990)

- **Equal access to lawyers** and provide **sufficient funding for legal services to the poor** (Preamble, art. 2,3 & 6)
- **Efficient procedures** and responsive **mechanisms for effective and equal access to lawyers**, **without distinction** of any kind, such as discrimination based onor social origin, **property, birth, economic or other status** (2)
- Sufficient **funding** and other resources for legal services to the poor **cooperation** of professional associations of lawyers for organization and provision of services, facilities and other resources. (3)
- **Information & special attention to assisting the poor** **to** enable them to assert their rights and where necessary **call upon the assistance of lawyers**. (4)
- Any such persons who do not have a lawyer shall, in all cases in which the **interests of justice so require**, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide **effective legal assistance, without payment by them if they lack sufficient means to pay for such services**. (6)

UN

Human rights in the administration of justice

Resolution 56/161
(2002)

- The right to **access to justice** as contained in applicable international human rights instruments forms an important basis for **strengthening the rule of law** through the administration of justice (Preamble)
- Appeals to Governments to include in their national development plans the administration of justice as an integral part of the development process and to **allocate adequate resources** for the **provision of legal-aid services** with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice; (Art.5)

UN

United Nations
Principles and
Guidelines on Access
to Legal Aid in Criminal
Justice Systems
Resolution 67/187 (2012)
adopted by the General
Assembly [on the report
of the Third Committee
(A/67/458)]

- Suspects, victims, witness (introduction n°8-9 – P3-5)
- **Equity** in access to **legal aid** (P10)
- **Non-discrimination** (P6)
- **Legal aid providers**
 - Lawyers & others stakeholders (intro 9)
 - Paralegals (G14)
- Right to be **informed on legal aid** (P8, G2)
- Competence & accountability legal aid providers (P13, G11)
 - Education, training, skills, experience (P13/37)
 - Disciplinary complaints & investigation (P13/38)
 - Criteria & accreditation of legal aid providers/ training requirements / complaints (G11/59)
- Children (P11, G10, G11) & specific groups
 - Training in children's law, specific training in child and adolescent development, effective communication with children (G11/58-note18)

UN

the CEDAW Committee
General
Recommendation 33
Women's Access to
Justice – **Legal Aid** (2015)

- Guidelines on strengthening **access to legal aid services for women**
- Ensure that **legal aid** and **public defense providers** are competent, gender-sensitive, respect confidentiality and are granted adequate time to defend their clients; (E 37b)
- Information and awareness-raising programmes for women about the existence of **legal aid** and public defense and the **conditions for obtaining** them. Information and communications technology should be used effectively to facilitate such programmes; (E37c)
- Develop **partnerships** with **competent non-governmental providers of legal aid** and/or train **paralegals** - **information and assistance** in navigating judicial and quasi-judicial processes and traditional justice systems; (E37d)

CoE

ECHR (1953)

- Right to a **fair trial** - **Civil** Rights (Art. 6.1 ECHR)
 - In the determination of his **civil** rights and obligations ..., everyone is entitled to a ... **Fair** hearing ... by an independent and impartial tribunal established by law. ...
 - **General right to a fair trial**
 - **No express provision on legal aid** in civil or administrative proceedings
- **ECtHR - Practical and effective**
 - **No reference to legal aid** (*Essaadi v. France*, § 30).
 - **Assistance of a lawyer** when such assistance proves **indispensable** for an **effective access to court** / does **not imply** that the State must provide **free legal aid for every dispute relating to a "civil right"** (*Airey v. Ireland*, § 26)
 - **Different factors** - ECtHR

CoE

ECHR

- Right to a **fair trial – criminal** (art. 6 para,3 c ECHR)
 - Everyone charged with a **criminal offence** has the following **minimum** rights: ...
 - (c) to defend himself in person or through **legal assistance** of his own choosing or, **if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require**; ...
 - (e) to have the **free assistance of an interpreter** if he cannot understand or speak the language used in court.
- ECtHR - **Practical and effective**
 - > **More than mere appointment of legal lawyer** (*Artico v. Italy*, § 33)
 - > Legal interpreter – **quality** (*Kamasinski v. Austria*, § 65)

CoE

Resolution (76) 5 on Legal Aid in Civil, Commercial and Administrative Matters (Adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies)

- Eliminating **economic obstacles to legal proceedings and permitting persons in an economically weak position more easily to exercise their rights** in member states
- It is expedient to ensure **equality of treatment in granting legal aid**
 - to nationals of member states of the Council of Europe and
 - to those aliens for whom such equality of treatment appears to be most justified
- Recommends to governments of member states to accord, under the same conditions as to nationals, **legal aid in civil, commercial and administrative matters, irrespective of the nature of the tribunal exercising jurisdiction,**
 - a. to natural persons being nationals of any member state;
 - b. to all other natural persons who have their habitual residence in the territory of the state where the proceedings take place.

CoE

Resolution (78) 8 on
Legal Aid and Advice
(Adopted by the
Committee of
Ministers on 2 March
1978 at the 284th
meeting of the
Ministers' Deputies)

- Right of **access to justice and to a fair hearing** – art. 6 ECHR - an essential feature of any democratic society
- All necessary steps with a view **to eliminating economic obstacles to legal aid**
- Provision of **legal aid** should **no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole**
- Legal aid in court proceedings (Part I)
 - **No** one should be **prevented** by **economic obstacles** from pursuing or defending his right before any court **determining civil, commercial, administrative, social or fiscal matters** (I/1)
 - **Costs totally or partial free** (I/2)
 - **All the costs necessarily** incurred by the assisted person in pursuing or defending his legal rights and in particular lawyers' fees, costs of experts, witnesses and translations (I/3)
 - Always include the assistance of a person **professionally qualified to practise law**(I/5, 6b)

CoE

**Resolution (78) 8 on
Legal Aid and Advice**
(Adopted by the
Committee of
Ministers on 2 March
1978 at the 284th
meeting of the
Ministers' Deputies)

- Part II - **Legal advice**
 - Obtain **necessary legal advice** on all questions arising out of the matters mentioned in principle 1, which may affect his rights or interests (II/12)
 - Legal advice - **available either free or on payment of a contribution dependent on the resources of the person seeking the advice** (II/13)

CoE

Recommendation No. R (81) 7 of the Committee of Ministers to Member States on **Measures Facilitating Access to Justice** (Adopted by the Committee of Ministers on 14 May 1981)

- An **effective system of legal aid and legal advice**, as provided for under Resolution (78) 8 of the Committee of Ministers
 - → may greatly contribute to the **elimination of obstacles for persons in a weak position**
- Simplification & acceleration of documents & proceedings
- **No sum of money as condition for legal aid** (D/11)

CoE

Recommendation No. R (93)1 of the Committee of Ministers to Member States on **Effective Access to the law and Justice for the very poor**

- Reference to Res. CoE, UN (extreme poverty), Human Rights Commission, the study of the International Movement ATD-Fourth World entitled "**Towards justice accessible to all: legal aid machinery** and certain local initiatives as seen by families affected by severe poverty" [H (92) 2]
- Intended to improve, **especially** with regard to the **very poor**, existing **legal advice and legal aid systems**,
- Facilitate **access to the law for the very poor** by
 - **defraying the cost of legal advice for the very poor through legal aid**, without prejudice to the payment of a modest contribution by the persons benefiting from such advice where this is **required by domestic law**;
- Facilitate **effective access to quasi-judicial methods of conflict resolution for the very poor** by:
 - a. increasing the involvement of non-governmental organisations or voluntary organisations providing support to the very poor in quasi-judicial forms of conflict resolution such as **mediation and conciliation**;
 - b. **extending the benefit of legal aid** or any other form of assistance to such **methods of conflict resolution**;

CoE

Recommendation No. R (93)1 of the Committee of Ministers to Member States on **Effective Access to the law and Justice for the very poor**

- Facilitate **effective access** to the courts for the **very poor**, especially by the following means:
 - a. extending **legal aid or any other form of assistance to all judicial instances** (civil, criminal, commercial, administrative, social, etc.) and
 - to **all proceedings, contentious or non-contentious,**
 - **irrespective** of the **capacity** in which the **persons** concerned act; (3)
- **Special attention** for **legal aid to very poor** persons who are **stateless or aliens**

CoE

Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters

- States should take into consideration the opportunity of setting up and providing
- wholly or partly free mediation
- or legal aid for mediation in particular if the interests of one of the parties require special protection.

CoE

Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ)

Appendix 2 to Resolution Res(2002)12

- The aim
 - to improve the **efficiency and the functioning of the justice system** of member states, with a view to ensuring that **everyone** within their jurisdiction can enforce their legal rights **effectively**, thereby generating increased **confidence** of the citizens in the justice system and
 - to enable a **better implementation** of the international legal instruments of the CoE concerning **efficiency and fairness of justice**
- Reference to non-exhaustive list of recommendations
 - Resolution (76) 5 on **legal aid in civil, commercial and administrative matters**;
 - Resolution (78) 8 on **legal aid and advice**;
 - Recommendation No. R (93)1 on **effective access to the law and to justice for the very poor**

CoE

Recommendation *Rec(2003)18* of the Committee of Ministers to member states

- Containing a **transmission form** for **legal aid** abroad for use under the European Agreement on the transmission of applications for legal aid (ETS No. 092) and its Additional Protocol (ETS No. 179)
- Use the form contained in Appendix I to this recommendation, together with the form contained in Appendix I of **Recommendation No. R (99) 6**, when transmitting an application for **legal aid** to a Party to the Agreement and, wherever possible, accept these forms when it receives them from another Party;

CoE

Recommendation Rec(2005)12
of the Committee of Ministers to
member states
containing an **application form
for legal aid** abroad for use under
the **European Agreement on
the transmission of applications
for legal aid** (CETS No. 092) and
its **Additional Protocol**
(CETS No. 179)

- Reference to
 - CoE as the European Agreement on the Transmission of Applications for **Legal Aid** (CETS No. 092), & EU as the Conclusions of the Tampere European Council of 1999;
- **co-operation** between the **Council of Europe and the European Union**, in order to permit **persons in an economically weak position** to **exercise their rights more easily** throughout Europe;
- **use of the application form** for request of legal aid

CoE

Guidelines of the Committee of Ministers of the Council of Europe on child- friendly justice (2010)

- IV. Child-friendly justice before, during and after judicial proceedings
- D. Child-friendly justice during judicial proceedings
- **2. Legal counsel and representation**

38. Children should have access to free legal aid, under the same or more lenient conditions as adults

CoE

Guidelines of the Committee of Ministers of the Council of Europe on child- friendly justice (2010)

Explanatory memorandum

- IV. Child-friendly justice before, during and after judicial proceedings
- A. General elements of child-friendly justice (55)

Guideline 5 - obligation to **information** on all charges against the child

.... **Information should also be given regarding possible complaints mechanisms, available systems of legal aid, ...**

- information **translated in a language the child** understands (a foreign language, Braille or other) as is the case for adults, and the **formal legal terminology** will have to be **explained so that the child can fully understand its meaning** (37)
- **Guideline 38** recommends providing children with **access to free legal aid**. This should **not necessarily require a completely separate system of legal aid**. It might be provided in the **same way as legal aid for adults, or under more lenient conditions, and be dependent on the financial means of the holder of the parental responsibility or the child him or herself**. In any case, the **legal aid system has to be effective in practice**. (EM102)

EU

Treaty on European Union (TEU)

- Human rights are protected in the form set out in the *EU Charter of Fundamental Rights*, which has the 'same legal value' as the *EU Treaties* (Article 6(1) TEU)
- EU is obliged to sign up to the **ECHR** in its own name (Article 6(2) TEU)
- Human rights are also still protected as '**general principles**' of **EU law**.

EU

Charter of Fundamental Rights of the European Union (2016/C 202/02)

- Right to an **effective remedy and to a fair trial** (Art. 47)
 -
 - Everyone shall have the possibility of being advised, defended and represented.
 - **Legal aid** shall be made available to **those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.**
- Relationship between the Charter and the ECHR (Art. 52.3)
 - In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms,
 - the meaning and scope of those rights shall **be the same as those laid down by the said Convention.**
 - This provision shall **not prevent Union law providing more extensive protection.**

EU

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in **cross-border disputes** by establishing minimum common rules relating to **legal aid** for such disputes

- Principle of **equality** of both parties (C4)
- Reaffirmation of art. 47 Charter (C5)
- Guarantee an adequate level in cross-border disputes (C8)

- Minimum common rules relating to **legal aid** (Art.1.1)
- **Cross-border** disputes (Art. 1.2, C9, C21)
 - **Civil & commercial** matters in **court or mediation, extrajudicial procedures**
 - **Not** extend, in particular, to **revenue, customs or administrative matters**
- Right to **legal aid** (Art.3, C11)
 - Prelitigation **advice, assistance** in bringing the case before court, representation in court, assistance **with or exemption from the cost of proceedings**
 - **Whole procedure** including enforcement & appeal (C20)

EU

**Council Directive
2002/8/EC** of 27
January 2003 to
improve access to
justice in **cross-border
disputes** by
establishing minimum
common rules relating
to **legal aid** for such
disputes

- Conditions relating to **financial resources** (Art.5)
 - **Partly or totally unable** to meet the costs
 - **Economic assessment** is needed
- Conditions relating to the substance of disputes (Art.6)
 - Rejecting manifestly unfounded demands of legal aid applications
- Costs related to the cross-border nature of the dispute (Art.7 & 13)
 - **Legal aid** granted in the Member State in which the court is sitting
 - **Interpretation, translation & travel costs**
- Costs covered by the Member State of the domicile or habitual residence (Art.8)
 - **costs of assistance of a local lawyer or any other person** entitled by the law to give **legal advice**
 - the **translation** of the application and of the necessary supporting document
- **Continuity of legal aid** (Art.9)
 - Same lawyer for enforcement & appeal

EU

Resolution on a
Roadmap for
strengthening
procedural rights of
suspected or accused
persons in criminal
proceedings (Council,
30 November 2009)

- A **step-by-step approach** - the adoption of measures
 - the right to translation and interpretation (measure A)
 - the right to information on rights and information about the charges (measure B)
 - **the right to legal advice and legal aid** (measure C)
 - the right to communication with relatives, employers and consular authorities (measure D)
 - special safeguards for suspected or accused persons who are vulnerable (measure E)
- → the order of the rights is only indicative
- → designed to **operate as a whole**

EU

Directive 2010/64/EU
of the European
Parliament and of the
Council
of 20 October 2010
on the right to
interpretation and
translation
in criminal proceedings

- Criminal proceedings
- Execution of a European arrest warrant (C15)
 - Executing Members States – **provide & bear the costs of interpretation and translation**
- **Costs** of interpretation and translation cfr Art.2 &3 (Art. 4)
 - → **Member States meet the costs**
 - **Irrespective of the outcome of the proceedings**
 - **Free and adequate linguistic assistance**, fully to exercise their right of defence and safeguarding the fairness of the proceedings (C17)

EU

Directive 2012/13/ /EU
of the European
Parliament and of the
Council
of 22 May 2012
on **the right to
information in criminal
proceedings**

- **Right to information about rights** (Art. 3.1)
 - suspects or accused person
 - promptly with information
 - at least the following procedural rights
 - (a) the **right of access to a lawyer**;
 - b) **any entitlement to free legal advice and the conditions for obtaining such advice**;
 -
- Right of **access to the materials** of the case (Art.7.5, C34)
 - 5. **Access**, as referred to in this Article, shall be provided **free of charge**

EU

Directive 2012/13/ /EU
of the European
Parliament and of the
Council
of 22 May 2012
on the right to
information in
criminal proceedings

- ***Indicative model Letter of Rights***
 - A. Assistance of a lawyer/entitlement to **Legal Aid**
 - right to a lawyer **In certain cases the assistance may be free of charge. Ask the police for more information.**
 - C. Interpretation & translation - **free of charge**
- ***Indicative model Letter of Rights for persons arrested on the basis of a European Arrest Warrant***
 - B. Assistance of a lawyer **In certain cases the assistance may be free of charge. Ask the police for more information**
 - C. Interpretation & translation - **free of charge**

EU

Directive 2012/29/EU
of the European
Parliament and of the
Council
of 25 October 2012
establishing minimum
standards on the
rights, support and
protection of **victims
of crime**, and replacing
Council Framework
Decision 2001/220/JHA

- Right to receive information from the first contact with a competent authority (Art.4.1.d)
 - (d) **how and under what conditions** they can **access legal advice, legal aid** and any **other sort of advice**;
- Right of victims when making a complaint (Art.5.3)
 - **translation, free of charge**, of the written acknowledgement of their complaint cfr §1, if they so request, in a language that they understand
- Right to interpretation and translation (Art.7 – C34)
 - upon request, with **interpretation** in accordance with their role in the relevant criminal justice system in criminal proceedings, **free of charge, at least during any interviews or questioning of the victim during criminal proceedings before investigative and judicial authorities, including during police questioning, and interpretation for their active participation in court hearings and any necessary interim hearings.**
 - upon request, with **translations of information essential to the exercise of their rights** in criminal proceedings in a language that they understand, **free of charge**, to the extent that such information is made available to the victims.

EU

Directive 2012/29/EU
of the European
Parliament and of the
Council
of 25 October 2012
establishing minimum
standards on the
rights, support and
protection of **victims
of crime**, and replacing
Council Framework
Decision 2001/220/JHA

- Right to **access victim support services** (Art.8)
 - victims, in accordance with their needs, have **access to confidential victim support services, free of charge**, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings
- Right to **legal aid** (Art.13)
 - ensure victims have access to **legal aid**, where they have the status of parties to criminal proceedings
 - **conditions or procedural rules** under which victims have access to **legal aid** shall be determined by **national law**

EU

Directive 2013/48/EU

of the European Parliament and of the Council of 22 October 2013 on the **right of access to a lawyer** in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

- The right of **access to a lawyer** - arrangements (28, 45, 48)
 - inter alia, the **competent authorities** arrange for the assistance of a **lawyer on the basis of a list of available lawyers** (28)
 - could include those **on legal aid if applicable** (28)
 - including those **on legal aid if applicable**, should be governed by national law (45)
 - **national law** in relation to **legal aid**, which should be in line with the **Charter, the ECHR and the case-law of the European Court of Human Rights** (48)
- **Legal aid** (Art.11)
 - without prejudice to national law in relation to **legal aid**, which shall apply in **accordance with the Charter and the ECHR**

EU

Commission

Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03) (27 November 2013)

- The aim - complement and render **effective the right of access to a lawyer** cfr Directive 2013/48/EU (P1, art.1)
- Reference to EU Charter, ECHR, ICCPR, & the **UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012)**
- The term 'lawyer' in this Recommendation refers to any person, who, in accordance with national law, is **qualified and entitled, including by means of accreditation by an authorised body**, to provide legal advice and assistance to suspects or accused persons.(P5)
- '**Legal aid**' means funding and assistance from the Member State ensuring the **effective use of the right of access to a lawyer**. The **funding** should cover the **costs of the defence and the proceedings** for suspects or accused persons in **criminal proceedings** and requested persons in **European arrest warrant proceedings**.(P6)
- to ensure a high professional standard of legal assistance that ensures a fair trial, Member States should establish **effective systems for general quality assurance of legal aid lawyers**. **accreditation schemes for legal aid lawyers**.action is taken if a failure in the legal assistance is manifest or is sufficiently brought to the Member States' attention (P11)
- Defense lawyers, as well as staff involved in decisionmaking on the right to **legal aid**, such as prosecutors, judges and staff on legal aid boards, should receive **appropriate training** to further the right to **effective access to legal aid**. (P12)

EU

Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03) (27 November 2013)

- .. entitled to receive **effective legal aid** to ensure the right to a **fair trial** in accordance with this Recommendation.(art.3)
- a minimum, be granted **legal aid** if they lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings as a result of their **economic situation** ('means test'), and/or when such aid is required in the interests of justice ('merits test'). (art.4)
- All necessary measures to make **all relevant information on legal aid in criminal proceedings easily accessible and understandable** for suspects or accused persons and requested persons, including **information on how and where to apply for such aid, transparent criteria** on when a person is eligible for legal aid, as well as information on the possibilities to **complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance** (art.5)

EU

Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03) (27 November 2013)

- Effectiveness & quality of legal aid (section 3)
- **Quality** of legal assistance provided under legal aid schemes
- **Legal assistance** provided **under legal aid schemes** should be of high quality in order to ensure the fairness of proceedings. To this end, systems to ensure the quality of legal aid lawyers should be in place in all Member States. (17)
- **Mechanisms** should be in place that allow the competent authorities to replace legal aid lawyers or require them to fulfil their obligations, if those lawyers fail to provide adequate legal assistance. (18)
- A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State. (19)
- Member States are invited to establish criteria for the accreditation. (20)
- **Staff** involved in the decision-making on legal aid in criminal proceedings should receive appropriate training. (21)

EU

Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03) (27 November 2013)

- In order to ensure high quality legal advice and assistance, training and the development of training programmes for lawyers that provide **legal aid services** should be encouraged. (22)
- The accreditation of legal aid lawyers should as far as possible be linked with an obligation to undergo continuous professional training.(23)
- The **preference and wishes of the suspects or accused** persons and requested persons should **as far as possible** be taken into account by the national legal aid systems in **the choice of the legal aid lawyer**.(24)
- The legal aid system should endeavour to ensure **continuity in legal representation by the same lawyer**, if the suspect or accused or requested person so wishes.(25)
- **Transparent and accountable mechanisms** should be put in place to ensure that suspects or accused persons and requested persons can make an **informed choice on legal assistance under the legal aid scheme, free from undue influence**. (26)

EU

Directive (EU)

2016/800

procedural safeguards
for **children** who are
suspects or accused
persons in criminal
proceedings

- Access to a lawyer cfr Directive 2013/48/EU
 - Provision of **legal aid** where this is necessary to ensure that the child is **effectively assisted by a lawyer** (25, 26)
 - or **the right to legal aid in accordance with the Charter and the ECHR, and with national and other Union law** (26)
- Right to information (Art.4.1.v)
 - (v) **the right to legal aid**, as provided for in Article 18
- Right to legal aid (Art.18)
 - ensure that national law in relation to **legal aid** guarantees the effective exercise of the right to be **assisted by a lawyer** pursuant to Article 6
- Costs (Art.22)
 - States meet the **costs** resulting from the application of Art. 7, 8 and 9 (Right to an individual assessment, medical examination & Audiovisual recording of questioning) **irrespective of the outcome of the proceedings**, unless, as regards the costs resulting from the application of Article 8, they are covered by medical insurance.

EU

2016/1919

legal aid for suspects
and accused persons
in criminal proceedings
and for requested
persons in European
arrest warrant
proceedings (26
October 2016)

- Reference to the EU Charter (47), ECHR (Art.6.3c) & ICCPR (Art.14.3d) - the right to legal aid in criminal proceedings (C3,23, 30)
- **Legal aid** should cover the **costs of the defence of suspects, accused persons and requested persons**. When granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons **bear part of those costs themselves, depending on their financial resources**. (C8)
- Minor offences - a means test, a merits test, or both in order to determine whether **legal aid is** to be granted (C13)
- **Practical arrangements** regarding the provision of **legal aid** (18)
- Minimum rules - the right to **legal aid** (Art.1)
 - suspects and accused persons in criminal proceedings
 - persons who are the subject of EAW
 - complements Dir. 2013/48/EU & 2016/800EU - Not limiting those rights
- **Minimum rules** → **freedom for a higher level of protection** (16,17, 30)

EU

2016/1919
legal aid for suspects
and accused persons
in criminal proceedings
and for requested
persons in European
arrest warrant
proceedings (26
October 2016)

- Definition for the purposes of this Directive (Art.3)
 - 'legal aid' = funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer
- Legal aid in criminal proceedings (Art.4)
 - **lack sufficient resources to pay** for the assistance of a lawyer - the right to legal aid when the **interests of justice so require** (5.1)
 - a means test, a merits test, or both to determine whether legal aid is to be granted (4.2, 4.3, 4.4)
- Legal aid in European arrest warrant proceedings (Art.5)
 - Legal aid lawyer in both countries

EU

2016/1919
legal aid for suspects
and accused persons
in criminal proceedings
and for requested
persons in European
arrest warrant
proceedings (26
October 2016)

- **Quality of legal aid services and training (Art.7)**
 - necessary measures, including with regard to funding, to ensure (7.1):
 - (a) there is an effective legal aid system that is of an adequate quality;
 - (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.
 - adequate training to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings (7.2)
 - appropriate measures to promote the provision of adequate training to lawyers providing legal aid services (7.3)
 - necessary measures for replacement of the legal aid lawyer where the specific circumstances so justify (7.4)
- Effectiveness and quality by continuity in his or her legal representation (25)
- Adequate training - training of judges that take decisions regarding the granting of legal aid (26)
- Adequate and effective remedies where the right to legal aid is undermined or the provision of legal aid is delayed or refused in full or in part (27)

EU

FRA

Child-friendly justice –
perspectives and
experiences of children
and professionals
summary

- European Union Agency for Fundamental Rights (FRA)
- FRA Opinion 11 - EU Member States should provide **legal aid unconditionally to all children, including free access to legal representation throughout the proceedings.**
 - the provision of legal aid is institutionalized
 - **clear guidelines** on accessing legal aid
 - **specialised child lawyers** available to **represent children** in both **civil and criminal** proceedings.
- FRA Opinion 26 - EU Member States should pay particular attention to facilitating **access to justice and providing the necessary legal aid, legal representation and support for children in especially vulnerable situations**, also taking into account **potential interpretation and translations** needs or barriers like physical or other impairments.

EU

FRA

European legal and
policy framework on
immigration
detention of children
(June 2017)

- European Union Agency for Fundamental Rights (FRA)
- FRA opinion 6
- To ensure that detention is neither unlawful nor arbitrary and, when imposed, does not limit fundamental rights unduly, European and international law provides a set of procedural safeguards. These include the right to judicial review, access to **free legal aid and linguistic assistance**. Alongside these general safeguards, child-specific safeguards exist, such as appointing guardians for unaccompanied children, as well as conducting procedures and providing information in a child-friendly manner.

The Hague

Application for legal aid Convention on International Access to Justice, signed at The Hague, the 25th of October 1980.

- **Legal aid**
 - Legal aid for court proceedings in **civil and commercial** matters (Art.1)
 - In **States where legal aid** is provided in **administrative, social or fiscal** matters, the provisions of this Article **shall apply** to cases brought before the courts or tribunals competent in such matters. (Art.1if)
 - To **legal advice** provided the person seeking advice is present in the State where advice is sought (Art.2)
- **Translation**
 - Transmitting authority – application: without charge a **translation** of the documents where such assistance is appropriate (Art.6)
 - The application, the supporting documents and any communications in response to requests for further information: **costs of translation** arising from the application of the preceding paragraphs **shall be borne by the requesting State**, except that any translations made in the requested State shall not give rise to any claim for reimbursement on the part of that State. (Art.7)
- **No charges** shall be made for the **transmission, reception or determination of applications for legal aid** (Art.11)

Conclusions

- International law: universal – regional
 - **Fair trial, equality, effective participation**
- **General principles** > **specific legal aid rules**
 - Criminal / civil → other procedures & mediation
 - Implicit guarantees > specific legal aid guarantees
 - Practical & effective
 - Minimum rights
 - **Vulnerable** groups (children, victims, ...)
 - Focus on quality for **specific legal aid providers** (lawyers, legal interpreters/translators, judges ..)
 - Influences of Soft law
 - More attention for **quality and training**
 - → **The way to effective legal aid & respect of the fair trial principle**
 - → **An obligation of the community as a whole**



On human rights there is no room for negotiation. Human rights are not a luxury, but a necessity, especially in times of crises.

F. Tulkens, former judge of the ECtHR



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