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## **PRINCIPLES AND GUIDELINES ON PUBLIC DEFENSE IN THE AMERICAS**

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### **INTRODUCTION**

1. The right to defense is a right recognized under all human rights instruments – universal and regional alike. This is a central component of due process, under which the state has an obligation to treat the individual at all times as a real subject of the process.
2. Legal assistance is a guarantee for the exercise of this right and must be provided by the state.
3. At the international level, Article 14.d of the International Covenant on Civil and Political Rights states that everyone shall be entitled to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
4. International instruments are in place, specifically addressing the right of access to justice. Thus, the *Basic Principles on the Role of Lawyers*<sup>1/</sup> was adopted in 1990. It provides that all persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offense assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
5. The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, which the General Assembly adopted in 2012,<sup>2/</sup> are of particular interest. These Principles recognize legal aid as “an essential element of a fair, humane, and efficient criminal justice system that is based on the rule of law.”
6. The scope of the United Nations Principles is limited to criminal justice. Thus, under Principle 3 states must ensure that anyone detained or arrested for, or suspected or accused of, a criminal offense liable to imprisonment or the death penalty is entitled to

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1. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, UN Doc.A/CONF.144/28/Rev.1 p. 118 (1990).  
2. UNGA RES 67/187.

legal aid at all stages of the criminal justice process. It also specifically refers to children<sup>3/</sup> and other especially vulnerable individuals.

7. Principle 12 of said instrument refers to the independence and protection of legal aid providers, with a provision that states should ensure that legal aid providers are able to carry out their work effectively, freely, and independently, without intimidation, hindrance, harassment or improper interference.

8. Likewise, the United Nations adopted a series of instruments specifically dealing with persons deprived of liberty, in terms of their right to be assisted by a lawyer – among them the *Standard Minimum Rules for the Treatment of Prisoners*<sup>4/</sup> and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.<sup>5/</sup>

9. At the regional level, Article 8.d of the American Convention on Human Rights recognizes defendants' right to defend themselves personally or to be assisted by counsel of their choice and to communicate freely and privately with their counsel, while paragraph (e) of this article establishes the inalienable right to be assisted by a state-provided lawyer, paid or unpaid depending on domestic laws, if defendants do not defend themselves personally or engage their own lawyer within the time period established by law, regardless of the likely applicable sanction or the complexity of the criminal matter to be settled, factors taken into account under other systems.

10. This provision is different from the one in the aforementioned Article 14.3 (d) of the International Covenant on Civil and Political Rights, for which “the interests of justice so require” is the basis for the guarantee of providing an individual with a cost-free official defender if he lacks adequate means to pay for it.

11. This means that the legal aid standard established under the inter-American system is higher than what exists at the universal level. As a result, the view is that the region needs to develop its own principles and guidelines to take into consideration its particular characteristics.

12. Beyond the fact that the autonomy requirement for public defender service is not expressly provided for in Article 8(2).e of the American Convention, in order to ensure competent legal aid and, more broadly, unrestricted access to the justice, the due process guarantees enshrined in Article 8(2) of the Convention must be interpreted against the backdrop of the ongoing evolution of the *corpus juris* of international human rights law<sup>6/</sup> and in strict application of the effectiveness of and need for protection of vulnerable groups.<sup>7/</sup>

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3. Principle 11.

4. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV), of July 31, 1957; and 2076 (LXII), of May 13, 1977.

5. Adopted by the General Assembly in resolution 43/173, of December 9, 1988.

6. Cf. I/A Court HR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, cit., par. 120.

7. Cf. I/A Court HR, *Case of Vélez Loor vs. Panama*, cit. par.99; *Case of Ibsen Cárdenas and Ibsen Peña vs. Bolivia. Merits, Reparations, and Costs*. Judgment of September 1, 2010 Series C No. 217, par. 90; *Case of Xákmok Kásek Indigenous Community vs. Paraguay. Merits, Reparations, and Costs*. Judgment of August 24, 2010 Series C No. 214, par. 250; and *Case of Sawhoyamaya Indigenous Community vs. Paraguay. Merits, Reparations, and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 189.

13. A state service of autonomous official public defense is vital to being able to properly guarantee the right to have a competent defense, enshrined in Article 8(2)(e) of the American Convention. In this regard, the lack of an autonomous public defense will hinder access to justice for the most vulnerable segments of society.<sup>8/</sup>

14. These concepts have been developed in five resolutions adopted by the OAS General Assembly [resolution AG/RES. 2656 (XLI-O/11)], “*Guarantees for Access to Justice. The Role of Official Public Defenders*”; resolution AG/RES. 2714 (XLII-O/12), “*Official Public Defenders as a Guarantee of Access to Justice for Persons in Situations of Vulnerability*”; resolution AG/RES. 2801 (XLIII-O/13), “*Toward Autonomy for Official Public Defenders/Criminal and Civil Legal Aid Providers as a Guarantee of Access to Justice*”; resolution AG/RES. 2821 (XLIV-O/14) “*Toward Autonomy for and Strengthening of Official Public Defenders as a Guarantee of Access to Justice*”; and resolution AG/RES. 2887 (XLVI-O/16) “*Promotion and Protection of Human Rights*” – subsection ix, “*Toward Autonomous Official Public Defenders as a Safeguard for Integrity and Personal Liberty.*”

15. Furthermore, the *100 Brasilia Rules*, adopted by the XIV Ibero-American Judicial Summit in March 2008, is worth noting. One of its underlying premises is that the judicial system should be structured as an instrument for effective defense of the rights of persons who are vulnerable and thus should help reduce social inequalities by encouraging social cohesiveness.

16. Notwithstanding the model used by states to deliver legal aid, no provision under the Principles and Guidelines can be interpreted as granting anything less than what is recognized under domestic law or in international treaties applicable to the administration of justice. This document is intended to contribute to the progressive development of standards in this area, especially taking into consideration the very nature of the region’s public defense institutions.

## PRINCIPLES

### *Principle 1*

Access to justice, as a fundamental right, is also the means of restoring the exercise of rights that have been denied or violated. [*Cf.* resolution AG/RES. 2656 (XLI-O/11); resolution AG/RES. 2714 (XLII-O/12); resolution AG/RES. 2801 (XLIII-O/13); resolution AG/RES. 2821 (XLIV-O/14)].

### *Principle 2*

Access to justice is not limited to ensuring admission to a court but applies to the entire process [*Cf.* resolution AG/RES. 2656 (XLI-O/11); AG/RES. 2714 (XLII-O/12); resolution AG/RES. 2801 (XLIII-O/13); resolution AG/RES. 2821 (XLIV-O/14)].

### *Principle 3*

The work of Official Public Defenders constitutes a core aspect for strengthening access to justice and consolidating democracy. [*Cf.* resolution AG/RES. 2656 (XLI-O/11), AG/RES. 2801 (XLIII-O/13), resolution AG/RES. 2714 (XLII-O/12); resolution AG/RES. 2821 (XLIV-O/14)].

### *Principle 4*

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8. *Cf.* I/A Court HR, case of *Ruano Torres vs. El Salvador*, judgment of October 5, 2015, Series C, No. 303, pars. 156-157, 159, and 163.

Cost-free state-provided legal counsel services are vital to promoting and protecting the right of access to justice for everyone, particularly those who are especially vulnerable. [*Cf.* resolution AG/RES. 2656 (XLI-O/11); resolution AG/RES. 2714 (XLII-O/12); resolution AG/RES. 2821 (XLIV-O/14)].

*Principle 5*

States have an obligation to remove obstacles that may impair or limit access to a public defender, in such a way as to ensure full and free access to justice. [*Cf.* resolution AG/RES. 2887 (XLVI-O/16)].

*Principle 6*

Without prejudice to the diversity of the legal systems of each country, the independence – functional, financial, and/or budgetary autonomy – of official public defenders is important. [*Cf.* resolution AG/RES. 2714 (XLII-O/12); resolution AG/RES. 2801 (XLIII-O/13); resolution AG/RES. 2821 (XLIV-O/14)].

*Principle 7*

As part of member states' efforts to guarantee a public service that is efficient, states must observe absolute respect for public defense in the exercise of its duties, free from any interference and improper control by other branches of government that might affect its functional autonomy, its mandate being to serve the interests of the person it is defending. [*Cf.* resolution AG/RES. 2887 ((XLVI-O/16)]

*Principle 8*

Public defense should not be limited to criminal investigations but should instead, within the ambit of the laws of each state, include legal aid in all investigations.

*Principle 9*

Without prejudice to the diversity of the legal systems of each country, it is important for Public Defender Offices to develop, within the framework of their autonomy, tools to systematize and register cases of alleged torture and other inhuman, cruel, and degrading treatment that could function as tools for prevention strategies and policies, the main objective being to prevent violations of the human rights of persons deprived of liberty, recognizing that public defenders are crucial actors in the prevention, reporting, and support of victims of torture and other inhuman, cruel, and degrading treatment. [*Cf.* resolution AG/RES. 2887 (XLVI-O/16).

*Principle 10*

Taking into account the legal systems in each state, the member states should promote the participation of public defenders in the inter-American human rights system, so that the right to a technical defense is exercised and ensured from the very first step in proceedings instituted against a person at the national level to, as applicable, the adoption of a judgment by the Inter-American Court of Human Rights.

*Approved by the Inter-American Association of Public Defenders (AIDEF) on August 3, 2016.*

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