

## The UN General Assembly Resolution on Access to Legal Aid in Criminal Proceedings - an Example for Europe

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### Developments of an EU directive on access to legal aid

The Roadmap is a Council Resolution that invites the Commission to present draft legislation on fair trial rights in stages.<sup>1</sup> The adoption of the Roadmap was the first successful step towards a procedural rights measure after a long and cumbersome campaign which commenced in 2001. The first two measures in accordance with the Roadmap have now been adopted,<sup>2</sup> and it is the third on access to a lawyer and originally access to legal aid that are proving to be difficult. The negotiations are ongoing,<sup>3</sup> and during the trilogies that began in September 2012 it became clear that there are still several differences between Member States as regards the scope and content of the instrument. The third measure also includes the right to communicate with the outside world, something which was planned to be arranged in measure D, but because it emerged that at least 22 Member States already provided for this right in their national legislation it was possible to cover this right at an earlier stage and include it in the measure currently under negotiation.

The issue of access to legal aid has been dropped from the third measure because the Commission did not want the discussions on the right of access to a lawyer to be strongly influenced by financial considerations, so both these rights could be discussed on their own merits. However, the right of legal assistance is inextricably linked with the right to legal aid and it is therefore difficult to believe that Member States, when negotiating the right to access to a lawyer, will not have the financial consequences in the back of their minds.

<sup>1</sup> For more details on the developments of the Roadmap see J. Blackstock, 'Procedural Safeguards in the European Union: A Road Well Travelled', 2(1) European Criminal Law Review (2012), 20-35.

<sup>2</sup> Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280/1, 26 October 2010; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1, 1 June 2012.

<sup>3</sup> Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 final, 8 June 2011.

### Summary

**The EU's attempts to adopt an EU-wide instrument on the right to access to legal aid in criminal proceedings have not been successful so far. The important issue was originally part of Measure C of the Roadmap for criminal procedural rights,<sup>1</sup> but due to political difficulties legal aid was dropped from the agenda. However, on a different plane agreement was reached on this topic as the United Nations General Assembly (UNGA) has adopted the world's first international instrument dedicated to access to legal aid in December 2012.<sup>2</sup> This policy brief argues that the EU should carry on in the 'spirit' of these recent developments and adopt a directive providing suspects and defendants with access to legal aid.**

<sup>1</sup> Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1, 4 December 2009; hereafter will be referred to this Council Resolution as the 'Roadmap'; for further information see M. Jimeno-Bulnes, 'The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings', 4 EUCrim (2009), 157-161.

<sup>2</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/Res/67/187, 20 December 2012; from here on will be referred to this as the 'Resolution'.

There are two ways of looking at the developments of an EU instrument on access to legal aid. On the one hand, one can be positive and hopeful since there is a clear mandate in the Roadmap that recognises the importance of EU legislation on this topic. Furthermore, the Commission has promised to table their proposal in 2013, so we can be hopeful that negotiations will take off soon after and lead to a positive outcome. On the

other hand though, we have to be wary as legal aid was dropped from measure C because of the political difficulties surrounding this topic. Even before entering into negotiations it was recognised that too many stumbling blocks lay ahead and it was therefore decided to stall it for a later time. Much of this is related to the financial consequences of such an instrument; Member States do not want to see their legal expenditure go up in times of austerity, and even if later this year a proposal is on the table, it remains to be seen whether something that actually improves access to legal aid will come out.

### Specific problems surrounding access to legal aid in the EU

As shown by several studies into the state of criminal procedural safeguards in the EU,<sup>4</sup> the provision of legal aid in many Member States is very poor. One of the main issues that policy makers face is how to spend public funds on legal aid in a cost-efficient manner. The UN Resolution takes this circumstance serious and aims at setting out 'the specific elements required for an effective and sustainable national legal aid system'.

Furthermore legal aid is often ineffective due to the slow, unclear and complicated application methods. Also the availability, quality and independence of criminal defence lawyers in legal aid cases proved to be inadequate, inter alia, due to low remuneration provided for legal aid work. Another aspect which has proven to be problematic is that in some Member States there is no legal obligation to inform the suspect of his right to legal assistance (partly) free of charge.

### Nature and background of the Resolution

A preliminary statement on the nature of UNGA resolutions has to be made as the question on readers minds could be why the EU would still have to make an effort to adopt an instrument on legal aid since there now is a UNGA Resolution. The answer to this question is that UNGA resolutions are not legally binding as such,<sup>5</sup> but have a recommendatory nature.<sup>6</sup> This does not mean that they have no relevance; the opposite is true as these resolutions have great authority being issued by the only forum that is composed of all the UN Member States, and thus of all the States in the world.<sup>7</sup> The International Court of Justice has worded eloquently that 'the persuasive force of Assembly Resolutions can indeed be very considerable, - but this is a different thing. It operates on the political not the legal level: it does not make these resolutions binding in

law'.<sup>8</sup> The UNGA not being a legislative body, the relevance of its resolutions can be found in its authority, especially when they are of a declaratory or 'law-making' nature, such as the Resolution at hand, and are assented to by a large majority of the Member States.

The origins of the UN Resolution on access to legal aid can be traced back to the Lilongwe Conference of 2004 where delegates from 26 States met to discuss the state of legal aid services in criminal justice systems in Africa. The conference, which was initiated by civil society groups, led to the adoption of a declaration which later formed the inspiration for the eventual Resolution.<sup>9</sup> It was also thanks to the pioneering role taken by the governments of South Africa and Georgia, which initiated and pushed for the adoption of a Resolution on legal aid.<sup>10</sup>

### The content of the Resolution

The main reason why access to legal aid is essential in order to properly ensure a fair trial, is that the majority of people who are charged, put to trial and ultimately sentenced are poor and have no financial resources to pay for legal assistance. The Resolution recognises this reality and aims at providing aid to those in need. In the many States around the world where no or insufficient legal aid is provided suspects are denied their fundamental right to a fair trial. Legal representation is the gateway to other procedural safeguards as suspects often do not possess legal knowledge and are not able to exercise the rights that are available to them without assistance. The Resolution recognises this by stating:

'legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process'.

Here in short are some of the particular aspects of the Resolution that can prove to be very useful for improving access to legal aid in the EU. These aspects will also show how ambitious the guidelines are as well as how they accommodate the specific problems in EU Member States mentioned earlier:

- States should ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid, thus 'prompt' access to legal aid, and also very important; at all stages of the criminal justice process.

4 T. Spronken, G. Vermeulen, D. de Vocht and L. van Puyenbroek, EU Procedural Rights in Criminal Proceedings (Maklu, 2009), 58-84; E. Cape, Z. Namoradze, R. Smith and T. Spronken, Effective Criminal Defence in Europe (Intersentia, 2010).

5 See UN Charter Articles 10, 11, 12, 13 and 14.

6 See M. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', 16(5) The European Journal of International Law (2006), 879-906

7 See R. Higgins, Problems & Process: International Law and How We Use it (Oxford University Press, 1994), 24-28.

8 South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase) [1966] ICJ Rep 6, at 50-51, par. 98

9 For the declaration see <http://www.penalreform.org/files/rep-2004-lilongwe-declaration-en.pdf>.

10 For more on the road to adoption of the Resolution see Z. Namoradze, 'Commission Adopts U.N. Instrument on Access to Legal Aid', Namati, 2012, available at <http://www.namati.org/entry/un-legal-aid-instrument/>.

- Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.
- States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.
- The Resolution does not only aim at ensuring access to legal aid for suspects and defendants, but goes further and also provides victims and witnesses with legal aid where appropriate.
- The provision of legal aid is not foreseen as being provided only by lawyers. The first providers of legal aid are lawyers, but the Resolution also suggests that States involve a wide range of stakeholders as legal aid service providers in the forms of universities, civil society and other groups and institutions providing legal aid.

These developments at the level of the UNGA can only be seen as a first step and much work still needs to be done in order for States to seriously implement these guidelines. However, this is a very positive first step and shows that a majority of States support a strong and effective assurance of access to legal aid in criminal proceedings. The timing of this instrument is perfect as it comes at a time when the Commission is preparing its proposal for a directive on legal aid and the existence of this instrument on the international level cannot be ignored.

#### What would be the benefits of an EU instrument?

The real asset of secondary EU law on legal aid would be its legally binding force, as it takes the form of a directive, and however much the importance of the UNGA Resolution is recognised here, it does not possess the same quality. Compliance with directives will be subject to the full scrutiny of EU institutions, in particular the Commission (through the initiation of infringement proceedings) and the Court of Justice.<sup>11</sup> The possibility of directives in the field of criminal matters and the enhanced judicial control by the Court have been enabled by the Lisbon Treaty; that has made significant changes to the legal framework in which judicial cooperation in criminal matters operates.<sup>12</sup>

#### The UNGA Resolution as a blueprint for the EU

This policy brief takes the stance that the developments within the

<sup>11</sup> The ECJ will have full jurisdiction on all measures concerning criminal law after a transitional period expires on 1 December 2014, see Protocol 36 on transitional measures, Articles 9 and 10.

<sup>12</sup> For more on the changes made by the Lisbon Treaty to cooperation in criminal matters see M. Fletcher, 'EU Criminal Justice: Beyond Lisbon', in C. Eckes and T. Konstadinides (eds.), *Crime Within the Area of Freedom, Security and Justice* (Cambridge University Press, 2011), 10-42.

framework of the UNGA can have a positive effect on the process of adopting an EU measure on legal aid. These developments, which ultimately led to a Resolution, can serve as an example, both on a political and a substantial level.

First the political viewpoint; simply put, if all the Member States of the UN can find agreement on such an important issue, why could 27 EU Member States not do the same? This is almost as a rhetorical question as the reality is that it is much easier for States to support a merely 'political statement' which the UNGA Resolution is, with no direct legal obligations, than it is to enter into a directive that is binding and can be enforced by the Commission.

However, from the developments that have taken place in the UNGA it can be inferred that States have recognised the need for action in this field, and have acted determined and swiftly, even if it was only in a legally non-binding manner.

The EU could take a lead role in protection for human rights and show that it is truly founded on respect for fundamental rights.<sup>13</sup> It would send out the clear message that the efforts made within the UNGA were not in vain but will be seriously implemented into the EU legal order.

As States often consider legal aid as a financial burden, it has to be mentioned that providing access to legal aid can very well have positive effects on the efficiency of a legal system. As stated by the Resolution:

'a functioning legal aid system, as part of a functioning criminal justice system, may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization.'

The Resolution might raise awareness on this 'alternative' look on legal aid; not as a burden but as a potential way to cut other costs related to the functioning of a criminal justice system.

Looking at the content of the Resolution (the substantive side of the argument), the instrument contains some very ambitious provisions that would undeniably raise the standard of defence rights throughout Europe and would make rights more practical and effective if implemented in this form. Even though it is not to be expected that an EU instrument would be this far reaching, an example can be taken.

The Resolution is based on emerging best practices and global jurisprudential and normative developments. The Commission should therefore look closely at the UN Resolution and select the elements that can prove beneficial at the EU level. Especially while the Commission is currently carrying out its impact assessment on

<sup>13</sup> As stated in Article 2 TEU, also relevant is Article 6 TEU, and in the specific context of judicial cooperation in criminal matters see Article 67(1) TFEU.

legal aid it should thankfully make use of this valuable knowledge.

But, as identified earlier, it is already known what the real 'problem areas' are, and because the UNGA Resolution deals with these specific problems this policy brief suggests that it would serve as a 'blueprint' for a Commission proposal, and eventually a directive on access to legal aid. Such a directive would not only ensure that the right to access to legal aid is made practical and effective at the EU level, but it has broader implications for the success or failure of the Roadmap; if suspects and defendants cannot afford a lawyer, it is very unlikely they will be able to exercise the other rights prioritised by the Roadmap. The EU should carry forward the 'momentum' created by the UNGA Resolution and adopt a directive which will result in a real improvement for the functioning of defence rights throughout the EU.

#### Further reading

- E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe* (Intersentia, Antwerp, 2007).
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- C. Heard and R. Schaeffer, 'Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice', 2(3) *New Journal of European Criminal Law* (2011), 270-281.
- S. Miettinen, *Criminal Law and Policy in the European Union* (Routledge, London, 2013), Chapter 9.
- J. Spencer, 'EU Fair Trial Rights- Progress at Last', 1(4) *New Journal of European Criminal Law* (2010), 447-457.
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- L. Van Puyenbroeck and G. Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU', 60(4) *International and Comparative Law Quarterly* (2011), 1017-1038.
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