

PART I

EUROPEAN AND INTERNATIONAL STANDARDS ON ACCESS TO JUSTICE IN PRE-TRIAL DETENTION

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The Council of Europe's Approach to Access to Justice, Legal Aid and the Enforcement of Rights in Detention

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The Council of Europe, comprising 46 member states, has become particularly influential in extending the recognition of human rights to all individuals, including prisoners.¹ Its primary task is to promote the emergence of a common democratic and legal space in Europe, and to negotiate conventions that establish shared legal standards and practices among its Member States.² The cornerstone of its work to protect fundamental rights and the rule of law is the European Convention on Human Rights, which entered into force in 1950, guaranteeing human rights to all citizens. Since its creation in 1949, this mission, together with the cohesion between its organs, has afforded the Council of Europe significant influence over the scope and content of European policy.

In the penal and prison sphere, the Council of Europe is undoubtedly the most influential body in recognising and monitoring respect for the fundamental rights of prisoners in Europe. Overall, the Council of Europe's norms and legal standards on prisoners' rights have been shaped by the interaction and mutual reinforcement of three key bodies that have acquired new powers and competences: the European Court of Human Rights, the Committee for the Prevention of Torture, and the Committee of Ministers.³ The European Court of Human Rights occupies a pre-eminent position, as its judgments are binding; however, its approach is informed by its dialogue with the other bodies, which enhances both its understanding of the realities on the ground and its interpretation of the Convention's provisions relating to prisons. The Committee of Ministers, acting under Article 46 of the Convention, also plays

1 Maurice Bond, *The Council of Europe: Structure, History and Issues in European Politics* (Routledge 2013).

2 *ibid.*

3 Jonathan Simon, Editorial: Mass incarceration on trial. *Punishment and Society*, 13(3), 251–255.

a crucial role in supervising the execution of the Court's judgments and in influencing the development of general standards, thereby contributing to a coherent and evolving European framework governing the rights of prisoners.

The dialogue between these bodies, which operate on a functional and complementary basis, has contributed to the establishment of a genuine legal status for prisoners, encompassing virtually all aspects of life behind bars. However, the proliferation of case-law and norms on prisoners' rights has coincided with a marked reluctance to intervene in domestic penal policies and has been accompanied by an increasing emphasis on the principle of subsidiarity.

1 THE EUROPEAN COURT OF HUMAN RIGHTS AND ACCESS TO JUSTICE IN THE CONTEXT OF PRISON LITIGATION

The European Court of Human Rights (ECtHR) has progressively moved from a “stage of ignorance” of conditions of detention to a full recognition of prisoners’ right to detention conditions that respect human dignity.⁴ In particular, the decade from 2000–2010 has seen a genuine increase in case law aimed at regulating aspects of life in prison. A major development in this area was the Grand Chamber Judgment *Kudła v. Poland*, which consecrated, under Article 3, the right to conditions of detention that are compatible with the principle of human dignity and imposed on States the obligation to protect detainee’s health.⁵ A few months later, the Court declared that physical conditions should be taken into account in and of themselves, thus abandoning the intentional infliction of pain as a decisive criterion for inhuman or degrading treatment.⁶ Article 3 being a non-derogable right, States must “organise [their] penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties”.⁷

Beyond the issues of material conditions of detention and health care, the Court has constructed a category-based protection for detainees, incorporating the doctrine created by other bodies of the Council of Europe, particularly the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

4 Françoise Tulkens, ‘Droits de l’homme en prison’ in Jean-Paul Céré (ed), *Panorama européen de la prison* (L’Harmattan 2002) 39 (own translation).

5 *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI. It is said that prisoners’ right to adequate detention conditions and prisoners’ right to the protection of their health find their “common matrix” in this judgment. See Françoise Tulkens, ‘Les prisons en Europe: Les développements récents de la jurisprudence de la Cour européenne des droits de l’homme’ (2014) 38 *Déviante et Société* 425.

6 *Peers v. Greece*, no. 28524/95, ECHR 2001-III; *Dougoz v. Greece*, no. 40907/98, ECHR 2001-II.

7 See for example, *Sándor Varga and Others v. Hungary*, nos. 39734/15 and 2 others, §103, 17 June 2021. Scholars have analysed the development of the Court’s case law under Article 3 as the creation of an “Article 3bis” guaranteeing human detention conditions. See Frédéric Sudre, ‘L’article 3 bis de la Convention européenne des droits de l’homme: le droit à des conditions de détention conformes au respect de la dignité de la personne humaine’ in (ed) J-P Céré, *Mélanges G. Cohen-Jonathan* (Bruylant 2004).

On the basis of Article 3, the Court's case law has addressed for example high-security regimes, body searches, life sentences.⁸ Beyond Article 3, it has also addressed many other aspects of life in detention—from use of force within prison, to prisoners' contacts with their family and prisoners' right to information.⁹

To ensure respect for the wide range of rights recognised in its case law, the Court has imposed a series of positive procedural obligations—chief among them, the right to an effective remedy, specifically in relation to material detention conditions. Indeed, the scope of the obligation under Article 13, in cases concerning inhuman or degrading conditions of detention under Article 3, encompasses two forms of appropriate redress recognised by the Court: improvement of the conditions (preventive relief) and compensation for the harm suffered (compensatory relief). The Court has consistently reaffirmed that these remedies must operate in a complementary manner to ensure the effectiveness of the protection afforded under the Convention.¹⁰ Such mechanisms must, *inter alia*, be independent, possess the power to issue binding decisions, and be capable of both preventing further violations and securing adequate redress for the injured party.¹¹ The Court has also ruled on the compensation afforded: not only has it assessed whether the monetary compensation was sufficient to compensate the harm suffered,¹² it has also examined (and validated) specific reforms such the possibility for prisoners to be granted a reduction of their sentence as a compensation for inadequate material detention conditions.¹³ The Court has also specified the States' procedural obligations by holding that the release of a prisoner who had been detained in poor detention conditions

8 See respectively *Piechowicz v. Poland*, no. 20071/07, 17 April 2012; *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II and *Frérot v. France*, no. 70204/01, 12 June 2007; *Murray v. the Netherlands* (GC), no. 10511/10, 26 April 2016.

9 See respectively *Kukhalashvili and Others v. Georgia*, nos. 8938/07 and 41891/07, 2 April 2020; *Khoroshenko v. Russia* (GC), no. 41418/04, ECHR 2015; *Osman and Altay v. Türkiye*, nos. 23782/20 and 40731/20, 18 July 2023.

10 see, e.g., *Barbotin v. France*, no. 25338/16, §46, 19 November 2020.

11 *Béatrice Belda*, *Les droits de l'homme des personnes privées de liberté: Contribution à l'étude du pouvoir normatif de la Cour européenne des droits de l'homme* (Bruylant 2010).

12 *Barbotin v. France*, no. 25338/16, 19 November 2020; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §117, 10 January 2012.

13 *Stella v. Italy* (dec.), no. 49169/09 and ten others, 16 September 2014; see also *Dirjan and Ştefan v. Romania* (dec), nos. 14224/15 and 50977/15, 15 April 2020.

does not absolve the relevant domestic authority from examining the complaint of inadequate conditions of detention and providing reasoning in that respect.¹⁴

The Court has articulated States' procedural obligations in this area with increasing precision, viewing the effectiveness of remedies as a matter of critical importance. Its policy has been to make the right to an effective remedy a privileged means for the eradication of endemic problems in Europe's prison systems, as identified in its pilot and quasi-pilot judgments in the 2010s-2020s.¹⁵ The handling of this dispute by the domestic courts was a vital necessity for the Court: large portions of its backlog consists of repetitive applications concerning conditions of detention.

In this context, it could have been expected that the Court would be particularly attentive to the obstacles encountered by detainees in accessing redress mechanisms.

What, then, does the Court's case law reveal? The purpose of enumerating the developments in the following section is not simply to recall the procedural requirements identified by the Court in prison matters; rather, it is to consider the Court's approach to overcoming these structural difficulties, as well as the procedural means it promotes in this area.

¹⁴ Kargakis v. Greece, no. 27025/13, §81-84, 14 January 2021.

¹⁵ Countries subject to pilot or quasi-pilot judgments (alphabetical order): Belgium (Vasilescu v. Belgium, no. 64682/12, 25 April 2014), Bulgaria (Neshkov v. Bulgaria, no. 36925/10, 27 January 2015), France (J.M.B. and others v. France, no. 9671/15, 30 January 2020); Greece (Nisiotis v. Greece, no. 34704/08, 10 February 2011); Hungary (Varga and others v. Hungary, no. 14097/12), Italy (Torreggiani v. Italy, no. 43517/09, 8 January 2013), Moldova (Ciorap v. Moldova, no. 12066/02, 19 June 2007 and I.D. v. Moldova, no. 47203/06, 30 November 2010), Poland (Orchowski v. Poland, no. 17885/04, 22 October 2009 and Norbert Sikorski v. Poland, no. 17599/05, 22 October 2009), Portugal (Petrescu v. Portugal, no. 23190/17, 3 December 2019), Romania (Rezmiveş v. Romania, no. 61467/12, 25 April 2017), Russia (Ananyev v. Russia, no. 42525/07, 1 October 2012), Ukraine (Sukachov v. Ukraine, no. 14057/17, 30 January 2020).

THE EFFECTIVE REMEDY MODEL UNDER ARTICLE 13: A REMEDY TO BE EXERCISED ALONE BY THE PRISONER

The Court's Preference for Simplified Remedy Mechanisms over Legal Representation

Although the Court has abstained from providing a model for the system of remedy, its clear preference for independent authorities or penitentiary judges takes into account not only a specific concern for the responsiveness of the mechanism and its knowledge of the penitentiary environment, but also its accessibility for detainees. The Court appears to be fully aware of the specific problems of the prison population when it comes to access to courts, yet, it approaches the issue primarily through the lens of procedural simplification, rather than through an insistence on legal assistance or structural support. To remain schematic, it can be said that the Court's response aims to adapt the characteristics of the appeal bodies themselves, rather than imposing legal assistance measures that would allow detainees to bring their cases before the ordinary courts.

Various factors are taken into account in this regard: the cost of proceedings, the complexity of related rules and procedures, protection against reprisals, etc. In the *Ananyev* pilot judgment, the Court is satisfied that the procedure for preventive remedy provided for by domestic law is implemented at no cost to the applicant (§109). As to the compensatory remedy to be established in execution of the judgment, the Court asserts that it must not include a regime with legal costs which place an excessive burden on an applicant whose action is with good cause (§98-99).

As for access to legal aid in the context of Article 6, case law appears to be rather sparse. From the perspective of a fair trial, the Court takes into account the absence of legal aid but declares in its conclusions, not on the grounds of a right to judicial access—but rather in terms of a failure to be personally heard before a judicial body.¹⁶ However,

¹⁶ Vladimir Vasilyev v. Russia, no. 28370/05, 10 January 2012; Beresnev v. Russia, no. 37975/02, 18 April 2013.

in its judgment in *Aden Ahmed v. Malta* (23 July 2013),¹⁷ regarding physical conditions for the retention of illegal immigrants, the Court expressly asserted that the absence of a structured system of legal aid posed in itself a problem in terms of access to recourse, regardless of the merits. However, it does not seem that such a position has been taken at this time in a penitentiary case. In prison settings, the Court insists rather on the filing of the complaint before the competent organs by the detainees themselves, emphasising the simplicity of the procedures¹⁸ or requiring the adaptation of rules governing the establishment of facts (see below).

Specific obligations are imposed on authorities in cases involving prisoners with mental health issues, requiring them to act on their own initiative to assess the situation. In *Sławomir Musiał v. Poland*,¹⁹ the Court found that, because the applicant suffered from a psychiatric disorder that impaired his mental faculties, he “should not be expected or required to act with the utmost scrupulousness in availing himself of all the remedies available under the Code of Execution of Criminal Sentence” (§73). In some cases involving detainees without such impairments, the Court has suggested a duty for authorities to act *proprio motu*,²⁰ though this obligation does not appear to be applied systematically in the case law, unlike in situations involving mental illness.

One major obstacle to exercising rights in prison, the fear of reprisals, also seems to be taken into account. In the judgment *Neshkov and Others v. Bulgaria*, the Court explicitly stated the detainees must be able to complain with no fear of punishment or prejudicial

¹⁷ *Aden Ahmed v. Malta*, no. 55352/12, §66, 23 July 2013.

¹⁸ See also *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, §191, 27 January 2015: “[...] prisoners must be able to avail themselves of remedies [...]”.

¹⁹ *Aden Ahmed v. Malta*, no. 55352/12, §66, 23 July 2013: “The Court would finally point out that had these remedies been effective in terms of scope and speed, there may still have been an issue in relation to accessibility. The Court is struck by the apparent lack of a proper structured system enabling immigration detainees to have concrete access to effective legal aid.” See also *M.S.S. v. Belgium and Greece* (GC), no. 30696/09, §319, ECHR 2011: “In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government’s submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum-seekers are concerned”.

²⁰ See for example, *Kalashnikov v. Russia*, no. 47095/99, § 96, ECHR 2002-VI.

consequences due thereto (§191).²¹ However, to date, the Court's recognition of the issue has not translated into a systematic requirement for protection mechanisms. The emphasis remains on a framework more concerned with formal accessibility than with the real conditions under which that accessibility must be exercised.

Procedural Design for Prison-Based Litigation: Limits of an Individually Driven Model

The Court has developed dense procedural requirements allowing for the effective intervention of an external body, despite the fact that applicants remain entirely under the control of the administration and that the latter represents the sole party with access to evidence. It has worked to simplify the procedural mechanisms in order to bring the protection afforded by Article 13 within the reach of detainees. This rationale makes it arguably possible for prisoners to file complaints on the most common issues in European penitentiary systems: promiscuity related to overcrowding, insalubrity, constructions that are unfit for human habitation, etc. In other words, issues in which the dispute involves chiefly descriptions and discussions on evidence in fairly simple terms. The pilot judgment in *Ananyev* recalls in a very explicit manner (§228) that it should merely be required that interested parties produce elements that are easily accessible to them, such as detailed descriptions of their conditions of detention, declarations by witnesses, or responses from inspection bodies; it would then be up to the authorities to refute these allegations by producing their own documents, demonstrating that the conditions of detention do not contradict Article 3 of the Convention.

The Court generally operates on the assumption that this system is also capable of ensuring the appropriate treatment of disputes involving complex issues. Until recently, case law had not explicitly engaged with the role of investigatory measures, particularly expert reports, which are often essential for informing judges on technical or specialised questions. In *Barbotin v. France* (2020, §§ 50–59), the Court confronted this issue directly, and found that requiring the applicant to bear the cost of an expert opinion on his detention conditions, despite the

²¹ The Court made direct reference to the European Prison Rules (Rule 70.4), and referred to another Bulgarian case where the applicant was placed in isolation due to his complaints to the prosecutor (*Kostov v. Bulgaria*, no. 13801/07, §§ 47-48, 24 July 2012).

success of his claim, rendered the compensatory remedy ineffective.²² In doing so, the Court recognised that procedural barriers related to expert evidence can undermine the effectiveness of remedies.

It is important to note, however, that this concern for simplification does not result in dissolution of the procedural requirements inherent in judicial review. Under Article 13, the consideration of claims by detainees must follow a procedure which is defined by law and that ensures the participation of interested parties. This means both allowing relevant facts to be independently established and also avoiding claims of detainees being ignored. The interested parties must be able to respond to observations made by the administration, in order to prevent their allegations from being negated by contradictory statements made by penitentiary services.

In *Shmelev and Others v. Russia (dec.)*, 2020, §§107–131 and 153–156,²³ the Court emphasised that applicants must not be subjected to undue procedural burden. In particular, the compensatory procedure must be equipped with adequate procedural safeguards typical of adversarial judicial proceedings—including the right to legal assistance—to ensure that it is truly effective in practice.

In addition, the body must be obliged by law to rule effectively on the claims. In this respect, authorities such as the Prosecutor—responsible in some central and eastern European States for checking the legitimacy of authoritative acts—were considered to be inadequate for the purposes of Article 13, as they did not allow detainees to follow the progress of their proceedings nor to dispute the statements of authorities.²⁴ The same considerations, further to those regarding the absence of an enforceable power, led the Court to refuse to see Ombudsman institutions as an effective remedy.²⁵ In *G.T. v. Greece (2022)*, the Court reaffirmed this position in the context of a refusal of prison leave to attend a parent’s funeral, where the Prosecutor’s

²² *Barbotin v. France*, no. 25338/16, 19 November 2020. The Court also noted that the compensation awarded by the domestic court was significantly lower than what would have been awarded under the Convention, see above.

²³ *Shmelev and Others v. Russia (dec)*, nos 41743/17, 60185/17, 66806/17 and others, 17 March 2020.

²⁴ *Pavlenko v. Russia*, no. 42371/02, §§88–89, 1 April 2010; *Aleksandr Makarov v. Russia*, no. 15217/07, §86, 12 March 2009; and *Ananyev*, cited above, §99. *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, §212, 27 January 2015

²⁵ See for example *Ananyev and others*, cited above, §§105–106.

decision could not be appealed and no effective remedy existed to challenge or prevent the violation. The Court reiterated that remedies must offer a reasonable prospect of success and be capable of either preventing the violation or offering redress.²⁶

The Court's approach remains fundamentally ambivalent. On one hand, it defines formal standards for effectiveness, independence, and participation. On the other, it implicitly accepts a reality in which detainees are left to face the full procedural weight of the administration alone.

THE RIGHT TO A FAIR TRIAL: A MISSED OPPORTUNITY FOR ROBUST SAFEGUARDS

Criminal Procedural Safeguards: Restrictive Scope in the Prison Context

Article 6§3, which applies to “criminal” charges, in the autonomous sense given to it by the European Court, i.e. independently of national legal classifications, contains potentially safeguards that could considerably strengthen detainees’ position in disputes with the administration. In particular, a person charged with a criminal offence who does not wish to defend himself or herself in person must be able to have recourse to legal assistance of his own choosing from the initial stages of the proceedings (Article 6§3(c)). In addition, Article 6§3(c), encompassing the right to legal aid, is subject to two conditions, which are to be considered cumulatively: (1) the accused must show that he lacks sufficient means to pay for legal assistance; (2) the interests of justice require an accused to be provided with free legal representation.²⁷

The question of the scope of application with regard to the criminal aspect of Article 6 is therefore decisive. In this respect, the main issue is the assimilation of disciplinary proceedings to a “criminal

²⁶ G.T. v. Greece, no. 37830/16, 13 December 2022.

²⁷ This requirement is looked at especially with regard to the capacity of the prisoner to present their case – for example, on account of unfamiliarity with the language used in court and/or the particular legal system.

charge” within the meaning of Article 6. Under current case law, disciplinary proceedings are considered as criminal charges only if they entail an extension to the duration of the sentence to be served.²⁸ In the absence of a practical extension to the duration of a detainee’s deprivation of liberty, the guarantees of Article 6§1 (criminal) and 6§3 do not apply in principle.²⁹ The case law in prison matters has remained unchanged, even though the criteria of Article 6§1 (criminal limb) have significantly changed³⁰ and could have led to an extension of the criminal field in prison disciplinary litigation.

This lack of prison case law under the criminal limb of Article 6§1 is compensated by the significant extension of the scope of application of the civil limb of this article. However, the procedural guarantees provided in this context are insufficient.

The Civil Limb of Article 6: Expansive in Scope, Limited in Protection

The civil aspect of Article 6§1 seemed to be, in the early 2000s, a potential vector for the establishment of the procedural rights for the detained population. Taking an incremental approach, the Court has recognised the applicability of this text to several categories of measures, for instance compensation claims filed by prisoners concerning poor material conditions of detention³¹ or inadequate health care.³² Article 6§1 also applies to restrictions imposed on a detainee’s right to receive money from outside prison³³ or on family rights, whether the question is a limitation of access to the visiting room³⁴ or security measures surrounding visits by relatives, such as the use of a separation system.³⁵

²⁸ In relation to the date of release that the person may have anticipated under domestic law. See *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, ECHR 2003-X; *Young v. the United Kingdom*, no. 60682/00, 16 January 2007.

²⁹ See *Payet v. France*, no. 19606/08, 20 January 2011; *Štitić v. Croatia*, no. 29660/03, 8 November 2007.

³⁰ *Jussila v. Finland* [GC], no. 73053/01, ECHR 2006-XIV. In principle, the criterion of the nature of the offence must take precedence over the others.

³¹ *Beresnev v. Russia*, no. 37975/02, 18 April 2013.

³² *Vasiliev v. Russia* (cited above).

³³ *Enea v. Italy* [GC], no. 74912/01, ECHR 2009.

³⁴ *Gülmez v. Turkey*, no. 16330/02, 20 May 2008; *Enea v. Italy* (cited above).

³⁵ *Stegarescu and Bahrin v. Portugal*, no. 46194/06, §35-39, 6 April 2010.

Besides this central core of rights of a private character, the Court's conception of what falls within the scope of the "sphere of personal rights" comprises a potentially wide variety of prison situations: limitations of access to the prison yard, resulting from the implementation of a high security regime,³⁶ confinement of a prisoner to the disciplinary block,³⁷ the imposition of security measures and frequent prison transfers.³⁸

The right of access to a court has been established as such by the Court in the renowned case *Golder v. The United Kingdom* (GC), which concerns the rejection of a prisoner's claim to the right to consult a lawyer, with the aim to bring defamation proceedings against a warder.³⁹ The Court stresses that such a hindrance to access can contravene the Convention (§26).

In an exemplary manner, the Court ruled that such an opportunity had not been granted to the applicants in the case *Stegarescu and Bahrein v. Portugal*, which concerned the isolation of prisoners accused of preparing a prison break. The Court took account of the fact that the applicants in that case had never had access to the text of the decisions ordering their confinement. In the eyes of the European judges, such a procedure did not enable the persons concerned to effectively challenge the measure at issue.

This requirement seems to be particularly relevant and could then be the starting point for developing a consistent case law in disputes concerning security measures, where the prison administration is ready to invoke public order in order to refuse an explanation to the persons concerned about the decisions that have been made against them.

The concern about ensuring a viable referral to the courts is present in the cases in which the Court ruled that excessive procedural constraints, such as the one requiring a list of all persons concerned by the procedure, are a breach of the right of access to a court, as is the exceedingly short timeline of the procedure.

³⁶ *ibid.*

³⁷ *Razvyazkin v. Russia*, no. 13579/09, 3 July 2012.

³⁸ *Wick v. Germany*, no. 22321/19, 4 June 2024.

³⁹ *Golder v. the United Kingdom*, 21 February 1975, §36, Series A no. 18

Unsurprisingly, the question of accessibility to the court comes up in terms of its financial dimension in prison litigation. This is the case because, to begin with, such accessibility entails the cost of fees. In this respect, the capacity of the applicant to pay for the legal costs, and the stage of the proceedings when these costs are due, are elements to be taken into account. These purely financial restrictions, totally decoupled from the prospects of success of the appeal, must be the subject of particularly rigorous scrutiny.

In the case *Ciorap v. Moldova*,⁴⁰ the applicant was denied access to a court on the grounds that he had not paid the fees of the proceedings. According to the Court, the person concerned should have been exempted from the payment, regardless of his capacity to pay, taking into account the severity of his allegations (in this case, torture).

As far as free legal aid is concerned, the case law considers that, unlike what is common in criminal matters, Article 6§1 does not imply such support in all litigation related to a “right of a civil character”. The situation could differ, though, when this assistance is indispensable in gaining effective access to a court, on the basis of the particular circumstances of the case, and in particular on the basis of the importance of the issue for the applicant, of the complexity of the right or of the applicable procedure, and of the capacity of the defendant to effectively present his case in person.

In prison-related matters, the Court seems quite reluctant to take a stance. In several cases, it took into account the absence of legal aid, but only with the purpose of reinforcing its line of argument, and not on the grounds of the right of access to a court, but rather on the grounds of the failure to appear before the judicial body.⁴¹

Taking into account the tendency of States to circumvent the logistical constraints associated with transferring prisoners to the courthouse, failures to ensure a detainee’s appearance before the court and the absence of a public hearing constitute key areas where a breach of Article 6 §1 is often found. These violations, which frequently occur together, are typically assessed alongside other

⁴⁰ *Ciorap v. Moldova*, no. 12066/02, 19 June 2007.

⁴¹ *Larin v. Russia*, no. 15034/02, 20 May 2010; *Beresnev v. Russia*, no. 37975/02, § 18 April 2013.

elements of the proceedings, with the aim of determining their overall fairness in light of the principles of equality of arms and adversarial procedure.

Article 6 does not guarantee the right to personal presence before a civil court, but rather a more general right to effectively present one's case, provided that the principle of equal arms vis-à-vis the opposing party is respected.⁴² To ensure compliance with the requirements of Article 6, domestic courts must conduct a comprehensive analysis of the nature of the dispute to determine whether the incarcerated litigant's presence is required.⁴³ The Court requires national authorities to consider concrete reasons for and against the litigant's appearance, interpreted in accordance with the Convention and all relevant factors, such as the nature of the dispute and the civil rights at issue.⁴⁴ The State retains discretion in choosing the means by which these rights are secured. As for the hearing requirement, it does not apply systematically in cases where written exchanges are deemed appropriate—particularly when no issues of fact or law arise that cannot be adequately resolved on the basis of the file and written submissions.

This approach was reaffirmed in *Ivan Karpenko v. Ukraine (No. 2)*, where the applicant, an unrepresented prisoner, was denied the opportunity to participate via videolink in administrative proceedings concerning the monitoring of his correspondence. The domestic courts rejected his requests, citing the lack of specific legal provisions for videolink participation from prison, and failed to assess whether his presence was necessary to ensure the fairness of the proceedings. The Court found a violation of Article 6 §1, emphasising that Convention standards cannot be curtailed by deficiencies in domestic legislation, and that the nature of the dispute, centred on contested facts, required the applicant's personal input. It also found a violation of the principle of equality of arms, as the prison administration was able to make oral submissions, while the applicant had no comparable opportunity to respond.

⁴² *Larin v. Russia* (cited above).

⁴³ see *Ivan Karpenko v. Ukraine (no. 2)*, no. 41036/16, §33, 24 April 2025; *Yevdokimov and Others v. Russia*, nos. 27236/05 and 10 others, §33-35, 16 February 2016.

⁴⁴ *ibid.*

Personal presence, the oral or written form of proceedings, and legal representation must therefore be analysed in the broader context of the “fair trial” safeguard: it must be verified whether the applicant was given a genuine opportunity to comment on the observations or evidence produced by the other party, and to present his or her case under conditions that did not place them at a disadvantage vis-à-vis the opposing party.

The Court’s jurisprudence under Article 6 thus reveals a persistent disjunction: it recognises that prisoners face distinctive procedural barriers, yet stops short of mandating the structural supports, such as legal aid, that would render fair trial rights truly effective in the detention setting.

CONCLUSION

The situation of detainees’ procedural rights under the Convention is marked by a paradox. On the one hand, the Court has developed an extensive body of case law to give effect to the substantive rights of detainees and has shown an ongoing commitment to addressing the practical obstacles they face in accessing a judge. On the other hand, when it comes to procedural guarantees, particularly under Article 13, the Court continues to overlook the central role of legal representation in ensuring genuine access to justice, a role that is all the more vital in the prison context.

The model the Court promotes rests on a dual assumption: first, that detainees are autonomous legal actors, capable of navigating complex legal procedures without assistance; and second, that judges will, of their own motion, apply Convention standards robustly and effectively. Yet, this vision is sharply at odds with empirical evidence and field research, as will be shown in the following chapters.

Fair trial principles, in particular those derived from Article 6, could in theory serve as powerful safeguards for the fundamental rights of prisoners. In practice, however, the protection afforded under this provision remains limited in scope. The Court’s case law continues to treat the structural disadvantages faced by prisoners, stemming from their total dependence on the prison administration, their socio-economic precarity, and the barriers to accessing legal mechanisms outside the prison system, as peripheral issues rather than central concerns.

By neglecting these realities and placing the burden of procedural navigation on detainees themselves, the Court risks undermining the very framework of protection it has so carefully built. In doing so, it leaves a gap between the formal recognition of rights and the conditions necessary for their effective exercise, thus weakening the force and coherence of its own jurisprudence.

2 **EFFICIENCY AS JUSTICE? THE COMMITTEE OF MINISTERS' STANDARDS ON LEGAL AID AND THEIR BLIND SPOT ON DETENTION**

The Committee of Ministers is the decision-making body of the Council of Europe;⁴⁵ a governmental body where national approaches to European problems are discussed and a forum to find collective responses to these challenges. It is, along with the Parliamentary Assembly, the “guardian of the Council’s fundamental values, and monitors member states’ compliance with their undertakings.” Indeed, one of its key roles is to supervise, under Article 46 ECHR, the execution of the ECtHR’s judgments, ensuring that States take the necessary individual and general measures to comply with the Court’s findings.

Another function of the Committee of Ministers is the development of soft-law standards through Recommendations addressed to member states, including in areas such as access to justice, legal aid, and the treatment of pre-trial detainees. Despite their non-binding nature, these recommendations have the potential to significantly impact upon both national and regional prison standards through their use as a benchmark by the CPT during inspections and by the ECtHR as an interpretative tool.⁴⁶ For instance, several European States such as France and the Netherlands have passed or reformed their prison legislations under their influence.⁴⁷

⁴⁵ Dirk van Zyl Smit and Frieder Dünkel, *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions* (Kluwer Law and Taxation Publishers 2001).

⁴⁶ Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2009).

⁴⁷ *Ibid.*

The standards of the Committee of Ministers have the advantage that they are drafted specifically to give clear guidance to national governments on a range of topics relating to imprisonment. The most recent recommendations in particular draw explicitly on the decisions of the ECtHR and the reports of the CPT.

Overall, the Committee's soft-law on access to justice and legal aid remain silent on detention, despite their broad scope and stated concern for vulnerability and structural disadvantage. None of the instruments explicitly mention persons deprived of liberty or the prison context. Although their focus on civil and administrative law could, in theory, encompass certain aspects of prison litigation, this remains implicit, and the guidelines offer no interpretative basis for extending their principles to detention. As a result, they fail to address the continued exclusion of detention-related procedures from legal aid schemes. This gap is reinforced by assumptions about accessibility that are incompatible with closed institutions: prisoners cannot freely contact legal aid providers, obtain information, or seek early advice. Their access depends on institutional mediation and is limited by censorship, fear of reprisals, and logistical barriers. The recommendations also omit safeguards such as on-site legal clinics, confidential communication channels, or protections for legal aid providers in prisons, leaving little practical guidance to strengthen prisoners' right to legal aid.

The standards that do address detention explicitly nonetheless treat access to justice and legal aid in a limited and fragmented manner. The EPR establish broad procedural safeguards and acknowledge prisoners' entitlement to legal advice, yet stop short of recognising a right to legal aid or addressing how such access can be made effective within prisons. The 2006 Recommendation affirms the right to legal assistance for remand prisoners but confines it to the criminal process, omitting any reference to legal aid in connection with complaints or other detention-related procedures. Similarly, the 2012 Recommendation on Foreign Prisoners recognises the need for legal advice and interpretation but provides no concrete obligations or mechanisms to ensure their realisation.

Across its standards, the Committee of Ministers demonstrates a tension between the formal recognition of access to justice as a principle and the failure to operationalise it in contexts of detention. Legal standards that recognise access to justice and legal

assistance in general cannot effectively benefit prisoners, as they face specific barriers that must be addressed directly if such safeguards are to have meaning in practice. The recommendations that do address detention explicitly fail to acknowledge that prisoners require free legal assistance and face unique practical obstacles in obtaining legal aid. They also stop short of affirming that prisoners should have access to a lawyer not only in the context of criminal proceedings but also in matters relating to the enforcement of their rights within detention.

RECOMMENDATIONS ON ACCESS TO JUSTICE AND LEGAL AID

When it comes to access to justice, the Committee of Ministers have expressed their commitment to this issue since 1981, when it adopted Recommendation No. R (81)7 on measures facilitating access to justice,⁴⁸ and later Recommendation No. R (93)1 on effective access to the law and to justice for the very poor in 1993.⁴⁹ Although neither instrument refers specifically to prisoners, both reflect the early development of a European concern with improving legal accessibility. At the same time, they suggest an underlying tension within the Council of Europe's approach, between an emphasis on procedural efficiency and the recognition of legal aid and representation as fundamental components of equal justice.

Through its 1981 Recommendation, the Committee of Ministers took a strong stance on access to justice, recognising that complex, costly, and time-consuming procedures often prevent individuals, particularly those in weak economic or social positions, from exercising their rights effectively. It emphasised that court fees and legal costs should not constitute barriers to justice, framing access to justice as dependent on both effective legal aid and systemic reforms to eliminate procedural and financial obstacles. However, even at that stage, the Council of Europe's approach revealed a preference for

⁴⁸ 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 at its 68th session).

⁴⁹ Recommendation No R (93) 1 of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (Adopted by the Committee of Ministers on 8 January 1993).

procedural simplification over structural guarantees of legal representation. The Committee urged member states to ensure that proceedings were simple, speedy, and inexpensive, underscoring the value of streamlined processes. Although it affirmed that no litigant should be prevented from obtaining legal assistance, it simultaneously cautioned against unnecessary reliance on lawyers and encouraged limits on the appointment of experts. This emphasis on efficiency reflected a broader concern with administrative practicality rather than with reinforcing substantive safeguards through guaranteed access to professional legal support.

The 1993 Recommendation on effective access to the law and to justice for the very poor, while not mentioning the situation of prisoners specifically, goes further in emphasising access to legal advice and representation as a substantive precondition for equality before the law. Through the Recommendation, the Committee urged member states to strengthen legal advice and aid systems to meet the specific needs of the very poor, including by promoting awareness among legal professionals, establishing advice centres in disadvantaged areas, and covering the costs of legal advice through legal aid. Crucially, the Committee called for assistance to extend not only to judicial proceedings but across all areas of law, including quasi-judicial procedures and that legal aid should be broadly available, simplified, and refused only in limited cases. It also highlights the involvement of NGOs as crucial in supporting those unable to defend themselves. Overall, the Committee framed access to justice for the very poor as integral to human dignity and as a necessary complement to broader anti-poverty strategies.

The CM Recommendation No. R (93) 1 On Effective Access to the Law and to Justice for the Very Poor invites the member States to promote legal advice services to the very poor by defraying the cost of legal advice through legal aid schemes, by supporting advice centres in underprivileged areas, and by enabling non-governmental organisations or voluntary organisations providing support to the very poor, to give legal assistance.

Taken together, these early recommendations illustrate the Council of Europe's longstanding engagement with the question of access to justice, but also the tension at the heart of its approach, between procedural efficiency and substantive access to legal representation. While the 1981 Recommendation prioritised simplification and

cost reduction, the 1993 Recommendation took a stronger stance by recognising legal aid as an essential corrective to financial inequality that determines who can effectively enforce their rights, and by calling for such assistance to extend across all procedures, including quasi-judicial ones.

DEDICATED LEGAL AID STANDARDS

The Committee of Ministers has adopted two key instruments on legal aid: Resolution (78) 8 on Legal Aid and Advice and the Guidelines on the Efficiency and Effectiveness of Legal Aid Schemes in the Areas of Civil and Administrative Law (2021). The first calls on States to ensure that persons in an economically weak position can obtain necessary legal advice in civil, commercial, administrative, social, or fiscal matters. It recommends that States support advice centres in underprivileged areas and enable non-governmental organisations to provide legal assistance. The 2021 Guidelines, prepared by the European Committee on Legal Co-operation, expand on this, with the aim of making national legal aid systems more efficient and effective within civil and administrative domains. They define legal aid broadly to include legal advice, assistance, and representation, emphasising non-discrimination, early intervention, quality assurance, user consultation, and data collection. It links legal aid to Article 6 of the European Convention on Human Rights, the Guidelines affirm its function as an essential precondition for access to justice, particularly for vulnerable groups.

Through these standards, the Council of Europe underscores the centrality of legal aid as a mechanism for ensuring that individuals in situations of vulnerability have equal access to the protection of their rights. It positions legal aid as essential to liberty and to guaranteeing that access to justice is not contingent upon wealth. However, these standards also reflect a recurrent tension within the Council of Europe's policy orientation: a tendency to frame the reduction of lawyers' involvement as a desirable efficiency measure. They place particular emphasis on the use of online technologies and digital tools as instruments for streamlining procedures and limiting the role of lawyers at certain stages of the legal aid process.

Despite their expansive scope and general emphasis on vulnerability and structural disadvantage in the enforcement of rights, these

instruments remain notably silent on detention. Neither instrument has any mention of persons deprived of liberty or the prison context. Their focus on civil and administrative law does, in theory, encompass prison litigation—such as challenges to disciplinary sanctions, administrative decisions, or conditions of detention—but this remains implicit. Even if, in principle, certain aspects of prison litigation could fall within the administrative sphere envisaged by the Guidelines, their generic framing fails to accommodate the particularities of detention. The Guidelines provide no interpretative leverage to extend their principles to detention. As a result, they cannot meaningfully challenge, for instance, the continuing practice of several States treating detention-related procedures as falling outside the scope of legal aid schemes, and this remains a blindspot.

This limitation is compounded by the Guidelines' underlying assumptions about accessibility. They presuppose that applicants can freely initiate contact with legal aid providers, obtain information about eligibility, and seek early advice—conditions that are structurally incompatible with life in closed institutions. Prisoners' access to legal information and assistance depends on institutional mediation, while their ability to pursue internal and external remedies is constrained by censorship, fear of reprisals, and logistical barriers. Yet the Guidelines make no reference to mechanisms for in situ legal assistance—such as on-site legal clinics, confidential communication channels, or dedicated safeguards for legal aid providers operating in prisons. As a result, even if their formal scope could, in theory, extend to certain aspects of prison litigation, they offer little that can be relied upon to strengthen prisoners' right to legal aid.

RECOMMENDATION ON THE IMPROVEMENT OF DOMESTIC REMEDIES

Another relevant instrument is Recommendation Rec(2004)6 on the improvement of domestic remedies, which seeks to strengthen the effectiveness of national remedies under Article 13 ECHR. It urges member states to ensure that domestic remedies are both effective in law and practice, capable of providing a decision on the merits and adequate redress for violations, and regularly reviewed in light of the Court's case law. While it reflects a strong procedural orientation, emphasising speed, accessibility,

and responsiveness, it remains silent on the role of legal assistance as a precondition for effective remedy. The Recommendation assumes that remedies can be rendered effective through structural and procedural measures alone, without addressing the reality that many individuals, particularly prisoners, cannot meaningfully access or pursue remedies without legal support.

THE EUROPEAN PRISON RULES

The European Prison Rules (EPR) are the most significant of the Council of Europe's recommendations on imprisonment, often described as resembling a code.⁵⁰ First adopted in 1973 as the European Standard Minimum Rules for the Treatment of Prisoners, they adapted the UN Standard Minimum Rules to the European context. Subsequent revisions in 1987, 2006, and 2020 reflected evolving legal standards and practices, particularly those developed through the jurisprudence of the European Court of Human Rights (ECtHR) and the monitoring work of the European Committee for the Prevention of Torture (CPT).⁵¹ The 1987 revision marked a turning point in European prison policy by establishing common principles that placed the right to respect for human dignity at the core of prison functioning, advancing a distinctly European approach to detention standards and synthesising earlier trends in prison reform. The EPR thus stand in close relationship with other European and international instruments, including CPT standards, ECtHR case law, and UN norms.⁵²

The 2006 EPR further consolidated these developments and gained wide political support as one of the Council of Europe's most authoritative instruments in the prison field in particular the dissemination efforts that have been devoted to it.⁵³ Their authority was reinforced by the Committee of Ministers, which promoted

⁵⁰ Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (Adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies) and Recommendation CM/Rec(2020)3 of the Committee of Ministers to Member States on the European Prison Rules (Adopted on 1 July 2020 at the 1380th meeting of the Ministers' Deputies).

⁵¹ Rule 1 of the 1987 EPR.

⁵² CPT 15th General Report [CPT/Inf (2005) 17C] § 50.

⁵³ Dirk van Zyl Smit, *Strategies for Improving Prisoners' Rights and Prison Conditions in Europe: Summary and Recommendations*, cited above.

their dissemination and encouraged implementation at the national level.⁵⁴ Their reception, however, has been uneven: while some states have integrated the EPR into domestic law and practice, it has at times been only a partial implementation and, others, such as the Netherlands and the UK, have stressed their “soft law” status and relied instead primarily on domestic legislation.

When it comes to access to legal advice and representation, the EPR are explicit that “all prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice”.⁵⁵ However, on the issue of legal aid, the Rules are notably limited. They provide that “prisoners may consult on any legal matter with a legal adviser of their own choice at their own expense” and only add that, “where there is a recognised scheme of free legal aid, the authorities shall bring it to the attention of all prisoners”.⁵⁶ The EPR therefore stop short of recognising a right to legal aid or even recommending that member states establish schemes that include prisoners within their scope. For pre-trial detainees, the EPR stipulate that they should be explicitly informed of their right to legal advice and that necessary facilities must be provided to assist them in preparing their defence and meeting with legal representatives.⁵⁷ Yet, this provision is clearly oriented towards criminal defence rather than the enforcement of prisoners’ rights within detention itself and the Rules are silent on how such detainees are expected to fund their defence, obtain access to legal assistance, or overcome practical barriers in doing so.

When it comes to foreign nationals, the EPR establish specific provisions aimed at safeguarding communication rights and ensuring access to assistance. The Rules stipulate that foreign national prisoners must be informed without delay of their right to contact, and be provided with reasonable facilities to communicate with, the diplomatic or consular representative of their state.⁵⁸ Where prisoners are stateless, refugees, or nationals of states without diplomatic

⁵⁴ Reply adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies to the Parliamentary Assembly Recommendation 1747 (2006) on the European Prisons Charter (CM/AS (2006) Rec1747 final 29 September 2006)

⁵⁵ EPR Rule 23.1.

⁵⁶ EPR Rule 23.3.

⁵⁷ EPR Rule 98.1-2.

⁵⁸ EPR Rule 37.1.

representation, they must be granted similar facilities to communicate with the relevant authority responsible for protecting their interests.⁵⁹ The Rules further require prison authorities to cooperate fully with diplomatic or consular officials in addressing the needs of foreign national prisoners,⁶⁰ to provide them with specific information about access to legal assistance,⁶¹ and to inform them of the possibility of applying for a transfer of sentence to another country.⁶² While these provisions reflect a recognition of the particular vulnerabilities of foreign nationals in detention, they stop short of imposing substantive obligations on states to ensure effective access to legal assistance or to address linguistic, cultural, and financial barriers that often impede foreign prisoners from exercising their rights in practice.

When it comes to prison litigation, the EPR set out procedural safeguards in the context of disciplinary proceedings and in relation to requests and complaints within prison. In relation to disciplinary proceedings, the EPR set out procedural safeguards intended to ensure fairness and transparency. Rule 59 provides that prisoners charged with disciplinary offences shall be informed promptly, in a language they understand and in detail, of the nature of the accusation; be granted adequate time and facilities to prepare their defence; be permitted to call and examine witnesses; and be provided with the free assistance of an interpreter if necessary. However, the EPR place primary emphasis on prisoners defending themselves in person, rather than being afforded professional legal representation. Legal assistance is mentioned only conditionally, to be permitted “when the interests of justice so require”.

Likewise, when it comes to requests and complaints within prison, the EPR only mention access to legal assistance conditionally, to be permitted “when the interests of justice so require”.⁶³ The framework governing requests and complaints is set out in Rule 70, which provides that prisoners, individually or collectively, must have ample opportunity to make requests or complaints to the prison director or

⁵⁹ EPR Rule 37.2.

⁶⁰ EPR Rule 37.3.

⁶¹ EPR Rule 37.4.

⁶² EPR Rule 37.5.

⁶³ EPR Rule 70.7.

other competent authority,⁶⁴ and that mediation should be attempted where appropriate.⁶⁵ If a request is denied or a complaint rejected, reasons must be provided, and prisoners must have the right to appeal to an independent authority.⁶⁶ The Rules further specify that prisoners must not be punished for lodging a complaint,⁶⁷ that authorities should consider written complaints from relatives where they have reason to believe a prisoner's rights have been violated,⁶⁸ and that no complaint may be brought by a legal representative or organisation on behalf of a prisoner without that prisoner's consent.⁶⁹ While these provisions do provide some vital safeguards, they ultimately place the burden of initiating and navigating the process squarely on prisoners themselves.

RECOMMENDATION ON THE USE OF REMAND IN CUSTODY

The 'Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse' from 2006⁷⁰ is the sole recommendation of the Committee of Ministers focused exclusively on remand prisoners. It sets out fundamental principles governing pre-trial detention, including judicial oversight, protection against reprisals, and the requirement that remand conditions be distinct from those of sentenced prisoners, while guaranteeing access to family contact, medical care, and education. Although the Recommendation affirms the right of pre-trial detainees to legal assistance and representation, it does so solely within the framework of criminal proceedings. It does establish that remand prisoners must have avenues of complaint both within and outside the remand institution, with the right to confidentially contact an authority competent to address

⁶⁴ EPR Rule 70.1.

⁶⁵ EPR Rule 70.2.

⁶⁶ EPR Rule 70.3.

⁶⁷ EPR Rule 70.4.

⁶⁸ EPR Rule 70.5.

⁶⁹ EPR Rule 70.6.

⁷⁰ Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the Use of Remand in Custody, the Conditions in which it Takes Place and the Provision of Safeguards against Abuse (Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies).

their grievances, in addition to any right to bring legal proceedings, and that such complaints should be dealt with promptly. However, it makes no reference to legal assistance in connection with these complaint mechanisms.

RECOMMENDATION ON FOREIGN PRISONERS

In 2012, the Committee of Ministers adopted Recommendation CM/Rec(2012)12⁷¹ to address the situation of foreign prisoners, recognising the specific difficulties they face due to language barriers, cultural differences, lack of family contact, and uncertainty about their legal status. The Recommendation replaces an earlier 1984 text and sets out a comprehensive framework requiring that foreign prisoners be treated with respect for their rights and individual needs, and not be subjected to custody or harsher sanctions on the basis of their foreign status. It calls for equal access to non-custodial measures, interpretation and translation, consular contact, legal advice and aid, culturally appropriate food, clothing and healthcare, and meaningful opportunities for work, education, and religious practice. Special attention is given to maintaining family ties across borders, avoiding isolation, and ensuring preparation for release whether through reintegration in the detaining state, return to the country of origin, or transfer elsewhere. The Recommendation further highlights the need for staff training in cultural sensitivity, proper allocation of resources, and systematic evaluation of policies affecting foreign prisoners.

CONCLUSION

The Committee of Ministers' recommendations reveal a long-standing recognition of the importance of access to justice and legal aid as prerequisites for equality before the law. Yet, when viewed through the lens of pre-trial detention and prison litigation, they expose a significant normative and structural gap. While the Council of Europe

⁷¹ Recommendation CM/Rec(2012)12 of the Committee of Ministers to Member States concerning Foreign Prisoners (Adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies).

has progressively refined standards on procedural fairness, legal advice, and representation, these have not been meaningfully extended to the enforcement of rights within detention. Prisoners, including pre-trial detainees, remain at the margins of the Council's access-to-justice architecture: they are mentioned only tangentially, if at all, in instruments concerning legal aid, and their specific constraints are nowhere addressed. The outcome is a structural blind spot: although the Committee of Ministers has been instrumental in shaping European standards on both access to justice and prison conditions, it has yet to bridge the gap between the two.

3 **THE LAWYER AS A SAFEGUARD AGAINST ILL-TREATMENT: THE CPT'S STANDARDS AND ITS UNFULFILLED POTENTIAL**

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is the body devoted to torture prevention within the Council of Europe. Founded to enforce the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, it functions as a non-judicial, preventive mechanism complementing also the Court's protection under Article 3 ECHR by carrying out periodic and ad hoc visits to places of deprivation of liberty to assess the treatment of persons held there. The CPT visits places of imprisonment in signatory countries and issues recommendations to States and adopts general recommendations.

One of the CPT's key contributions to the prevention of torture has been its consistent advocacy for three core 'fundamental safeguards' for persons deprived of their liberty,⁷² grounded in the understanding that the risk of torture and ill-treatment is greatest during the initial stages of detention. Among these is the right of access to a lawyer. First articulated in the CPT's Second General Report (1992), these safeguards have since remained the

⁷² These three fundamental safeguards are the right of access to a lawyer, the right of access to a doctor, and the right to have one's detention notified to a relative or a third party of choice (CPT, 12th General Report on the CPT's Activities covering the period 1 January to 31 December 2002, CPT/Inf (2002) 15, para 37).

cornerstone of its preventive approach and are systematically examined in virtually all CPT periodic and ad hoc reports. While the precise formulation of these safeguards may vary to reflect the particularities of national legal systems, the CPT considers them universally applicable, regardless of whether concrete evidence of ill-treatment has been found. Over time, the CPT has maintained its emphasis on these principles, an approach further reinforced by empirical research demonstrating their preventive effectiveness.⁷³

The CPT has made clear that these “three fundamental safeguards” against ill-treatment “should apply as from the outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc.)”. The 1992 statement also introduced a fourth, complementary safeguard: detainees must be both informed of and granted these rights “without delay.” Moreover, any possibility for the authorities to postpone the exercise of these rights “should be clearly defined and their application strictly limited in time”.⁷⁴

A blind spot in the CPT’s approach to access to a lawyer is that it has primarily focused on criminal proceedings, particularly during police custody and interrogation, but has failed to emphasise the crucial role of legal assistance in enabling detainees to enforce their rights in detention, including at the pre-trial stage. The CPT has not explicitly linked access to a lawyer with the ability of detainees to challenge violations occurring within detention, such as through internal administrative or disciplinary proceedings, or external judicial mechanisms concerning conditions of detention and remedies for ill-treatment. As this research shows, effective access to legal advice and representation for enforcing rights in detention, and not only in relation to criminal proceedings, is essential to ensuring that rights are enforceable in practice and that safeguards against torture and abuse are not merely theoretical but practical and effective.

When it comes to access to a lawyer, the CPT has over time elaborated in detail what effective access entails; however, its focus has implicitly referred to access in the context of police custody,

⁷³ See, e.g., Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press 2016).

⁷⁴ CPT Second General Report, 1992, § 37.

and its *ratio legis* has been to protect those concerned against the extortion of confessions in this setting. The CPT has responded to persistent reluctance among states to apply the safeguard “from the very outset” of custody. In its Twelfth General Report (2002), the CPT observed that many states limited access until after a certain period or a formal declaration of suspect status, and it rejected these delays as inconsistent with prevention. It accepted that brief postponements could occur for compelling investigative reasons but insisted that in such cases detainees must still have access to another independent lawyer. It further clarified that this right extends to anyone obliged to attend police premises, includes the right to consult privately, to have a lawyer present during questioning, and requires the availability of legal aid to ensure effectiveness. In its Twenty-first General Report (2011), the CPT reinforced that the safeguard applies from the moment of deprivation of liberty, regardless of legal status, and must cover those detained as “witnesses” or for “informative talks,” who remain at serious risk of ill-treatment. It underlined that the right applies irrespective of the seriousness or category of the offence, warning that excluding “minor” or “administrative” offences creates loopholes enabling abuse. The CPT has also opposed blanket restrictions under anti-terrorism or similar laws, insisting that any limitation be assessed case by case. Despite this sustained clarification, it has continued to find widespread non-compliance, reflecting both institutional resistance and the practical challenge of ensuring the availability of lawyers nationwide, including in remote areas.⁷⁵

Moreover, the CPT has underscored that effective grievance and inspection systems are vital safeguards against ill-treatment in places of detention. According to its standards, prisoners must have accessible complaint mechanisms both within the prison and through external authorities, including the right to communicate confidentially with a competent body by correspondence or during visits.⁷⁶ In line with this, the European Prison Rules provide that “national law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted”.⁷⁷

⁷⁵ Malcolm Evans, ‘European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)’ (November 2020) Max Planck Encyclopedia of International Procedural Law (OUP Online).

⁷⁶ CPT 2nd General Report [CPT/Inf (92) 3] § 54.

⁷⁷ EPR Rule 24.3.

However, the CPT has not fully confronted the practical and structural dimensions of compliance with its own safeguard on access to a lawyer. While the CPT has long affirmed that this safeguard is “one of the fundamental guarantees against ill-treatment”,⁷⁸ its engagement has remained largely limited to the formal right of access and its timing; that is, the need for access “from the very outset of deprivation of liberty”.⁷⁹ It has paid comparatively little attention to the means through which that access is to be realised in practice, particularly for those without financial resources.⁸⁰ The Committee itself has acknowledged that “in order for the right of access to a lawyer during police custody to be effective in practice, appropriate provision should be made...for persons who are not in a position to pay for a lawyer”.⁸¹ Yet it has never elaborated this point into a substantive requirement or standard.

The question of whether legal assistance should be freely available to detainees, and if so, to which categories of detainees and under what conditions, has remained unaddressed in the CPT’s elaboration of standards. As this research demonstrates, legal aid frameworks in many States are structurally and financially constrained, and detainees face distinct structural and practical barriers to accessing them. This omission by the CPT significantly weakens the preventive value of the safeguard, as the right to a lawyer, absent accessible legal aid, risks remaining a theoretical protection, available only to those with the means to exercise it.

⁷⁸ CPT Second General Report, 1992, §36.

⁷⁹ CPT Twenty-first General Report, 2011, §19.

⁸⁰ Malcolm Evans, ‘European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)’ (November 2020) Max Planck Encyclopedia of International Procedural Law (OUP Online).

⁸¹ CPT Twenty-first General Report, 2011, §25.

4 **LEGAL AID AS A GATEWAY TO THE REALISATION OF SOCIAL RIGHTS: ITS INCREASING RECOGNITION IN THE EUROPEAN SOCIAL CHARTER SYSTEM**

Access to legal aid is not explicitly mentioned or guaranteed under the European Social Charter (ESC). Nevertheless, through its monitoring practice, the European Committee of Social Rights (ECSR) has interpreted several Charter provisions as implicitly requiring states to provide legal aid in specific contexts. Its case law increasingly recognises that access to justice is a precondition for the realisation of social rights, positioning legal aid as a gateway, a procedural guarantee that enables the enforcement of other substantive rights. The Committee has done so on the basis of its mandate to interpret the rights and freedoms set out in the Charter in light of current conditions,⁸² relevant international instruments,⁸³ and newly emerging issues and situations; in other words, the Charter operates as a living instrument.⁸⁴

The Committee has recognised legal aid as a necessary safeguard under several rights: the right to social and medical assistance,⁸⁵ the right to housing,⁸⁶ and the right of children and young persons to social, legal and economic protection.⁸⁷ In these areas, the ECSR has established that legal aid is indispensable to the effective exercise of procedural rights. For example, under Article 13, states must provide legal aid to guarantee applicants the “effective [exercise of their] right of appeal” in matters relating to social or medical assistance.⁸⁸

⁸² *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, §194.

⁸³ *European Federation of National Organisations working with the Homeless (FEANTSA)*, Complaint No. 39/2006, decision on the merits of 5 December 2007, §64.

⁸⁴ *Transgender-Europe and ILGA-Europe v. Czech Republic*, Complaint No. 117/2015, decision on the merits of 15 May 2018, §75. On the Charter as a living instrument, see *Digest of the case law of the European Committee of Social Rights*, 2022, p. 34.

⁸⁵ Revised ESC, Article 13.

⁸⁶ Covered both by Revised ESC Articles 16 (the right of the family to social, legal and economic protection) and 31 (the right to housing).

⁸⁷ Revised ESC Article 17.

⁸⁸ Conclusions XVI-1 (2003), Ireland: [LINK](#).

Likewise, in relation to the right to housing, the Committee has held that individuals at risk of eviction must be ensured access both to legal remedies and to legal aid as part of the procedural safeguards protecting against arbitrary interference.⁸⁹ Regarding “children in conflict with the law”,⁹⁰ the Committee has affirmed that legal assistance must be available from the outset of proceedings (and, in particular, during police questioning), and that states must ensure such assistance even where the child or guardian has not arranged it themselves.⁹¹ The Committee has further clarified that this assistance is required where parents’ or guardians’ interests conflict with those of the child, that separate legal representation is crucial at the pre-trial stage, and that the provision of legal aid must not be left to administrative discretion.⁹²

The Committee is increasingly recognising that access to justice, and legal aid in particular, is a crucial precondition for the enjoyment of a wide range of social rights. Promoting further the recognising access to legal aid as a precursor to the enjoyment of the rights enshrined in the European Social Charter through soft-law and litigation in this field could be a forward-looking step to bridge the gap between social rights and civil and political rights, and improve access to justice for the vulnerable groups in society, including for prisoners.

⁸⁹ Conclusions 2011, Azerbaijan: [LINK](#).

⁹⁰ The situation of “children of conflict with the law” is in the scope of Article 17 of the Revised ESC on the right of children and young persons to social, legal and economic Protection. See International Commission of Jurists (ICJ) v. Czech Republic, Complaint No. 148/2017, decision on the merits of 20 October 2020, § 45 and § 82: [LINK](#).

⁹¹ *Ibid.*, §93.

⁹² *ibid.*, §99, §94.

5 CONCLUSION

A central finding of this chapter is that none of the Council of Europe’s standards explicitly link the right to a lawyer, access to legal aid, or similar procedural guarantees to the context of prisoners enforcing their rights from within detention. Indeed, there are no Council of Europe standards that directly address access to a court or funded legal assistance for prisoners seeking to enforce their rights from within detention. Insofar as they do apply—or where the patchwork of applicable standards does address this in part—the prevailing approach favours procedural simplification over an explicit recognition of the right to a lawyer or to legal aid in the context of prison litigation.

The European Court of Human Rights has played a central role in shaping the Council of Europe’s standards on detention and access to remedies, yet its jurisprudence also reflects significant gaps in ensuring effective access to justice for prisoners. Over the past two decades, the Court has progressively required States to establish domestic remedies for violations of Article 3, framing the effectiveness of these remedies as a procedural obligation under Article 13. However, rather than mandating structural measures that would enable prisoners to pursue such remedies with legal assistance, the Court has endorsed an approach grounded in procedural simplification—emphasising accessibility in form rather than substantive equality in practice. This position assumes that prisoners can “avail themselves” of remedies independently, even within inherently adversarial proceedings where the prison administration holds exclusive control over relevant evidence. The Court’s jurisprudence under Article 6 similarly falls short of extending procedural guarantees to prisoners. Its restrictive interpretation of the criminal limb has confined the right to free legal assistance to a narrow subset of disciplinary offences, while under the civil limb it has refrained from recognising access to legal aid as an essential component of the right to a fair hearing. Although the Court has occasionally found violations linked to the absence of legal aid, it has done so only when this absence resulted in a procedural default, not as a broader barrier to access to a court.

While the Committee of Ministers’ access-to-justice standards do underscore the centrality of legal aid as a mechanism for ensuring that individuals in situations of vulnerability have equal access to the protection of their rights, these standards also reflect a recurrent

tension within the Council of Europe's policy orientation: a tendency to frame the reduction of lawyers' involvement and the simplification of procedures as a desirable efficiency measure. None of these instruments refer explicitly to prison litigation or adapt the delivery of legal aid to the prison context. The standards that do explicitly address legal aid in the prison context do so primarily in the context of criminal proceedings, and where they do address legal aid for prison litigation they say legal representation need only be made available where the interests of justice so require, showing the primary approach echoed throughout the standards is leaving the burden on prisoners themselves to navigate most requests, complaints, and disciplinary proceedings.

The CPT echoes this approach; while it underscores that the role of the lawyer is crucial in preventing ill-treatment, it does so only in relation to criminal proceedings and fails to recognise the vital role that legal aid and assistance play in enabling prisoners to enforce their rights, including the right to freedom from torture and ill-treatment. Its engagement has largely remained confined to the formal right of access and its timing, without elaborating on how such access is to be ensured in practice or connected to detainees' ability to enforce their rights beyond the criminal process.

Overall, the Council of Europe's approach to prisoners' access to justice reflects a structural paradox. While it has been pivotal in articulating that human rights extend behind prison walls, it has failed to ensure the conditions for those rights to be effectively enforced. Across its institutions the emphasis has remained on procedural accessibility rather than substantive capability, on the assumption that simplification can substitute for legal assistance. This orientation obscures the fundamental truth that prisoners, by virtue of their confinement, dependence, and vulnerability to reprisals, cannot meaningfully enforce their rights without professional support. In the absence of a recognised right to legal aid for prison litigation, the Council's human rights architecture leaves a crucial gap between entitlement and enforcement.

Chapter 2

The European Union's Limited Intervention in Prison Matters

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Unlike the Council of Europe (CoE), the European Union's (EU) intervention in the area of prisons has remained very limited to date.¹ One explanation is to be found in the evolution of the EU's powers, which had limited competence in the area of criminal law until the end of the 1990s, when the Amsterdam Treaty (1999) introduced the Area of Freedom, Security and Justice (AFSJ). At the same time, the European Council of Tampere (1999) gave a "new impetus" to European intervention in criminal law policy.² A decade later, the Lisbon Treaty (2009) provided a stronger legal basis for an EU intervention in the field of criminal law – in addition to facilitating the enactment of EU law in this area by replacing the unanimity system in force until then by majority voting. A central provision in this matter is Article 82 (2) of the Treaty on the Functioning of the EU (TFEU), which gives EU institutions the power to establish minimum rules, by means of directive and "[t]o the extent necessary to facilitate [...] judicial cooperation in criminal matters", concerning "(b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision [...]".

The extent to which this provision constitutes a valid ground for the EU to intervene in the area of prison issues remains a matter of debate (see below, 2.2.). Setting aside this question temporarily, a second explanation to the EU's relative inaction in the field of prison lies in the constant reluctance of EU Member States (EUMS) to grant the EU powers to regulate this essential area of State sovereignty. This was for

1 In this chapter, the terms "area of prisons", "prison issues" or "prison matters" are used in a narrow sense, referring both to the internal status of prisoners (such as detention conditions and relations with the prison administration) and to their external status (in particular, access to justice, which constitutes the main focus of this report).

2 Taru Spronken, 'EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach', *European Criminal Law Review*, vol. 1, issue 3, 2011, p. 217.

instance made explicit in EUMS' response to the European Commission's 2021 non-paper proposing the adoption of EU detention condition standards. The EUMS argued that "there is no need for additional legal instruments on minimum standards at EU level as these standards are already set out in various international fora" and that "the focus should [instead] be on a more effective application of existing standards, e.g. those laid down [by the CoE]".³ The first information getting out of the High-Level Forum on the future of EU criminal justice held in 2025, shows stability in this matter⁴ – and contributes to explaining why, more than fifteen years after the entry into force of the Lisbon Treaty, no significant EU texts came to regulate prisoners' rights – let alone prisoners' access to justice. Consequently, the rights guaranteed by the EU Charter of Fundamental Rights (CFR) – including the right to an effective remedy and to a fair trial under Article 47 CFR, which encompasses a right to legal aid for "those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice" – do not apply in the prison context, in the narrow sense in which this notion is used here (see footnote no. 1).

3 Council of the European Union, 3816th Council meeting, Home Affairs, 12574/21, 7 October 2021, p. 3. See the complementary document: Council of the European Union, [Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention](#), 12161/21, 24 September 2021.

4 In the absence, at the time of writing, of any official EU press releases, we are forced to rely on social media posts from participants: see Gustav Tallving (Executive Director of the European Organisation of Prison and Correctional Services (EUROPRIS)), [LinkedIn post of 2 October 2025](#); "EU Member States show a strong reluctance to further regulate procedural justice or detention conditions. Some even argue that this is not allowed in the EU Treaty (article 82) [...]. With this position of the EU MS the further regulation of detention conditions, and procedural justice, is not probable in a foreseeable future."

1

THE EU'S LIMITED INTERVENTION IN PRISON MATTERS: EXPLORING A PARADOX

TWO CATEGORIES OF EU TEXTS ON PRISON MATTERS

Two categories of EU texts touching upon prison issues can be identified: on the one hand, texts that directly address prison issues, but are unable to bring about harmonisation between EUMS prison systems because there are not legally binding; on the other hand, texts that are legally binding but which address prisoners' rights in an incidental manner.⁵

Within the first category of texts, the most prominent is the recent European Commission Recommendation “on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions”, adopted in December 2022.⁶ This Recommendation, which “mainly consist of a consolidation of existing [prison] standards”⁷ on material detention conditions also contains two sections directly aiming at setting standards on

5 This section focuses on EU texts that address prison policy and prisoners' rights. It does not extend to EU texts that may influence prison systems through their impact on the prison population. This is the case of EU substantive criminal law, which, by making imprisonment the “barycentre” of the EU's approach to punishment, can be said to have an impact on prison systems (see Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual*, Hart Publishing, Oxford, 2019, Part II). Similarly, the EU's attempts to regulate recourse to pre-trial detention “as a measure of last resort” (2022 Recommendation, paragraph 10) are not covered in the examples below.

6 European Commission, [Recommendation \(EU\) 2023/681 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions](#), 8 December 2022.

7 Anne Weyembergh and Julia Burchett, [Prisons and detention conditions in the EU](#), Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, 6 March 2023, pp. 71-72. See also Recital (20) of the Recommendation: “The Commission aims to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case law of the Court of Justice and of the European Court of Human Rights [...]”; and Recital (31): “Only an overview of selected standards is provided in this Recommendation and it should be considered in light of, and without prejudice to, the more detailed guidance provided in the Council of Europe standards and of the case law of the Court of Justice and of the European Court of Human Rights”.

prisoners' access to justice. Paragraphs 58 to 60 regulate prisoners' access to legal assistance and provide that detainees should have "effective access to a lawyer" (58), that the confidentiality of any form of communication between detainees and their lawyers (including meetings and correspondence) should be guaranteed (59), and that EUMS should "grant detainees access to, or allow them to keep in their possession, documents relating to their legal proceedings" (60). However in the absence of any reference to legal aid in those paragraphs, the right to "effective access" to a lawyer risks remaining a formal guarantee rather than a fully effective safeguard in practice..

Paragraphs 61 to 63 concern "requests and complaints" and cover access to legal information and complaint procedures. Paragraphs 61 and 62 aim to guarantee prisoners' information on "the rules applicable in their specific detention facility" (61) and that prisoners can "challenge aspects of their life in detention" through "confidential requests and complaints [...] through both internal and external complaint mechanisms" (62). Paragraph 63 concerns the body in charge of reviewing such complaints. This body must not be a judicial body but should be independent from the prison administration and be "empowered to order measures of relief". This Recommendation is, to date, the most comprehensive EU text on prisoners' rights. However, its non-binding nature limits its capacity to harmonise EUMS legislation in this area.⁸

The same can be said of texts adopted by the European Parliament and the Council on prisons. The European Parliament has adopted a number of resolutions and recommendations over the past 20 years, advocating specifically for the adoption of EU standards in

⁸ As of October 2025, the evaluation of the Recommendation, which should assess its implementation by EUMS, had not been finalised. However, first echoes from the High-Level Forum on the future of EU criminal justice suggest that the evaluation first results show an important discrepancy in the implementation at national level of the listed standards.

the area of material detention conditions.⁹ The Council's intervention has remained more limited but has touched upon core elements of prison policies, such as prison regimes and counter-radicalisation programmes,¹⁰ sentence adjustment mechanisms,¹¹ as well as the organisation of prison estate and the promotion of small-scale detention facilities.¹² Both categories of documents being non-binding, their actual impact on prisoners' rights is bound to be limited.

Other texts are of binding nature and concern the penal field, but they address prisoners' rights only incidentally. The procedural rights directives adopted between 2010 and 2016 were designed to enhance the rights of suspects and accused persons during criminal proceedings, including those subject to pre-trial detention.¹³ Therefore, their impact on prisoners' rights in the frame of prison litigation remains overall constrained. However, Directive 2016/800 "on procedural safeguards for children who are suspects or accused persons in criminal proceedings" constitutes an exception to the extent that it places obligations on EUMS in respect of material detention condi-

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- 9 European Parliament, [Report on the situation as regards fundamental rights in the European Union \(2002\)](#), 2002/2013(INI), 21 August 2003; European Parliament, [Report with a proposal for a European Parliament recommendation to the Council on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union](#), 2003/2179(INI), 23 October 2003; European Parliament, [Resolution on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme](#), P7_TA(2009)0090, 25 November 2009; European Parliament, [Resolution on detention conditions in the EU](#), 2011/2897(RSP), 7 December 2011; European Parliament, [Resolution of 5 October 2017 on prison systems and conditions](#), 2015/2062(INI), 5 October 2017; European Parliament, [Situation of Fundamental Rights in the European Union - Annual Report for the years 2018-2019](#), 2019/2199(INI), 26 November 2020; European Parliament, [Resolution on the implementation of the European Arrest Warrant and surrender procedures between Member States](#), 2019/2207(INI), 20 January 2021. See Anne Weyembergh and Julia Burchett, *op. cit.*, pp. 69-70.
 - 10 Council of the European Union, [Conclusions of the Council of the European Union and of the Member States meeting within the Council on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism](#), 14419/15, 20 November 2015.
 - 11 Council of the European Union, [Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice](#), 2019/C 422/06, 16 December 2019.
 - 12 Council of the European Union, [Council conclusions on 'Small-scale detention: focusing on social rehabilitation and reintegration in society'](#), 10105/24, 14 June 2024.
 - 13 The six directives establish common rules on suspects' and accused persons' right to information in criminal proceedings ([Directive 2012/13/EU](#)), right to interpretation and translation in criminal proceedings ([Directive 2010/64/EU](#)), right to a lawyer and to legal aid in criminal and EAW proceedings ([Directive 2013/48/EU](#) and [Directive \(EU\) 2016/1919](#)). They also strengthen certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings ([Directive \(EU\) 2016/343](#)) and set specific safeguards for children who are suspects or accused in criminal proceedings ([Directive \(EU\) 2016/800](#)).

tions of children. Article 12 of the Directive (“Specific treatment in the case of deprivation of liberty”) contains two sets of obligations. On the one hand, it requires EUMS to hold children in detention “separately from adults, unless it is considered to be in the child’s best interests not to do so” (12 (1)). On the other hand, it provides that EUMS “shall take appropriate measures” to ensure the preservation of the health of children detained, their right to education and training, their right to family life, their access to reintegration programmes and to ensure that their freedom of religion is respected (12 (5)). It is important to note that children’s right to legal information (Article 4 (1) (c)), extends to the rights set out in Article 12. To this extent, it is the only procedural rights directive with a significant impact on prisoners’ rights beyond criminal proceedings, although limited to children in detention.

A second important text in this category is Directive 2012/29/EU “on the rights, support and protection of victims of crime” (VRD), and in particular the revised version proposed by the European Commission.¹⁴ Indeed, the Commission’s proposal integrates elements from the EU Strategy on victims’ rights (2020-2025), which identified “victims of crimes committed in detention” as a “group of victims in a situation of particular vulnerability” and requiring therefore specific attention due to their limited access to justice.¹⁵ Consequently, the Commission’s proposal for a revised VRD contains provisions relating specifically to the situation of prisoners victims of crimes to guarantee that they receive adequate legal information, can “rely on facilitated crime reporting” and “have access to support and protection in accordance with their individual needs” (Article 26a (1) (b)). Furthermore, the report drafted by the European Parliament on the Commission’s proposal contains amendment that, if adopted, could have very beneficial effects on prisoners’ procedural rights.¹⁶ In particular, Amendment 78 aims to extend

14 European Commission, [Proposal for a Directive amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), COM(2023) 424 final, 12 July 2023. See in particular Recital (6), Article 5a, Article 22 (2) (d), Article 26a (1) (b). At the time of writing (September 2025), the revised VRD had yet not been adopted.

15 European Commission, [EU Strategy on victims' rights \(2020-2025\)](#), COM(2020) 258 final, 24 June 2020.

16 European Parliament, [Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#), 25 March 2024.

access to legal aid for victims of crimes, which is currently limited to victims of crimes “where they have the status of parties to criminal proceedings” (Article 13 VRD). By proposing to remove this limitation, the amendment, if adopted, would extend the scope of legal aid to administrative proceedings that prisoners often must pursue before initiating criminal proceedings.

Beyond these two examples of binding texts that partially impact on prisoners’ rights, other secondary law instruments could also be used in prison settings, but doing so requires creative legal work, the outcome of which is inherently unpredictable.¹⁷

THE GROWING IMPORTANCE OF PRISON ISSUES IN EU POLICY

The lack of EU intervention on prison issues, as illustrated by the examples above, is paradoxical in view of their growing importance in EU policy, and in particular on judicial cooperation in criminal matters. Although their impact “on mutual trust, and consequently on mutual recognition and judicial cooperation generally within the [EU]”¹⁸ has been considered by the European Commission at least since the early 2010s’, it is the case law of the Court of Justice of the EU (CJEU) on the European arrest warrant (EAW) that has given prison issues their current prominence in this area.

The Aranyosi and Căldăraru judgment issued in 2016 constituted a turning point.¹⁹ By ruling that EUMS must refuse to execute a EAW in case of “systemic or generalised” deficiencies in detention

17 See for instance the recent attempt, before the French Supreme Administrative Court (Conseil d’Etat), to bring prisoners working in prisons within the scope of Directive 2003/88/CE (Working Time Directive). The Conseil d’Etat eventually rejected the application, even though it had been [supported by the public rapporteur](#), who suggested lodging a request for a preliminary ruling to the CJEU. See Conseil d’Etat, no. [431775](#), ECLI:FR:CECHR:2020:431775.20201130, 30 November 2020; see also the [public rapporteur’s conclusions](#).

18 European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM/2011/0327 final, 14 June 2011.

19 Adriano Martufi, ‘Prison Conditions and Judicial Cooperation in the EU – What Future for the European Arrest Warrant?’, *European Criminal Law Review*, Vol. 11, 2021, pp. 188-210.

conditions, the Court admitted an exception to mutual trust between EUMS, understood as a presumption that national authorities comply with fundamental rights.²⁰ The EAW being “one of the oldest and most used” instrument in judicial cooperation in criminal matters, the impact of this new approach could not be underestimated.²¹ This position was subsequently confirmed by further CJEU judgments,²² and the ECtHR reinforced it by requiring EUMS to exercise due diligence when examining assurances provided by the requesting state to ensure that the surrender would not breach the rights of the requested person under the ECHR.²³

According to the figures provided by the Commission, between 2016 (year of publication of the Aranyosi and Căldăraru judgment) and 2022 (year of the latest available data), a total of 586 EAW were refused on fundamental rights grounds – a category that includes both refusals on grounds of poor detention condition and on grounds of risks to breach of the right to a fair trial.²⁴ Compared to the number of 115 344 EAW issued over the same period,²⁵ the quantitative impact of the introduction of a fundamental rights exception seems overall limited. However, as argued above, the matter is not purely quantitative: its importance is to be measured on its harmful effect on mutual trust and on the whole judicial cooperation architecture in the longer term.

Even more so that since 2016, the CJEU’s case law has evolved to include other aspects of detention conditions. In April 2023, the CJEU ruled that EUMS must not execute a EAW if a surrender would expose

²⁰ CJEU, joined cases [C-404/15](#) (Pál Aranyosi) and [C-659/15 PPU](#) (Robert Căldăraru), ECLI:EU:C:2016:198, 5 April 2016, see in particular § 88. The Court imposed a two-steps test to determine whether the EAW should be executed or refused: first, the existing of “systemic or generalised” deficiencies in detention conditions must be determined; second, it must be demonstrated that the requested person would be exposed to these deficient detention conditions.

²¹ A. Weyembergh and J. Burchett, *op. cit.*, p. 31.

²² See among others CJEU, [C-220/18 PPU](#) (ML), ECLI:EU:C:2018:589, 28 July 2018; CJEU, [C-128/18](#) (Dumitru-Tudor Dorobantu), ECLI:EU:C:2019:857, 15 October 2019.

²³ ECtHR, *Bivolaru and Moldovan v. France*, nos. [40324/16](#) and [12623/17](#), 25 March 2021.

²⁴ European Commission, [Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant](#). See the report for 2022 for figures covering 2020-2022, the report for 2019 for figures covering 2018-2019, and the report for 2017 for figures covering 2016-2017.

²⁵ European Commission, [Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2022](#), 29 May 2024, see “Annex II – Overview of the number of issued and executed EAWs 2005-2022”, pp. 47-50.

the requested person to “a real risk [...] of suffering a serious, rapid and irreversible decline in his or her state of health or a significant reduction in life expectancy”.²⁶ A few months later, the CJEU acknowledged that a refusal to execute a European Arrest Warrant (EAW) may also be justified in circumstances beyond those engaging the absolute prohibition of torture or inhuman or degrading treatment or punishment (Article 4 CFR).²⁷ In its GN judgment, it held that EUMS not execute a EAW where “systemic or generalised deficiencies in the conditions of detention of mothers of young children and of the care of those children in the issuing Member State” could lead to a violation of the right for respect of private and family life (Article 7 CFR) and the best interests of the child (specifically Article 24 (2) and (3) CFR).²⁸ More recently, in a case concerning the surrender procedure foreseen in the Trade and Cooperation Agreement between the EU and the United Kingdom, the CJEU had to examine whether changes to the parole regime for prisoners convicted of terrorist offences can be interpreted as a heavier penalty (Article 49 CFR), and set a number of conditions on the powers of review of the parole officers involved in the process.²⁹

A variety of issues may also emerge in future CJEU case law. On the one hand, domestic practices could eventually be brought before the

²⁶ CJEU, [C-699/21](#) (E.D.L.), ECLI:EU:C:2023:295, 18 April 2023, § 41. Importantly, in this case, the CJEU did not apply the two-step test established in *Aranyosi and Căldăraru*: specifically, it was not required to demonstrate that the identified deficiencies were of a structural nature. See Cécilia Rizcallah, ‘Arrêt ‘E.D.L.’: mandat d’arrêt européen et risque pour l’état de santé, la confiance mutuelle recadrée en faveur de la dignité humaine’, *Journal des Tribunaux - Droit Européen*, vol. 6, 2023, pp. 294-297.

²⁷ The absolute nature of this prohibition has constituted a central element of the Court’s reasoning in its case law, see *Dorobantu*: “As regards [...] the question as to whether the existence of a real risk that the person concerned will be subjected to inhuman or degrading treatment because detention conditions in the issuing Member State do not meet minimum requirements according to the [ECtHR] case-law may be weighed [...] against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition, it should be noted that the fact that the prohibition of inhuman or degrading treatment within the meaning of Article 4 of the Charter is absolute [...] precludes the fundamental right not to be subjected to such treatment from being in any way limited by such considerations.”

²⁸ CJEU, [C-261/22](#) (GN), ECLI:EU:C:2023:1017, 21 December 2023, § 59.

²⁹ CJEU, [C-743/24](#) (*Alchaster II*), ECLI:EU:C:2025:230, 3 April 2025. On the role of the parole commissioners, see especially § 45: “it is not apparent from the documents before the Court that the Parole Commissioners have a purely discretionary power that goes beyond the discretion relating to the assessment, inter alia, of the dangerousness of the sentenced person after that person has served a substantial part of his or her sentence in custody. In particular, it is not apparent from those documents that those commissioners could rely on criminal policy considerations independent of that assessment.”

Court and may compel it to address new questions – such as the issue of informal prisoner hierarchy.³⁰ On the other hand, the tension between the increasing importance attached to prisoners’ reintegration and the “new phase in European penal policy” identified by the Council of Europe,³¹ characterised by longer prison sentences that further hinder reintegration, may influence future EAW proceedings.³²

This dynamism of the CJEU’s case law, and its potential future evolution, indicate that the operation of the EAW requires EU action to restore mutual trust between EUMS.

2 **TWO WAYS FOR AN EU INTERVENTION IN THE AREA OF PRISONS**

THE UNCERTAIN PROPOSAL OF BINDING EU DETENTION CONDITION STANDARDS

The priority direction explored by the EU to address the harmful impact of poor detention conditions on judicial cooperation in criminal matters has been that of advocating for the establishment of EU detention conditions standards. This is well reflected in the main documents issued on this matter, from the 2011 Green

³⁰ See for instance the consistent line of decisions of the Amsterdam District Court, which was recently reaffirmed in its 19 March 2025 judgment refusing to execute a EAW issued by Latvia. In that case, the court found, inter alia, that the requested person could be exposed to inhuman or degrading treatment due to the informal prisoner hierarchy (the so-called “caste system”). See *Rechtbank Amsterdam*, no. [13-349098-24](#), ECLI:NL:RBAMS:2025:1756, 19 March 2025, especially the conclusion where the Court states: “the information regarding the requested person does not sufficiently guarantee that he will be protected against violence and other negative consequences of the caste system.” (own translation).

³¹ Marcelo F. Aebi and Edoardo Cocco, *Prisons and Prisoners in Europe 2024: Key Findings of the SPACE I survey*, 16 July 2025, p. 27.

³² On the principle of prisoners’ reintegration, see however this recent CJEU judgment declaring that this objective, in the operation of the EAW is secondary to the objective of combating impunity: CJEU, [C-305/22](#) (C.J.), ECLI:EU:C:2025:665, 4 September 2025, §§ 62-63. On the length of sentences, see this case pending before the CJEU, which brings the question of whether a EAW can be rejected where the requested person has been sentenced in the issuing state to a “disproportionate minimum term of imprisonment”: CJEU, [C-583/24](#) (Tagu), Request for a preliminary ruling from the *rechtbank Amsterdam* (Netherlands) lodged on 5 September 2024.

Paper³³ to the Recommendation adopted ten years later (2022). It is also the main proposal put forward in this area by the Commission in the frame of the High-Level Forum on the future of EU criminal justice. Similarly, this has been a constant recommendation of the European Parliament in its various resolutions (see above 1.1) and the CJEU itself suggested that it could be a proper solution, when declaring that “in the absence, currently, of minimum standards in that respect under EU law” it had to rely on ECtHR case law.³⁴

However, as mentioned above, EUMS are strongly opposed to any EU intervention in this area, arguing that the European Commission lacks a legal basis in this respect. Independently of the question of the legal basis (discussed below in 2.2.), on which the Commission and the EUMS seem to disagree, the position of this report is that the definition of binding EU detention conditions standards is unable to effectively solve the issue it aims to address.

First, as illustrated by the 2022 Recommendation, EU standards on detention conditions risk duplicating existing and well-developed CoE standards, thereby limiting their added value. Second, and more importantly, the mere definition of standards is insufficient to bring about lasting improvements in material detention conditions, which depend on broader developments in prison and criminal justice policies.³⁵ The experience of the CoE illustrates this point: despite decades of standard-setting through treaties, case law, and soft law instruments, prison overcrowding persists in 11 EU Member States, and in five of them it has been identified as a structural problem requiring reforms “embedded in a rational and coherent penal policy, to identify and address [its] different root causes”.³⁶ Third, and for this reason, the likely consequence

33 European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), op. cit. See among other quotes: “Future European Union action in [the] field [of detention condition] could play a part in ensuring equivalent prison standards for the proper operation of the mutual recognition instruments”.

34 CJEU, *Dorobantu*, § 71 (emphasis added).

35 Marcelo F. Aebi and Edoardo Cocco, op. cit., p. 3: “[...] beyond crime rates or admission flows, sentencing practices—particularly the length of custodial sanctions—play a central role in shaping prison populations over time”.

36 Committee of Ministers of the Council of Europe, Decision in respect of the execution of the judgment *Petrescu v. Portugal*, no. 23190/17: [CM/Del/Dec\(2024\)1507/H46-23](#), 19 September 2024. On prison overcrowding in EUMS, see Marcelo F. Aebi and Edoardo Cocco, op. cit., p. 17.

of defining EU standards would be an observable implementation gap, potentially followed by infringement proceedings, the effectiveness of which remains uncertain – with damaging implications for the authority of EU law.

ADVANCING PRISONERS’ ACCESS TO JUSTICE

By contrast, reinforcing prisoners’ access to justice through EU binding legal instruments that would secure their access to legal information, a lawyer, legal aid and translation and interpretation, would have several advantages.

First, it would offer significant added value to the ECtHR’s normative framework, which provides only limited safeguards concerning prisoners’ access to a lawyer (see Chapter on Council of Europe standards), and would thus serve as a complementary legal framework to that of the CoE.³⁷ In other words, the strengthening of prisoners’ procedural rights would enhance their access to justice and therefore the enforcement of existing standards by national courts – thereby contributing to restore mutual trust between EUMS.³⁸

A key measure in this regard would be to strengthen prisoners’ access to legal aid, which is essential to give full effect to their rights to legal information, legal assistance, and translation and interpretation. As shown by a previous study, lawyers play a crucial role in ensuring prisoners access to justice, given that the complexity of available remedies, combined with the specificities of the prison environment and the socio-demographic characteristics of the prison population (who often lack legal literacy), constitutes a

³⁷ Anne Weyembergh and Julia Burchett, *op. cit.*, p. 104: “it would be advisable to seek a complementarity with existing standards adopted at CoE level and thus avoid the risk of double standards”.

³⁸ The development of prisoners’ capacity to engage in prison litigation is also aligned with the EU strategy to strengthen the application of the CFR, see European Commission, [Strategy to strengthen the application of the Charter of Fundamental Rights in the EU](#), COM(2020) 711 final, 2 December 2020: “When other routes, such as prevention and dialogue, prove unsuccessful, effective judicial protection also includes strategic litigation, which contributes to a more coherent implementation and application of EU law and to the enforcement of people’s rights”.

major obstacle to their effective access to a judge.³⁹ Yet, access to justice is largely determined by “the cost of litigation”,⁴⁰ consequently prisoners who cannot afford a lawyer are often unable, in practice, to effectively seek justice. Establishing clear rules on prisoners’ entitlement to legal aid would thus enhance the financial accessibility of justice systems and, in turn, contribute positively to their overall quality.⁴¹

In a longer-term perspective, the expansion of prison litigation can also set in motion a positive dynamic for prison reform. Enhanced judicial scrutiny of prisons fosters the development of prison case law, whose interpretation in legal doctrine contributes to the autonomisation of prison law. This process moves the field beyond its traditionally marginal status and increases the visibility of detention conditions and their underlying causes in public debate.⁴²

Second, such an approach could also be regarded more favourably by EUMS than an EU intervention into material detention conditions. It would be aligned with the mutual recognition approach, which “[u]nlike harmonisation or approximation [...] only requires the adoption of limited procedural rules that allow the interaction between judicial actors operating under different (and potentially divergent) sets of domestic norms”.⁴³

39 European Prison Litigation Network (EPLN), [Bringing justice into prisons: for a common European approach. White paper on access to justice for pre-trial detainees](#), 2019, pp. 40. Prisoners often belong to “marginalised and [...] most socially and economically disadvantaged” communities in a society (Henrique Carvalho and Anastasia Chamberlen, *Questioning Punishment*, Routledge, Abingdon, 2023, p. 49). Furthermore, people with mental health disorders make up one-third of the European prison population (World Health Organisation, “[One-third of people in prison in Europe suffer from mental health disorders](#)”, 15 February 2023), and, on average, a quarter of the prison population is detained in a country of which they are not nationals, suggesting that they may lack the linguistic skills to participate in legal proceedings independently (Marcelo F. Aebi and Edoardo Cocco, *op. cit.*, p. 11).

40 European Commission, [The 2025 EU Justice Scoreboard](#), 1 July 2025, p. 20: “The cost of litigation is a key factor that determines access to justice” and legal aid “allows access to justice to people who would not otherwise be able to bear or advance the costs of litigation”.

41 European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems CEPEJ Evaluation Report, Evaluation Cycle, PART I: General Analyses, 2024: LINK*, p. 87: “[q]uality justice must be accessible to its users”, and specifically concerning financial accessibility: “Crucial to individuals being able to pursue legal action is the ability to pay the associated costs, or the availability of free of charge state-based assistance and advice.”

42 EPLN, *op. cit.*, p. 46, with examples from Belgium and France.

43 Adriano Martufi, *op. cit.*, p. 189.

Such proposal would also benefit from the precedent of the six procedural rights directives. One of the aims sought by the adoption of those directives was indeed to harmonise the implementation of CoE standards (here in the area of fair trial) through the reinforcement of the procedural rights of suspect and accused persons.⁴⁴ Similarly, providing binding EU rules on the procedural rights of prisoners would support the harmonisation of the implementation of CoE standards that are unevenly implemented.

It must be noted that such an initiative would not establish entirely new standards but would rather support the emerging consensus among EU Member States on recognising prisoners' right to legal assistance under national legal aid schemes when exercising their right to complain, while also addressing the significant disparities that persist between national models regarding the scope of the rights granted.⁴⁵

Third, it can reasonably be argued that Article 82 (2) (b) TFEU, which enables the EU to establish minimum rules concerning "the rights of individuals in criminal procedure", constitutes a valid legal basis for such an initiative. Against the argument that this provision should be read in a restrictive manner, this report agrees with the view that the notion of "criminal procedure" referred to in this article should be understood as an autonomous concept of EU law that encompasses both "criminal proceedings" (which end with the final judgment, as defined by the procedural rights directives) and the execution of sentences.⁴⁶ Similarly, adequate conditions of detention (from sufficient personal space to the protection of prisoners' health as defined by existing standards) should be framed as "individual rights" (rather than impersonal standards), whose protection

⁴⁴ Council of the European Union, [Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#), 2009/C 295/01, 30 November 2009: "there is room for further action on the part of the European Union to ensure full implementation and respect of [ECHR] standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards".

⁴⁵ EPLN, op. cit., p. 41. The report identifies a broad consensus in this respect among the nine countries studied (Belgium, Bulgaria, the Czech Republic, France, Germany, Italy, the Netherlands, Poland and Spain).

⁴⁶ See Leandro Mancano, 'Storming the Bastille: detention conditions, the right to liberty and the case for approximation in EU law', *Common Market Law Review*, vol. 56, 2019. For the opposing view, see Irene Wiczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)(b) TFEU) fit for Purpose?', *European Journal on Criminal Policy and research*, 2022, pp. 465-481. See also Anne Weyembergh and Julia Burchett, op. cit., p. 73 for a short discussion on this scholarly debate.

requires justiciability. In this respect, strengthening prisoners' access to justice, by guaranteeing their access to a lawyer, would strengthen the implementation of these individual rights.⁴⁷

⁴⁷ Leandro Mancano, *op. cit.*

Chapter 3

The United Nations'
Standards on
Pre-Trial Detention
and Access to Justice

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This chapter maps the United Nations' standards pertaining to prison litigation and distils the UN norms that shape both the substance of such claims and the legal assistance and legal aid that make them effective in practice. For the purposes of this chapter, "legal aid" refers to the provision of legal advice, assistance and representation by the State (or through its established mechanisms) free of charge, while "legal assistance" denotes the guarantee that persons deprived of liberty or charged with offences have access to counsel or legal advisers of their own choosing from the earliest stages of proceedings, including the right to effective and confidential communication with them. Its focus is on the UN framework governing pre-trial detention in general, as well as on the mechanisms that enable pre-trial detainees to initiate, pursue and obtain remedies for violations while in custody. Anchored in that scope, the chapter unfolds along five lines. First, it sets out the UN's general approach to pre-trial detention. Second, it consolidates the right to an effective remedy for persons in detention, drawing together treaty obligations and soft-law standards. Third, it clarifies how fair-trial guarantees operate in detention-related proceedings. Fourth, it sets out and details the UN standards on legal aid and finally those concerning the right to legal assistance.

1

CONTEXT: THE UN'S GENERAL APPROACH TO PRE-TRIAL DETENTION

Shortly after its founding, the United Nations began to promulgate international norms for the protection of persons accused of crimes and/or deprived of liberty by their Government. The UN system overall promotes a general rule against pretrial detention. Article 9(3) of the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'), sets out that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement [sic]." The UN Human Rights Committee has interpreted this provision to require an individualised determination of whether less restrictive measures are available to ensure a criminal defendant's appearance at trial.¹ The UN Human Rights Committee elaborates:

“ Detention pending trial must be based on an individualised determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as ‘public security’.² ”

If the pretrial detention period has reached or exceeded the longest sentence a person might receive for their charges, they must be released.³ The UN Working Group on Arbitrary Detention (hereinafter 'WGAD') has adopted this stance in its jurisprudence and continuously emphasised that pretrial detention must be an individualised

1 Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35 para 38.

2 *ibid.*

3 *ibid.*

exception rather than a default mechanism.⁴ The WGAD has also expressed concern over domestic systems that entrench pretrial detention.⁵

Moreover, two inter-related principles run throughout the UN framework on pre-trial detention: first, the principle that pre-trial detainees should be treated better than convicted prisoners, grounded in the presumption of innocence and the requirement that their detention not take on a punitive character; and second, that if they are detained rather than released pending trial, they must be separated from convicted persons and provided with their own distinct regime.⁶ The Human Rights Committee has elaborated on this⁷ and held that article 10(2)(a) of the Covenant requires that convicted and unconvicted persons be kept in separate quarters, but need not be kept in separate buildings.⁸

Another consistent concern across the UN system is the disproportionate use of pre-trial detention against economically and socially marginalised groups. The WGAD has observed that pre-trial detention “disparately impacts on vulnerable groups, such as the poor, persons living with mental health problems, indigenous people, and racial minorities.”⁹ During its visit to Australia, it noted that judges often assess an accused’s “roots in the community” when determining the likelihood of attendance at future hearings, a criterion that, when applied to marginalised people, frequently results in denial of bail.¹⁰ Similarly, on its visit to Germany, the WGAD highlighted the disproportionate number of foreigners in pre-trial detention, since “one of the deciding factors [in determining whether to grant bail] is whether the detainee has any links, including friends and family, to hold him or her in the city or country and hence prevent him or her from

4 Gloria Macapagal-Arroyo v. The Philippines, WGAD Opinion No. 24/2015, Adopted Sept. 2, 2015, §37; Teymur Akhmedov v. Kazakhstan, WGAD Opinion No. 62/2017, Adopted Aug. 25, 2017, §41.

5 Report of Working Group on Arbitrary Detention: Visit to Viet Nam, Commission on Human Rights, E/CN.4/1995/31/Add.4, Dec. 21, 1994, §50.

6 Human Rights Library, Human Rights and Pre-trial Detention: [PDF](#) ICCPR, Art 10(2)(a); Standard Minimum Rules, Rule A.

7 General Comment 9(2); Larry James Pinkney v. Canada (27/1978) (29 October 1981), Selected Decisions, vol. 1, p. 95, at p. 100, §30.

8 *ibid.*

9 Report of the Working Group on Arbitrary Detention: Mission to Canada, Commission on Human Rights, E/CN.4/2006/7/Add.2, Dec. 5, 2005, §63.

10 *ibid.*

jumping pretrial bail or release.”¹¹ The WGAD explained that this logic effectively works against foreigners, as courts can easily argue that they lack ties to the country and may abscond, thereby contributing to their overrepresentation in pre-trial detention.¹²

2 THE RIGHT TO AN EFFECTIVE REMEDY

The right to an effective remedy is a cornerstone of international human rights law and extends fully to persons in detention. It guarantees that individuals whose rights have been violated can access procedures capable of addressing those violations, providing redress, and preventing recurrence. Within the UN system, this right is articulated across a range of binding treaties and soft-law standards.

The international legal basis for the right to a remedy and reparation is firmly enshrined in the corpus of international human rights instruments now widely accepted by States. Article 8 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The International Covenant on Civil and Political Rights (ICCPR) strengthens this guarantee by setting out a binding obligation in Article 2(3), which requires States to ensure that any person whose rights under the Covenant have been violated has access to an effective remedy, even where the violation has been committed by State officials, and that competent authorities enforce such remedies when granted. The ICCPR further specifies in Article 9(5) that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation, while Article 14(6) provides for compensation in cases of wrongful conviction. Comparable protections are found in other core treaties: Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination guarantees effective

¹¹ Report of the Working Group on Arbitrary Detention: Mission to Germany, Human Rights Council, A/HRC/19/57/Add.3, Feb. 23, 2012, §§43, 63.

¹² *ibid.*

protection and remedies against acts of racial discrimination; and Article 39 of the Convention on the Rights of the Child requires measures of recovery and reintegration for child victims.

Overall, several key UN soft-law instruments consolidate the right to a remedy for detainees. The Mandela Rules (Rules 56–57) guarantee prisoners the right to make complaints without risk of reprisal, and to have such complaints examined promptly, impartially and with the possibility of appeal. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides in Principle 33 that damage caused by acts or omissions of officials contrary to its provisions must be compensated according to domestic liability rules. Most comprehensively, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus by the General Assembly in 2005, affirm that victims are entitled to remedies including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The significance of this instrument lies not in introducing new rights, but in consolidating what the international community had already recognised as existing rights. Although not legally binding, the Basic Principles have become a milestone in international law: they have catalysed a clearer understanding of the right to reparation, guided action at both domestic and international level, and are increasingly invoked in the jurisprudence of human rights bodies and courts.¹³

The significance of the Basic Principles and Guidelines lies in the way they function as both a consolidation and a practical roadmap. Although formally a non-binding resolution, the General Assembly made clear that the instrument restates existing law rather than creating new rights, thereby lending it considerable normative weight. The drafting process further underlined this approach: the Chairperson-Rapporteur noted that the use of “shall” marked binding norms already in force, while “should” denoted recommended practice. By categorising reparation into restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, the Guidelines provided a taxonomy that has since been widely adopted by international and regional human rights bodies.

13 UN General Assembly, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff’ (14 October 2014) UN Doc A/69/518: [LINK](#).

SCOPE OF THE RIGHT

At its core, the right to a remedy encompasses access to justice, adequate redress, and measures to prevent recurrence of violations. It requires that victims be able to bring claims before competent, independent and impartial authorities; that such claims are examined fairly, promptly and effectively; and that remedies granted are enforced in practice. Reparation under international standards is understood broadly, extending beyond financial compensation to include restitution of liberty, employment or property; medical and psychological care; rehabilitation and reintegration; satisfaction through public acknowledgment or apology; and guarantees of non-repetition through legal and institutional reform. In this way, the right functions both as an individual entitlement and as a structural obligation on States to ensure accountability, restore rights, and prevent further harm.

As the Human Rights Committee has emphasised in its General Comment No. 31, the duty of States to make reparations to individuals whose rights under the ICCPR have been violated is an integral component of the obligation to provide effective domestic remedies: “Without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy ... is not discharged.” This approach reflects the growing body of jurisprudence across human rights bodies, which consistently affirms that effective remedies constitute a right of victims rather than merely a duty incumbent upon States.

In detention contexts, where detainees have been subjected to torture, ill-treatment, or other serious violations, remedies must include not only sanctions against responsible officials, such as suspension, dismissal, loss of benefits, or criminal prosecution, but also measures tailored to the victim’s situation. For instance, a person who has suffered treatment more severe than any lawful sanction would have permitted must be entitled to remedies up to and including immediate release.¹⁴ Article 14 of the CAT obliges States to ensure that victims of torture obtain redress, including an enforceable right to fair and adequate compensation as well as

¹⁴ United Nations, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (14 October 2014) UN Doc A/69/518: [LINK](#).

rehabilitation. This establishes not only a duty to punish perpetrators but also a positive obligation to assist and restore victims. The Committee against Torture has clarified that Article 14 must be interpreted in light of the **Basic Principles and Guidelines on the Right to a Remedy and Reparation**, which identify restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as essential components of reparation. Procedurally, States are required to establish suitable institutions, judicial, administrative, constitutional or specialised bodies, that enable victims to obtain redress, with the critical guarantee that victims themselves are entitled to initiate such proceedings.¹⁵

FAIR TRIAL GUARANTEES

The UN framework recognises that the right to a fair trial applies not only to the determination of criminal charges but also to procedures concerning issues in detention. Under Article 14 of the ICCPR, there is a structural distinction: paragraphs (2) to (5) and (7) are expressly limited to persons “charged with a criminal offence” and enshrine guarantees such as the presumption of innocence and protection against double jeopardy, which are not transferable to non-criminal proceedings. By contrast, Article 14(1) sets out the overarching right to a fair and public hearing by a competent, independent and impartial tribunal, which is applicable to both criminal and non-criminal proceedings.¹⁶

By contrast, Article 14(1) sets out the overarching right to a fair and public hearing by a competent, independent and impartial tribunal, which applies in both criminal and non-criminal proceedings.

The concept of the determination of rights and obligations “in a suit at law” (*de caractère civil/de carácter civil*) is complex, as emphasised by the UN Human Rights Committee in its General Comments and

¹⁵ UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak’ (15 January 2007) UN Doc A/HRC/4/33: [LINK](#).

¹⁶ Counter-Terrorism Implementation Task Force, ‘Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism’ (United Nations, October 2014) <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>, §16; UN Human Rights Committee, General Comment No. 32 (2007), §27 (right to trial without undue delay).

jurisprudence.¹⁷ It is formulated differently across the equally authentic language versions of the Covenant (Article 53), and the travaux préparatoires do not resolve these discrepancies. The Committee has therefore clarified that the notion is defined by the nature of the right in question, rather than by the status of the parties or the type of forum before which the matter is heard.¹⁸ It encompasses, in particular, (a) judicial procedures aimed at determining rights and obligations and (b) equivalent administrative-law proceedings.

The Committee has further affirmed through its case law that the right extends fully to civil proceedings, and that the principle of equality of arms applies therein. This requires, *inter alia*, that each party be afforded an opportunity to contest the arguments and evidence advanced by the other.¹⁹ The same procedural rights must be granted to all parties unless distinctions are grounded in law and justified on objective and reasonable grounds, without resulting in disadvantage or unfairness to any party.²⁰

The door is, therefore, open for UN bodies to apply core fair trial guarantees—such as equality of arms, impartial adjudication and the right to be heard—to proceedings concerning detention, including the enforcement of rights in detention through internal and external proceedings. Academic and civil society commentary underscores that while the full suite of fair trial rights attaches to the determination of guilt, many of the procedural safeguards contained in Article 14(1) apply in post-conviction contexts, ensuring that the treatment and continued detention of individuals remain subject to judicial oversight consistent with the principle of fairness.²¹

17 UN Human Rights Committee, General Comment No. 32 (2007), §16 (right to trial without undue delay).

18 Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.

19 Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

20 Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4.

21 See, e.g., Paul M Taylor, 'Article 14: Fair Trial Rights' in *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press 2020) which states that Article 14 paragraph 1 is applicable to "the determination of any ... rights and obligations in a suit at law".

3 THE RIGHT TO LEGAL AID

Under international law the right to legal aid is recognised as a right in itself and an essential precondition for the rule of law and the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy.²² It is firmly embedded in both binding treaties and soft-law standards.

The Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, and the right to a fair and public hearing, forming the foundation for later treaty provisions.²³ The International Covenant on Civil and Political Rights, in particular article 14, further guarantees the right of anyone charged with a criminal offence to defend themselves in person or through legal assistance of their own choosing, or to have counsel assigned where the interests of justice so require.²⁴ Complementary standards reinforce these rights: the Standard Minimum Rules for the Treatment of Prisoners²⁵ recognise the right of untried prisoners to receive visits from their legal advisers; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²⁶ affirms the right of detainees to defend themselves or to be assisted by counsel; and the Basic Principles on the Role of Lawyers²⁷ establish that persons without sufficient means are entitled to free legal assistance by competent lawyers in the interests of justice. These guarantees have been further echoed in political declarations and resolutions, including the Bangkok Declaration,²⁸ the Salvador Declaration,²⁹ and Economic and Social Council

²² UN Human Rights Council, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul' (15 March 2013) UN Doc A/HRC/23/43: [LINK](#).

²³ Resolution 217 A (III).

²⁴ See resolution 2200 A (XXI).

²⁵ Human Rights: A Compilation of International Instruments, Volume I (First Part), Universal Instruments (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, PART I)), sect. J, No. 34.

²⁶ Resolution 43/173.

²⁷ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3.

²⁸ Resolution 60/177.

²⁹ Resolution 65/230.

resolution 2007/24,³⁰ all of which stress the centrality of legal aid in reducing pretrial detention and strengthening access to justice.

There are four dedicated texts at the UN level on legal aid. The main standard is the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted in 2013, which remains the most comprehensive soft-law framework in this field. The scope of most of these instruments is confined to criminal proceedings. The exception is the first UN document on the subject, General Assembly Resolution 2449 (XXIII) on “Legal aid”, adopted in 1968. Broader in scope than later instruments, this resolution recommends the development of comprehensive systems of legal aid to protect human rights and fundamental freedoms generally, while recalling article 14 of the International Covenant on Civil and Political Rights, without limiting itself to criminal proceedings.³¹

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013)³² represent the most comprehensive legal instrument to date for the development and strengthening of legal aid systems at the national level.³³ They provide the most detailed international framework in the field of legal aid. They affirm that legal aid is a fundamental duty of States and a cornerstone of a fair and efficient justice system, requiring entrenchment at the highest legal level, adequate resources, and tailored provision for vulnerable groups. Effective implementation depends on the independence and protection of providers, respect for confidentiality, and safeguards for competence and accountability through training, accreditation, and oversight.

³⁰ Resolution 2007/24.

³¹ Alongside these texts, the UN has also elaborated a Model Law on Legal Aid in Criminal Justice Systems, with detailed commentaries prepared by UNODC to guide states in translating principles into legislation, and the Commission on Crime Prevention and Criminal Justice adopted Resolution 25/2 on “Promoting Legal Aid, Including Through a Network of Legal Aid Providers” in 2016, encouraging cooperation and exchange of good practices to strengthen national systems.

³² General Assembly resolution 67/187.

³³ UN Human Rights Council, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul’ (15 March 2013) UN Doc A/HRC/23/43: [LINK](#).

Resolution 25/2, ‘Promoting legal aid, including through a network of legal aid providers’,³⁴ builds on the 2013 Guidelines and situates legal aid within the broader framework of access to justice and the Sustainable Development Goals, particularly SDG 16. It urges States to strengthen legal aid through legislation and policy, with tailored provision for vulnerable groups, diversification of delivery models, and the development of networks to share good practices and expand cooperation. Emphasising civil society participation and public awareness, the Resolution frames legal aid as a public good and a structural guarantee of fair trial rights, not a discretionary service.

Other human rights treaty bodies have also mentioned the right to have access to legal aid in their general comments or general recommendations. In its general comment No. 7 (1997), the Committee on Economic, Social and Cultural Rights included legal aid in the list of procedural guarantees that should be provided to persons who have been subject to forced eviction and seek redress from the courts.³⁵

In its general recommendation XXXI (2005), the Committee on the Elimination of Racial Discrimination recommended that States parties to the Convention should (a) supply legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights; (b) promote, in the areas where such persons live, institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation; and (c) expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organisations specialising in protecting the rights of marginalised communities and in the prevention of discrimination.³⁶ In its general recommendation XXIX (2002), the Committee also recommended that States take the necessary steps to secure equal access to the justice system for all members of descent-based communities, “including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights”.³⁷

³⁴ Resolution 25/2.

³⁵ Official Records of the Economic and Social Council, 1998, Supplement No. 2 (E/1998/22), annex IV, §15.

³⁶ Official Records of the General Assembly, Sixtieth Session, Supplement No. 18 (A/60/18), general recommendation XXXI, §§ 7-9.

³⁷ *Ibid.*, Fifty-seventh Session, Supplement No. 18 (A/HRC/57/18), general recommendation XXIX.

In its general comment No. 3 (2012), the Committee against Torture stated that States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress, and that the failure to provide sufficient legal aid and protection measures for victims and witnesses impede the enjoyment of the right to redress and prevent effective implementation of article 14.³⁸

SCOPE OF LEGAL AID

Most UN standards on legal aid focus narrowly on criminal proceedings and do not explicitly extend their scope to prison litigation—that is, access to justice for those challenging prison conditions or ill-treatment. The text of the Principles and Guidelines themselves already reflects a relatively expansive understanding of legal aid. Beyond legal representation, they require States to ensure access to legal information and legal education, including through public legal awareness programmes and materials adapted to persons deprived of liberty.³⁹ They further provide that legal aid may be delivered through a variety of modalities—including public defender offices, specialist units, bar association schemes, law school clinics, paralegal services and cooperation with NGOs—and require that these be supported through dedicated legal aid funds.⁴⁰ This baseline, already embedded in the Guidelines, has been interpreted by the UN Special Rapporteur as supporting an even broader conception of legal aid that encompasses judicial and extrajudicial procedures relating to the determination of rights and obligations.⁴¹ On the basis that the aim of legal aid is to remove obstacles that restrict access to justice by assisting those unable to afford legal representation, she has argued that its definition should be as broad as possible, extending beyond criminal cases to encompass any judicial or extrajudicial procedure aimed at determining rights and obligations.⁴²

This expansive approach is supported by the position of treaty bodies.

³⁸ CAT/C/GC/3, §§30-38.

³⁹ Guideline 44(e).

⁴⁰ Guideline 47(a)–(d).

⁴¹ UN Human Rights Council, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul' (15 March 2013) UN Doc A/HRC/23/43: [LINK](#).

⁴² *Ibid.*

In its general comment No. 32 (2007), the Human Rights Committee stressed that “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,” and encouraged States to provide free legal aid not only in criminal proceedings but also in other cases where individuals lack sufficient means. In certain circumstances, the Committee has considered that States may even be obliged to do so—for instance, where a person sentenced to death seeks constitutional review of irregularities in a criminal trial but lacks the means to pay for legal assistance (para. 10). In line with this jurisprudence, the Special Rapporteur has further argued that the notion of beneficiaries of legal aid should extend to any person who comes into contact with the law and lacks the means to pay for counsel, including (a) persons whose rights or freedoms have been violated by state action or omission, and (b) those engaged in judicial or extrajudicial procedures aimed at determining rights and obligations “in a suit at law.”

Definition of Legal Aid

Human rights treaties do not contain an agreed definition of legal aid. The only internationally recognised definition is found in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which construes legal aid broadly to include legal advice, assistance and representation for victims and for arrested, prosecuted and detained persons in the criminal justice process, provided free of charge to those without means. The definition also encompasses legal education, access to legal information, and services delivered through alternative dispute resolution mechanisms and restorative justice processes.⁴³

⁴³ General Assembly resolution 67/187, §8.

LEGISLATIVE REGIME

Since access to legal aid constitutes an essential procedural guarantee for the effective exercise of a number of human rights, it must be legally guaranteed in national systems at the highest possible level, ideally through constitutional recognition.⁴⁴ Legislation on legal aid should therefore: (a) contain a broad definition of legal aid; (b) set out clear eligibility criteria; (c) ensure that effective assistance is available at all stages of the justice process, including pretrial proceedings and in any judicial or extrajudicial procedure aimed at determining rights and obligations; (d) guarantee access to legal aid for victims of human rights violations to secure their right to an effective remedy; (e) ensure public information on the availability and scope of legal aid, disseminated through appropriate channels including the media, the Internet, and facilities where persons are detained; and (f) establish minimum qualifications and training for professionals and paralegals working within the system.⁴⁵

The structure of legal aid models varies according to scope, funding, and the characteristics of national justice systems. Common models include public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations and paralegals. Although States bear the primary responsibility to provide legal aid, a range of stakeholders may contribute to its delivery. States are expected to identify the model most suited to their legal system and resources, with the aim of maximising access to free legal aid for all within their jurisdiction.

National legislation must also include specific financial and substantive criteria for eligibility, together with a right of appeal for persons denied legal aid.⁴⁶ In criminal cases, urgent preliminary assistance should be provided to persons held at police stations or detention centres while eligibility is being determined. The burden is on the accused to show lack of means, though only on the basis of “some indications” rather than proof beyond doubt; courts retain discretion to decide whether aid should be granted and whether the interests

⁴⁴ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 1.

⁴⁵ UN Human Rights Council, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaut' (15 March 2013) UN Doc A/HRC/23/43: [LINK](#).

⁴⁶ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guideline 1.

of justice require it.⁴⁷ In civil cases, eligibility criteria are generally more complex, combining financial thresholds with considerations of cost-benefit, likely prospects of success, and the potential gain or loss for the applicant.⁴⁸

MERIT TESTING

Where means testing is applied, eligibility assessments must be accurate and sensitive to household dynamics, so as not to disadvantage individuals with restricted access to shared resources, such as women and older persons. Alongside financial criteria, many legal aid schemes impose substantive or “merit” criteria. While such tests, often based on the likelihood of success of a case, particularly in civil matters, can help ensure resources are used effectively, they must not be so restrictive as to deprive individuals of their right to legal assistance even in weak cases. Importantly, any person denied legal aid under national eligibility rules should have the right to appeal the decision of the court.

TRAINING OF LEGAL AID PROVIDERS

The quality of legal aid depends primarily on the qualifications and training of those who provide it. National legislation should therefore require that professionals working within the legal aid system possess qualifications and training appropriate to the services they deliver.⁴⁹ Where shortages of qualified lawyers exist, legal aid provision may also involve non-lawyers or paralegals. In such cases, legislation must ensure that paralegals meet minimum quality standards, receive appropriate training, and operate under the supervision of a qualified lawyer. It should also clearly distinguish between the types

⁴⁷ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 317; The European Court of Human Rights specified 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 offence, the complexity of the case and the ability of the defendant to provide his or her own representation.

⁴⁸ National Legal Aid and Defender Association, *International Legal Aid and Defender System Development Manual: Designing and Implementing Legal Assistance Programs for the Indigent in Developing Countries*, November 2010 (available from www.nlada.org), p. 44.

⁴⁹ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guideline 13.

of legal services that may be provided by paralegals and those that require the expertise of a qualified legal professional.

INFORMATION ON LEGAL AID

Access to information on the right to legal aid, its scope, the services available, and the procedures for obtaining it is a necessary precondition for the effective exercise of this right. Such information should be made available to the general public through appropriate means, including the media and the Internet, and must be accessible in all facilities where persons are detained, including police stations, detention centres and prisons. Officials such as police officers, prosecutors, lawyers and judges should actively inform unrepresented persons of their right to legal aid and of other procedural safeguards. In addition, foreign detainees and prisoners must be informed, in a language they understand, of their right to request contact with their consular authorities without delay.⁵⁰

FUNDING

Regardless of the model adopted, States must allocate sufficient budgetary resources to ensure that prompt and effective legal aid services are available to all individuals within their jurisdiction who cannot otherwise afford the costs of legal proceedings. Funding should cover criminal, civil and administrative cases. While some States operate separate systems for criminal and civil legal aid,⁵¹ and others use merged schemes,⁵² it is essential that civil and administrative legal aid are not undermined in single-budget systems. The United Nations has encouraged the establishment of dedicated “impact litigation” funds for civil cases—targeting matters likely to set precedents benefiting the wider population—as a cost-effective means of maximising limited resources.⁵³

⁵⁰ *ibid.*, guideline 2.

⁵¹ For example, see the Criminal Defence Service and the Community Legal Service in England and Wales.

⁵² See for example the Legal Aid Board in South Africa (see [LINK](#)).

⁵³ See for example the Special Impact Litigation Fund set up by the Board of South Africa in 2001 to support claims that have “a reasonable chance of success where a positive outcome will set a precedent that will benefit South Africa’s indigent population”. Legal Aid Board Annual Report, 2002.

Guideline 12 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems further recommends that States establish dedicated legal aid funds to support a variety of schemes, including public defender offices, bar associations, university clinics, NGOs and paralegal organisations. States are also encouraged to identify sustainable fiscal mechanisms, such as earmarking a percentage of the justice budget for legal aid or allocating proceeds recovered from criminal activities to cover legal aid for victims.

LEGAL AID FOR VULNERABLE AND MARGINALISED GROUPS

The right to equality before the courts and tribunals, as enshrined in article 14(1) of the International Covenant on Civil and Political Rights, guarantees equal access to the administration of justice. This provision not only obliges States to prohibit any distinction in access to courts and tribunals that is not based on law and cannot be justified on objective and reasonable grounds, but also requires them to take positive measures to ensure that no individual is deprived of the ability to claim justice.

The Special Rapporteur on the independence of judges and lawyers has noted that the absence of public policies aimed at eliminating barriers to access to justice disproportionately affects those in vulnerable situations or living in extreme poverty, as well as groups that are culturally, economically or socially disadvantaged.⁵⁴ To ensure equal and effective access to legal aid for those lacking sufficient means, provision must be guaranteed to all persons regardless of age, race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, citizenship or domicile, birth, education, social status or other status.

In practice, special measures are needed to secure meaningful access to legal aid for women, children and groups with particular needs, including the elderly, minorities, persons with disabilities, persons with mental illness, persons living with HIV or other serious communicable diseases, drug users, indigenous and aboriginal peoples, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. These measures

⁵⁴ A/HRC/8/4, §48.

must take account of the specific requirements of each group, including gender-sensitive and age-appropriate approaches.⁵⁵ The UN emphasises that developing joint strategies is vital to creating a more comprehensive, equitable and sustainable system of legal aid.

The Special Rapporteur has further observed that legal services tailored to the specific needs of women remain rare, particularly for women living in poverty. In the area of free legal aid, women are often forced to compete with men for scarce resources, which in any case are frequently channelled into uniform services that do not reflect differing needs.⁵⁶ To address this imbalance, guideline 9 of the United Nations Principles and Guidelines recommends the incorporation of a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid. This includes ensuring, as far as possible, that female defendants, accused persons and victims are assisted by female lawyers, and that legal aid, advice and court services are available to female victims of violence in all proceedings, thereby safeguarding access to justice and avoiding secondary victimisation.

4 **THE RIGHT TO LEGAL ASSISTANCE**

Closely intertwined with the right to legal aid is the right of access to counsel. Under international law, access to legal assistance is recognised as an essential safeguard against ill-treatment, arbitrary detention, and violations of due process, ensuring that the rights of detained persons are respected from the outset of proceedings. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

The right of access to legal assistance is firmly enshrined across international law. Article 14(3) of the International Covenant on Civil and Political Rights guarantees minimum rights for those facing criminal charges,

⁵⁵ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 10.

⁵⁶ A/HRC/8/4, §51.

including adequate time and facilities for the preparation of a defence, the right to communicate with counsel of one's own choosing, and the right to free legal assistance where an individual lacks sufficient means. The Standard Minimum Rules for the Treatment of Prisoners⁵⁷ (rule 93) likewise provide that untried prisoners may apply for free legal aid and consult their legal adviser in conditions of confidentiality, while the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁵⁸ (principle 17) requires that detainees be promptly informed of their right to legal assistance and provided with it whenever the interests of justice so require, at no cost if they cannot afford it. These guarantees are further reinforced by the Basic Principles on the Role of Lawyers,⁵⁹ which require states to allocate sufficient resources for legal services, guarantee access to a lawyer promptly and no later than 48 hours after detention, ensure full confidentiality of consultations, and protect the independence of the legal profession from interference or intimidation. Similar protections are embedded in specialised instruments, including the Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules")⁶⁰ and the Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules").⁶¹

At the heart of these provisions is the recognition that access to counsel is an essential safeguard against ill-treatment, arbitrary detention, and violations of due process, ensuring that the rights of detained persons are respected from the outset of proceedings. Taken together, these standards affirm that effective legal assistance must be provided promptly and continuously at all stages of judicial and extrajudicial proceedings. It requires unhindered access to legal providers, confidentiality of communications, access to case files and information, adequate time and facilities to prepare legal cases, and where necessary, legal advice, legal education, and mechanisms for alternative dispute resolution.

The Human Rights Committee has clarified that this right cannot be reduced to a formal entitlement but must be effective in practice,

⁵⁷ Economic and Social Council resolutions 663 C (XXIV) and 2076 (LXII), §93.

⁵⁸ General Assembly resolution 43/173, annex, principle 17, §2.

⁵⁹ Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, §6.

⁶⁰ General Assembly resolution 45/113, annex, §18(a).

⁶¹ General Assembly resolution 40/33, rule 15.1.

beginning at the earliest stages of detention.⁶² Persons deprived of liberty must be informed, prior to any questioning, of their right to legal aid and of other procedural safeguards.⁶³ The Committee has further stressed that states are obliged not only to appoint counsel where required by the interests of justice but also to ensure that representation provided is effective and independent.⁶⁴ It has also criticised systems in which suspects are restricted to state-appointed counsel during the initial period of detention.⁶⁵

Finally, the UN Special Rapporteur on the independence of judges and lawyers has highlighted legal assistance as a central component of broader efforts to safeguard judicial independence and the rule of law, and recognised it as a structural guarantee for the protection of justice systems as a whole. Recent thematic reports have addressed challenges such as protecting lawyers against undue interference (2022), reimagining justice in the face of systemic barriers (2023), and safeguarding judicial systems in the context of threats to democracy (2024).

5 CONCLUSION

Overall, UN standards articulate a comprehensive framework from access to justice, legal aid, and legal assistance to the prevention of arbitrary detention and the protection of fair trial rights. However, across this framework, a similar tension emerges as that observed within the Council of Europe: while the UN instruments affirm access to justice as a fundamental principle, they stop short of concretising it to the specific context of detention. None of the instruments reviewed—whether the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Basic

62 UN Human Rights Council, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul' (15 March 2013) UN Doc A/HRC/23/43.

63 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 8.

64 See *Miguel Angel Estrella v. Uruguay* (74/1980) (29 March 1983), *ibid.*, p. 93, at p. 95, §1.8.

65 See Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40 (A/46/40), §166 (Spain).

Principles on the Role of Lawyers, or the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems—is devoted specifically to ensuring access to legal aid for prison litigation, nor do they adequately reflect the structural and practical constraints faced by prisoners when seeking to enforce their rights from within closed institutions. Even where the standards acknowledge the importance of legal assistance for persons deprived of liberty, their focus remains limited to criminal proceedings, leaving a normative gap in respect of legal aid for proceedings concerning the enforcement of rights in detention. As a result, legal aid and legal assistance remain recognised in principle but only partially realised in practice for prisoners—underscoring the need for explicit standards that account for the realities of incarceration and ensure effective access to justice within detention itself.

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