

# The Role of the Human Rights Committee in Standardizing the Right to Legal Aid

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## 1. Introduction

Law aspires to administer fair judgments in disputes between parties who are unequal in respect of money, power and status.<sup>1</sup> Yet the formal legal system is inaccessible to the poor due to a variety of factors including the exorbitant cost of engaging a lawyer coupled with other costs for travelling long distances, paying court fees and collecting evidence and judgments, inability to recognize a claim to pursue or defend, reluctance to use law and legal institutions, corruption in the judiciary and others.<sup>2</sup> This eventually creates a justice gap between the rich and poor in the society. Legal aid is considered a ‘classic corrective’ to such fundamental contradiction of the legal system and brings the poor into contact with it.<sup>3</sup> According to Knaul, the purpose of legal aid is the elimination of obstacles and barriers which impair or restrict access to justice by providing assistance to those who are unable to afford legal representation and access to the court system.<sup>4</sup> More precisely, the right to legal aid can be described as both a right and an essential guarantee for the effective exercise of other human rights including the right to an effective remedy, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial.<sup>5</sup>

The International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> has obligated States to establish the right of ‘a minimum guarantee’ in the form of equality before

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1 Vivek Maru, “Allies Unknown: Social Accountability and Legal Empowerment,” 12 (1) *Health and Human Rights* (2010) 84.

2 Magdalena Sepúlveda Carmona, Report of the Special Rapporteur on Extreme Poverty and Human rights, General Assembly Resolution A/67/278(9 August 2012), paras. 17-84 <<http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>> accessed 14 March 2016.

3 Supra note 1.

4 Gabriela Knaul, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/23/43 (15 March 2013), para.27 <<http://www.wave-network.org/sites/default/files/UN%20Special%20Rapporteur%20on%20the%20Independence%20of%20Judges%20and%20Lawyers.pdf>> accessed 13 March 2016.

5 Ibid, para. 28.

6 The ICCPR was adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976 <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 1 March 2016.

the courts. According to Article 14 of the Covenant, State Parties are obligated to ensure the right to legal assistance in criminal cases without payment if the person does not have sufficient means to pay for it or where the ‘interests of justice’ require so.<sup>7</sup> As regards legal assistance, the Human Rights Committee (HRC) has opined 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.<sup>8</sup> It should be noted that the HRC monitors the implementation of the ICCPR by its State Parties. Furthermore, the First Optional Protocol<sup>9</sup> to the Covenant authorizes the Committee to examine individual’s complaints with regard to the alleged violations of the Covenant by State Parties to the Protocol. In this context, the purpose of the article is to demonstrate that the HRC has developed the normative contents of the right to legal aid and, therefore, plays a considerable role in clarifying the State’s obligation to ensure the right.

## 2. The Human Rights Committee (HRC) and its Functions

The HRC is composed of 18 independent experts who possess high moral character and recognized competence in the field of human rights.<sup>10</sup> As noted earlier, it is entrusted with the responsibility of monitoring the implementation of the ICCPR by

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7. Article 14(3) reads, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. The person is also entitled to choose the lawyer under this provision.”
8. HRC, General Comment 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para.10 <<http://www.refworld.org/docid/478b2b2f2.html>> accessed 13 March 2016.
9. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 with entry into force on 23 March 1976, in accordance with Article 9.
10. <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>> accessed 9 March 2016.

its State Parties. Therefore, the HRC is called the guardian of the ICCPR.<sup>11</sup> As a treaty body, the functions of the Committee include three main tasks: it (1) develops General Comments, (2) formulates concluding observations on State reports, and (3) adopts views on individual communications.<sup>12</sup> General Comments are, as Alston says, “means by which a UN human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance.”<sup>13</sup> General Comments deal with thematic or cross-cutting issues and provide detailed interpretation of generally worded provisions of the ICCPR. In its General Comment 33, the HRC states that the views of the Committee provide an authoritative interpretation of the ICCPR by a body entrusted by State Parties.<sup>14</sup> However, General comments are not legally binding.<sup>15</sup> Yet they possess ‘practical authority’ since they are published by an important body of experience that interprets matters from the perspective of the respective treaty<sup>16</sup> and the State Parties often adopt them while submitting their reports to the HRC.<sup>17</sup>

As far as the concluding observations are concerned, State Parties to the ICCPR are obliged to submit regular reports to the HRC on how they are implementing the rights. The Committee examines each report and expresses its concerns and recommendations to the State Party in ‘concluding observations’. Thus, the HRC

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11 UN Doc. CCPR/C/SR.702 (26 March 1987), para. 4, cited in Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge, Cambridge University Press, 2011)109.

12 *Office of the United Nations High Commissioner for Human Rights, Monitoring the core international human rights treaties* <<http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx>> accessed 13 March 2016.

13 Philip Alston, ‘The Historical Origins of “General Comments” in Human Rights Law’ in de Chazournes and Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague, Martinus Nijhoff, 2001)775.

14 HRC, General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, 5 November 2008, para. 13 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en)> accessed 12 March 2016.

15 Nigel S Rodley, ‘The Role and Impact of Treaty Bodies’, in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013) 639.

16 Helen Keller and Leena Grover, ‘General Comments of the Human Rights Committee’, in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge, Cambridge University Press, 2012)132-133; Kerstin Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights,’ 42 *Vanderbilt Journal of Transnational Law*(2009) 929.

17 Jane Connors and Markus Schmidt, ‘United Nations,’ in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, David Harris (eds.), *International Human Rights Law* (Oxford, Oxford University Press, 2013) 380.

looks at whether or not the concerned State is discharging its treaty obligations, and indicates the relevance of a treaty to a specific situation in the concluding observations. While such observations are non-binding,<sup>18</sup> their value cannot be ignored. They elucidate States' obligation under the Covenant and are important sources in interpreting the provisions of the treaty, since State consent can be understood from the acceptance of the treaty and the authority of the Committee.<sup>19</sup>

The hearing of individual communications represents a clear legal character as the Committee is required to determine whether the rights of an individual are violated or not in a specific case.<sup>20</sup> However, like the General Comments and concluding observations, the final decisions on the merits of the complaint procedures are also not legally binding. Yet the monitoring role of the HRC indicates that the views of the Committee cannot be easily disdained.<sup>21</sup> The HRC's General Comment 33 states that despite their non-binding nature, the views of the Committee 'exhibit some important characteristics of a judicial decision'.<sup>22</sup> Moreover, the HRC provides an authoritative interpretation of the ICCPR<sup>23</sup> and the principle of good faith to treaty obligations requires States to cooperate with the Committee as well as inform it of action they have taken to implement its views.<sup>24</sup> The International Court of Justice (ICJ) has also expressed its view in this context. The ICJ has noted that the opinion of the HRC—"an independent body established specifically to supervise the application of that treaty"—should be given "great weight" [*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*)<sup>25</sup>], Merits, Judgment, I.C.J. Reports 2010, para. 66]. Thus, the HRC develops jurisprudence on the interpretation and implementation of the ICCPR by its General Comments, concluding observations, and individual complaint procedures. In addition, opinions of the Committee are useful for decision makers and are considered as supporting evidence of current human rights law.<sup>26</sup>

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18 Supra note 15 at p. 639.

19 Christine Chinkin, 'Sources', in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, David Harris (eds.), *International Human Rights Law* (Oxford, Oxford University Press, 2013) 89.

20 Kerstin Mechlem, supra note 16 at p. 924.

21 Supra note 19 at pp. 89-90.

22 HRC, General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, 5 November 2008, para.11 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en)> accessed 12 March 2016.

23 Ibid at para. 13.

24 Ibid at para.15; Supra note 17 at p. 383.

25 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=103&p3=4>> accessed 11 March 2016.

26 Supra note 19 at pp. 89-90.

### 3. Developing the Normative Contents of the Right to Legal Aid

#### 3.1. *Legal Aid for both Civil and Criminal Proceedings*

Paragraph 3(d) of Article 14 of the ICCPR guarantees the right to have legal assistance in criminal cases to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. Thus, the conditions to be met for getting free legal assistance under Article 14 are two-fold—first, the absence of sufficient means to pay for legal assistance and second, if the interests of justice require it. As far as the condition of ‘the absence of sufficient means’ is concerned, existing human rights treaties do not provide the definition of ‘sufficient means’, and the case law suggesting the level or kind of private means that may be taken into account while deciding whether or not to award legal aid is lacking.<sup>27</sup> However, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>28</sup> have taken into account the applicant’s income level and the distribution of the wealth in the household in order to determine the financial eligibility criterion for the legal aid beneficiaries. With regard to the condition of ‘in the interest of justice’, a number of factors is taken into consideration, such as, what is at stake for the applicant based on the seriousness of the offence and the possible sentence that might result from it. In the case of *Lindon v. Australia*,<sup>29</sup> the HRC has considered the gravity of the offence in order to determine whether counsel should be assigned in the proceedings. In *O.F. v. Norway*, the HRC decided that in relation to a defendant who had been charged with two minor offences that could only result in a small fine, the State was not required to provide State-funded legal assistance.<sup>30</sup> On the other hand, the HRC on various occasions has held that in cases involving capital punishment, the accused must be effectively assisted by a lawyer at all stages of the proceedings.<sup>31</sup> In *Z.P. v. Canada*, the HRC has even considered the existence of

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27 David Harris, Michael O’Boyle and Colin Warbrick, Harris, O’Boyle and Warbrick: *Law of the European Convention on Human Rights* (New York, Oxford University Press, 2009) 317; Supra note 4 at para. 39.

28 General Assembly Resolution A/RES/67/187 (28 March 2013) <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/187](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/187)> accessed 9 March 2016.

29 *Lindon v. Australia*, Communication No. 646/1995, 25 November 1998, U.N. Doc. CCPR/C/64/D/646/1995, para.6.5 <<http://www1.umn.edu/humanrts/undocs/session64/view646.htm>> accessed on 13 March 2016.

30 Communication No.158/1983, 26 October 1984, U.N. Doc. CCPR/C/OP/2 at 44 (1990). <<http://www1.umn.edu/humanrts/undocs/html/158-1983.htm>> accessed on 12 March 2016.

31 *Aliboeva v. Tajikistan*, Communications No. 985/2001, U.N. Doc. CCPR/C/85/D/985/2001 (2005), para. 6.4 <<http://www1.umn.edu/humanrts/undocs/985-2001.html>> accessed 1 March 2016; *Saidova v. Tajikistan*, Communication No. 964/2001, U.N. Doc.

some objective chance of success at the appeals stage in order to determine whether it serves the purpose of protecting the interest of justice.<sup>32</sup>

It is widely recognized that the government has the obligation to provide legal aid in criminal matters since these involve the coercive power of the State.<sup>33</sup> In other words, the State is a party in criminal proceedings, and the accused has to defend him against such mighty opposition. Therefore, pursuant to Article 14 of the ICCPR, all persons charged with a criminal offence have a primary right to be present at the trial and defend themselves through the assistance of legal counsel at no cost when they are financially handicapped insofar as this is necessary in the interest of the administration of justice.<sup>34</sup> In the case of *Currie v. Jamaica*,<sup>35</sup> the HRC held that where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have adequate capacity to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with Article 14(1) coupled with the right to an effective remedy as provided in Article 2(3) of the Covenant.<sup>36</sup>

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CCPR/C/81/D/964/2001 (2004), para. 6.8 <<http://www1.umn.edu/humanrts/undocs/html/964-2001.html>> accessed 1 March 2016; *Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997 (2003), para. 7.3 <<http://www1.umn.edu/humanrts/undocs/781-1997.html>> accessed 10 March 2016; *LaVende v. Trinidad and Tobago*, Communication No. 554/1993, U.N. Doc. CCPR/C/61/D/554/1993 (17 November 1997), para. 5.8 <<http://www1.umn.edu/humanrts/undocs/session61/vws554.htm>> accessed 10 March 2016.

32 *Z.P. v. Canada*, Communication No. 341/1988, U.N. Doc. CCPR/C/41/D/341/1988 (1991), para. 5.4 <<http://www1.umn.edu/humanrts/undocs/session41/341-1988.html>> accessed 13 March 2016.

33 Daniel S. Manning, 'Development of a Civil Legal Aid System: Issues for Consideration', in *Making Legal Aid a Reality, A Resource Book for Policy Makers and Civil Society* (Hungary, Public Interest Law Institute/pili, 2009) 61.

34 Manfred Nowak, *U. N. Covenant on Civil and Political Rights, CCPR Commentary* (Germany, N.P. Engel Publisher, 2005) 339.

35 *Currie v. Jamaica*, Communications No. 377/1989, CCPR/C/50/D/377/1989, para. 13.4 <<http://www1.umn.edu/humanrts/undocs/html/Vws377.htm>> accessed 13 March 2016.

36 Also see *Shaw v. Jamaica*, Communication No. 704/1996, U.N. Doc. CCPR/C/62/D/704/1996 (4 June 1998), para. 7.6 <<http://www1.umn.edu/humanrts/undocs/session62/view704.htm>> accessed 12 March 2016; *Taylor v. Jamaica*, Communication No. 707/1996, CCPR/C/60/D/707/1996, para. 8.2 <<http://www1.umn.edu/humanrts/undocs/707-1996.html>> accessed 13 March 2016; *Henry v. Trinidad and Tobago*, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (10 February 1999), para. 7.6 <<http://www1.umn.edu/humanrts/undocs/session64/view752.htm>> accessed 13 March 2016; *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (2002), para. 7.10 <<http://www1.umn.edu/humanrts/undocs/845-1998.html>> accessed 13 March 2016.

The above expositions show that the right to free legal assistance is guaranteed to persons charged with a criminal offence under Article 14 of the ICCPR. However, Article 14 sets out a series of rights and procedural guarantees which are required both in civil and criminal proceedings to ensure the proper administration of justice.<sup>37</sup> As a result, the HRC clarifies that the right to free legal assistance can be considered to be applicable to the right of access to court and a fair hearing in the determination of civil rights and obligations or 'in a suit of law' as well. The term 'in a suit at law' (*de caractère civil/de carácter civil*) is more complex and it involves a set of civil and administrative matters. For example, the concept embraces (a) judicial procedures for the purpose of determining rights and obligations concerning the areas of contract, property and torts in the area of private law, as well as (b) equivalent concepts in the area of administrative law such as the termination of the employment of civil servants for other than disciplinary reasons.<sup>38</sup> Again it may (c) include other procedures which must be examined on a case-by-case basis depending on the nature of the right in question.<sup>39</sup> More particularly, as mentioned in General Comment 32, the HRC has called on States to provide free legal aid in non-criminal cases for individuals who do not have sufficient means to pay for it to ensure their meaningful access or participation in the relevant proceedings.<sup>40</sup>

The HRC has also inquired about the availability of legal assistance in civil matters while assessing the country's compliance with the ICCPR on various occasions. For instance, in response to Zimbabwe's report in 1998, it called on States to be proactive in addressing and remedying discrimination on women's right to inherit their deceased husband's property and has acknowledged the important role that

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37 HRC, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 04/13/1984. General Comment 13, para. 1.

In general, the reports of State Parties fail to recognize that Art.14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for State Parties to provide all relevant information and to explain in greater detail how the concepts of "criminal charge" and "rights and obligations in a suit at law" are interpreted in relation to their respective legal systems. Para.2 <<http://www.refworld.org/docid/453883f90.html>> accessed 13 March 2016. This General Comment 13 is replaced by General Comment 32; the same spirit and explanation is again reiterated by the HRC in General Comment 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, paras. 9 and 16.

38 *Casanovas v. France*, Communication No. 441/1990, U.N. Doc. CCPR/C/51/D/441/1990 (1994), para.5.2 <<http://www1.umn.edu/humanrts/undocs/html/vws441.htm>> accessed 12 March 2016.

39 HRC, General Comment 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 16.

40 HRC, General Comment 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 10.

legal aid can play in this regard.<sup>41</sup> In 2007, during the examination of the Czech Republic's periodic report, the HRC expressed its concern over the housing situations that the *Roma* faced involving the issues of forced evictions and substandard quality and then it specifically asked the Czech Republic to "provide legal aid for victims of discrimination" as part of its implementation of the ICCPR.<sup>42</sup> In addition, the HRC has very often asked for information on civil legal assistance from the countries that request for its concerns and interpretation. Even on some occasions, when the HRC has found a country's initial report is not submitted, it has particularly inquired about the right to counsel in civil matters.<sup>43</sup> For instance, while commenting on Spain's compliance report, the HRC inquired "whether legal aid was available in both civil and criminal cases".<sup>44</sup> Again the Committee sought clarification from the United Kingdom with regard to its provision of legal aid in both civil and criminal cases.<sup>45</sup>

Countries have also shown positive gestures to address the issue of counsel in civil matters for the purpose of submitting their compliance reports to the HRC. For example, Canada's report of October 2005 mentioned the case of *New Brunswick (Minister of Health and Community Services) v. G.J.*<sup>46</sup> since it held that "the government may be required to provide an indigent party with state-funded counsel"

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41 "While welcoming the Deceased Estate Succession Act of 1997, under which a widow may inherit part of her deceased husband's estate, the Committee would appreciate further information on the steps taken to ensure that widows are made aware of this right and that legal assistance be provided for their benefit." Report of the Human Rights Committee, U.N. Doc.A/53/40, vol.I (15 September 1998), para. 215 <[http://www.ccprcentre.org/wp-content/uploads/2012/04/A\\_53\\_40Vol-I\\_en.pdf](http://www.ccprcentre.org/wp-content/uploads/2012/04/A_53_40Vol-I_en.pdf)> accessed 13 March 2016); Sarah Paoletti, Deriving Support from International Law for the Right to Counsel in Civil Cases, 15(3) *Temple Political and Civil Rights Law Review*(2006) 659.

42 U.N. Report of the Human Rights Committee, Concluding Observations—Czech Republic, CCPR/C/CZE/CO/2 (9 August 2007), para.16 <[http://www.univie.ac.at/bimtor/dateien/czechrep\\_ccpr\\_2007\\_concob.pdf](http://www.univie.ac.at/bimtor/dateien/czechrep_ccpr_2007_concob.pdf)> accessed 10 March 2016.

43 U.N. Report of the Human Rights Committee, Concluding Observations of the Human Rights Committee, Brazil, U.N. Doc. CCPR/C/BRA/CO/2 (2005), para. 17 (stating the Committee's concern "... about a lack of access to counsel and legal aid") <<http://www1.umn.edu/humanrts/hrcommittee/brazil2005.html>> accessed 10 March 2016.

44 Report of the Human Rights Committee to the General Assembly, Spain, General Assembly Official Records: Fortieth Session, Supplement No.40(A/40/40) (19 September 1985), para. 491 <<http://www.ccprcentre.org/wp-content/uploads/2012/08/N8525623en.pdf>> accessed 13 March 2016.

45 Report of the Human Rights Committee to the General Assembly, United Kingdom, General Assembly Official Records: Fortieth Session, Supplement No.40(A/40/40) (19 September 1985), para. 561 <<http://www.ccprcentre.org/wp-content/uploads/2012/08/N8525623en.pdf>> accessed 13 March 2016.

46 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R.46 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1725/index.do>> accessed 13 March 2016.



in a child custody case. In 2002, Germany's report to the HRC also demonstrated its commitment to render legal aid to both the plaintiffs and respondents.<sup>47</sup>

In sum, the development of the jurisprudence of Article 14 of the ICCPR as contributed by the HRC indicates that the international human rights law supports a right to legal aid not only in criminal cases but also in civil matters. The governments are, therefore, required to establish a national legal aid system that covers both criminal and non-criminal proceedings.

### 3.1.1. Ensuring Early Access to Legal Aid in Criminal Proceedings

As noted earlier, the government has an obligation to ensure legal aid not only in criminal matters but also in civil proceedings. As far as the criminal proceedings are concerned, the stage when legal aid is guaranteed is critical. This is because the early stages of the criminal justice process involving the first hours or days of police custody or detention are crucial for arrested<sup>48</sup> or detained persons<sup>49</sup> since it determines their ability to protect their rights effectively, the length of their detention or the time when they are produced before a court and as a whole their right to a fair trial.<sup>50</sup> Again suspects and accused persons are likely to face the greatest risk of torture or other forms of degrading treatment and unlawful detention during this period.<sup>51</sup> As a result, the early stages of criminal proceedings have a crucial role for ensuring the efficiency and fairness of the criminal justice system.<sup>52</sup>

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47 U.N. Report of the Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Fifth Periodic Report: Germany, CCPR/C/DEU/2002/5 (4 December 2002), para. 190 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FDEU%2F2002%2F5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FDEU%2F2002%2F5&Lang=en)> accessed 13 March 2016.

48 The terms 'arrested' and 'detained' are defined in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. General Assembly Resolution A/RES/43/173 (9 December 1988) <<http://www.un.org/documents/ga/res/43/a43r173.htm>> accessed 13 March 2016.

'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority and 'Detained person' means any person deprived of their personal liberty except as a result of conviction for an offence. The same definitions have been adopted in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (para. 10).

49 United Nations Office on Drugs and Crime and United Nations Development Programme, *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (2014) 1 <[http://www.unodc.org/documents/justice-and-prison-reform/eBook-early\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf)> accessed 13 March 2016.

50 Ibid.

51 Moritz Birk, Julia Kozma, Ronald Schmidt, Zoe Oliver Watts, Debra Long and Elina Steinerte, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, Open Society Foundations (2011) 11 <<http://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-06222011.pdf>> accessed 10 March 2016.

52 Supra note 49 at p. 2.

It is noted that the right to legal assistance, in practice, does not often arise at the first questioning of the criminal proceedings.<sup>53</sup> This can result in severe consequences on the outcome of a case, and a lawyer might not be in a position to rectify this at a later point after incriminating statements have already been made without a lawyer's presence.<sup>54</sup> Moreover, since investigative acts are done in the early stages of a criminal justice process with a view to collecting evidence, it determines the prospects for a fair trial.<sup>55</sup> Article 14 of the ICCPR in its paragraph 3(b) states that every person charged with a criminal offence shall have "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing". Therefore, it can be understood that the right to legal assistance and to communicate with the lawyer belongs to a person accused of a criminal offence from the preparation to all stages of the proceedings involving the pre-trial proceedings also.<sup>56</sup> The HRC has accordingly adopted the view that the denial of representation when requested during an interrogation amounts to a violation of rights under Article 14(3) (b) of the ICCPR on various occasions.<sup>57</sup> For example, in the case of *Gridin v. Russian Federation*,<sup>58</sup> Gridin asserts that he was not allowed to have a lawyer available to him for the first 5 days after his arrest but the State Party claimed that he was represented in accordance with the law. The State Party did not, however, oppose the claim that Gridin requested a lawyer soon after he was granted detention and that his request was ignored. Furthermore, the State Party did not oppose that Gridin was interrogated without lawyer's consultation despite the fact that he repeatedly requested such a consultation. The HRC, therefore, concluded that denying the access to legal counsel after the request and interrogating during that time constituted a violation of the rights under Article 14, paragraph 3(b).<sup>59</sup> In another instance, the HRC has made it adequately clear that the failure to provide legal aid at the time of arrest or the limitation of legal aid to

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53 Auke Willems, "The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: A Step toward Global Assurance of Legal Aid?" 17(2) *New Criminal Law Review*(2014) 192.

54 Ibid.

55 Ibid.

56 N. A. N. Muhammad, 'Due Process of Law for Persons Accused of Crime' in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981) 151-152.

57 *Ramirez v Uruguay*, Communication No. 4/1977, U.N. Doc. CCPR/C/10/D/4/1977 (1980), para 18 <<http://www1.umn.edu/humanrts/undocs/session35/R1-4.htm>> accessed 2 March 2016; and *Sequeira v Uruguay*, Communication No. 6/1977, UN Doc CCPR/C/OP/1 at 52 (1984), para 16 <<http://www1.umn.edu/humanrts/undocs/session35/R1-6.htm>> accessed 2 March 2016.

58 Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000) <<http://www1.umn.edu/humanrts/undocs/session69/view770.htm>> accessed 3 March 2016.

59 Para. 8.5.

serious crimes violates the provision of Article 14, paragraph 3(d).<sup>60</sup> In 2011, the Committee ruled that the right of the complainant's brother to a lawyer was violated because he was not allowed access to a lawyer of his choice in pre-trial detention for 13 days.<sup>61</sup> The authority conducted both the investigative acts and the interrogation during this period of time.<sup>62</sup> The Committee, therefore, observed that the brother's right to a lawyer was violated because the brother was denied access to a lawyer during police questioning in the course of pre-trial detention.

Thus, the above jurisprudential analysis and views of the HRC make it clear that legal aid in criminal proceedings is a right not only at the trial stage; it has to be guaranteed in the pre-trial proceedings also. To be more particular, the normative standard established by the HRC indicates that States are under an obligation to ensure early access to legal aid for those who have been arrested, detained, suspected of or charged with a criminal offence for the protection and promotion of his rights as part of a comprehensive legal aid system.

### 3.2. *Effective Legal Assistance from Lawyers*

It is understood that the right to counsel would be meaningless if it does not include the right to effective counsel.<sup>63</sup> The HRC has established that nominal appointment of a lawyer is not enough; States have the obligation to ensure effective and substantial legal assistance in criminal or civil matters.<sup>64</sup> Once assigned, the lawyer must serve the client effectively- in the words of the HRC, counsel must, "once assigned, provide effective representation in the interests of justice".<sup>65</sup> In *Scarrone v.*

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60 Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations: Slovakia, CCPR/C/79/Add.79(1997) (4 August 1997), para. 19<<http://www1.umn.edu/humanrts/hrcommittee/slovakia1997.html>> accessed 13 March 2016.

61 *Toshev v. Tajikistan*, Communication No. 1499/2006, UN Doc. CCPR/C/101/D/1499/2006 <<http://ccprcentre.org/doc/OP1/Decisions/1499%202006%20Tajikistan.pdf>> accessed 13 March 2016). Also see, Open Society Justice Initiative, Case Digests, International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions (April 2013) 19<<http://www.opensocietyfoundations.org/sites/default/files/digests-arrest%20rights-human-rights-committee-20130419.pdf>>accessed 12 March 2016.

62 Para. 6.7.

63 HRC, General Comment 32, para. 38.

64 For instance, the HRC says, "It is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation," *Bnrissenko v. Hungary*, Communication No 852/1999, U.N. Doc. CCPR/C/75/D/852/1999 (2002), para. 7.5<<http://www1.umn.edu/humanrts/undocs/852-1999.html>> accessed 3 March 2016.

65 *Pinto v. Trinidad and Tobago*, Communication No. 232/1987, U.N. Doc. CCPR/C/39/D/232/1987 (1987)<<http://www1.umn.edu/humanrts/undocs/session39/232-1987.html>> accessed 3 March 2016; *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc CCPR/C/41/D/253/1987 at 60 (1991)<<http://www1.umn.edu/humanrts/undocs/session41/253-1987.html>> accessed 3 March 2016.

*Uruguay*, the HRC held that where counsel is assigned but never visits the accused or informs him about the developments in the case, access to counsel is effectively denied.<sup>66</sup>

As far as effective legal assistance is concerned, the issue of choosing a lawyer becomes pertinent. When a person who cannot afford to pay a counsel receives such assistance, he cannot be deprived of the option to select his counsel.<sup>67</sup> Article 14 of the ICCPR, hence, clearly mentions that the person seeking legal assistance must be given the right to choose his own lawyer. In death penalty cases, the HRC has ruled that preference should be given to the choice of counsel by the accused, including appeal, even when it entails a postponement of the case.<sup>68</sup> In general terms, the Committee has also held that where the accused is offered only a limited choice of assigned counsel, and where the counsel assigned takes “the attitude of a prosecutor”, (para. 1.8) the accused’s right to adequate defence is violated.<sup>69</sup>

The ICCPR further recognizes that the accused must have the opportunity to engage and communicate with counsel and such communication must be made confidentially. Therefore, during communication the elements of both privacy and access must be satisfied.<sup>70</sup> In fact, a violation of the right to assigned counsel occurs when there is no effective access to legal assistance.<sup>71</sup> As a result, the HRC notes that counsel must be able “to communicate with the accused in conditions giving full respect for the confidentiality of their communications”.<sup>72</sup> The right to communication implicates that no interference or censorship of the communication between counsel and client can be made, and that communications between detained persons and their lawyers are not regarded as admissible evidence against them

66 Communication No. 103/1981, U.N. Doc. Supp. No. 40 (A/39/40) at 154 (1984) <<http://www1.umn.edu/humanrts/undocs/session39/103-1981.htm>> accessed 3 March 2016.

67 Richard J. Wilson, The Right to Legal Assistance in Civil and Criminal Cases in International Human Rights Law, Paper prepared for the National Legal Aid and Defender Association (5 February 2002) 16. <<http://ssrn.com/abstract=1028899>> accessed 8 March 2016.

68 Ibid at p. 17.

69 *Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. Supp. No. 40 (A/38/40) at 150 (1983) <<http://www1.umn.edu/humanrts/undocs/session38/74-1980.htm>> accessed 28 February 2016.

70 Richard J. Wilson, ‘The Right to Legal Assistance in Civil and Criminal Cases in International Human Rights Law’, in *International Legal Aid and Defender System Development Manual* (2010) 36. <[http://www.nlada.org/Defender/Defender\\_Publications/International\\_Manual\\_2010](http://www.nlada.org/Defender/Defender_Publications/International_Manual_2010)> accessed 27 February 2016.

71 *Antonaccio v. Uruguay*, Communication No. R.14/63, U.N. Doc. 40 (A/37/40) at 114 (1982) <<http://www1.umn.edu/humanrts/undocs/session37/14-63.htm>> accessed 12 March 2016.

72 HRC, General Comment 32, para. 34.

unless they become evidence of the commission of an ongoing or contemplated crime.<sup>73</sup> Moreover, governments are under an obligation not to interfere with the access to counsel and should allow lawyers to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference.<sup>74</sup>

In the case of *McLeod v. Jamaica*,<sup>75</sup> the HRC found a violation of the right to effective counsel because the counsel in a capital case argued no grounds for appeal without informing his client of that decision.<sup>76</sup> Effective counsel on appeal, according to the HRC, would include consulting with the client and informing him of the lawyer's intention to withdraw the appeal or argue that it had no merit.<sup>77</sup> In the case of *Campbell v. Jamaica*, the complainant alleged that in spite of his instructions, the defence lawyer failed to raise objections to the confessional evidence. More particularly, the complainant had submitted that he wished to be present during the appeal hearing, but he was absent as well as could not instruct his legal representative. In light of the circumstances of the case and that the complainant was sentenced to death, the Committee decided that the State Party should have allowed the complainant any of the two options- to instruct his lawyer concerning the appeal, or to represent himself at the appeal proceedings for effective assistance.<sup>78</sup>

Thus, the ICCPR calls on States to provide legal assistance to those who are unable to afford the cost of it or where the interests of justice require so, but the interpretation of the HRC makes it adequately clear that mere perfunctory service does not suffice, the assigned lawyer is required to act in the best interests of the client and maintain confidentiality. Lawyers must represent their clients with determination and diligence in accordance with their recognized professional duties,

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73 Supra note 70.

74 General Comment 13, Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para.9<<http://www1.umn.edu/humanrts/gencomm/hrcom13.htm>> accessed 1 March 2016.

75 *Anthony McLeod v. Jamaica*, Communication No. 734/1997, U.N. Doc. CCPR/C/59/D/734/1997 (3 June 1998) <<http://www1.umn.edu/humanrts/undocs/session62/view734.htm>> accessed 10 March 2016.

76 Para. 6.3.

77 *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc CCPR/C/41/D/253/1987 at 60 (1991)<<http://www1.umn.edu/humanrts/undocs/session41/253-1987.html>> accessed 10 March 2016.

78 Communication No. 248/1987, CCPR/C/44/D/248/1987, para.6.6 <[http://www.worldcourts.com/hrc/eng/decisions/1992.03.30\\_Campbell\\_v\\_Jamaica.htm](http://www.worldcourts.com/hrc/eng/decisions/1992.03.30_Campbell_v_Jamaica.htm)> accessed 13 March 2016.

standards and ethics and should not take on a case if they do not have requisite competence, time or resources to handle the case adequately. The government has the obligation to allow the legal aid recipient to choose his counsel and therefore, not to interfere with access to counsel, nor impose inefficient counsel on the recipient.

#### 4. Conclusion

International human rights are considered a strong motivational force for the growth and development of comprehensive and sustainable legal aid schemes in domestic legal jurisdictions in order to adequately protect the legal rights and interests of the poor and disadvantaged in society.<sup>79</sup> It becomes clear that the HRC monitors the implementation of the ICCPR as well as develops jurisprudence and normative contents of the rights contained in it that can be used as a benchmark for clarifying the extent of States' obligation towards their implementation.<sup>80</sup> The present article has made particular reference to the right to legal aid and demonstrated that States are under an obligation to ensure the right to legal aid for both civil and criminal proceedings. With regard to criminal matters, such right is required to be provided at the early stage of the proceedings for those who have been arrested, detained, suspected of or charged with a criminal offence. States are also obligated to ensure that the assigned lawyers provide effective assistance to the legal aid recipients. Thus, the standards, as have been established by the HRC, are of considerable value in establishing a functional legal aid system and ensuring effective legal assistance to those who are in need of it.

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79 Roger Smith, "Human Rights and Access to Justice", 14(3) *International Journal of the Legal Profession* (2007) 278; Don Fleming, Legal Aid and Human Rights, Paper presented to the International Legal Aid Group Conference, Antwerp, (6-8 June 2007) 27.

80 For instance, see –HRC, General Comment 4, Article 3 (Thirteenth session, 1981), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 4 (1994) <<http://www1.umn.edu/humanrts/gencomm/hrcom4.htm>>accessed 18 March 2016; HRC, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994)<<http://www1.umn.edu/humanrts/gencomm/hrcom6.htm>>accessed 18 March 2016.