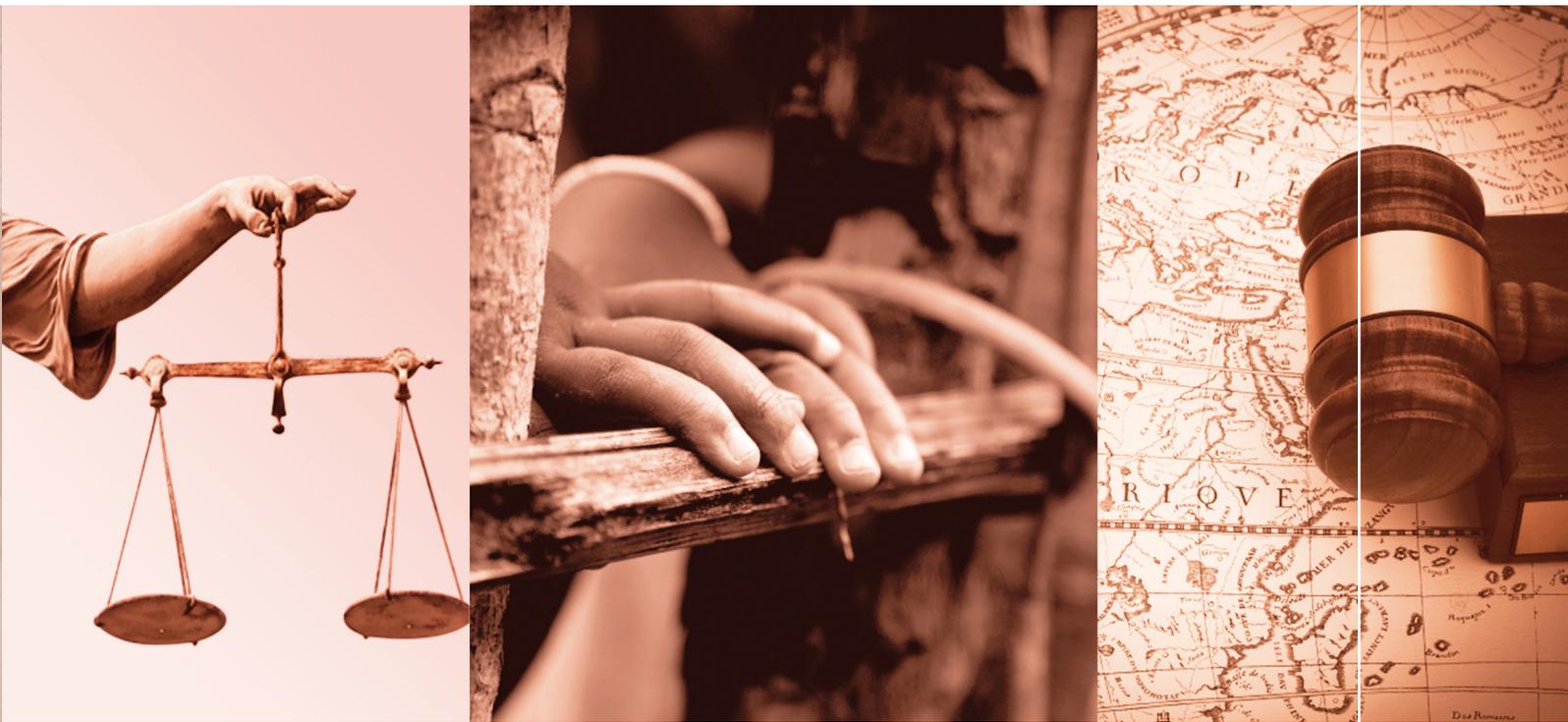




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Handbook on improving access to legal aid in Africa

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Handbook on improving access to legal aid in Africa

CRIMINAL JUSTICE HANDBOOK SERIES



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Introduction

In its resolution 2007/24 on international cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa, the United Nations Economic and Social Council recognized the importance of providing legal aid to suspects and prisoners and its effect on reducing the length of pre-trial detention, prison overcrowding and congestion in the court. The Council also noted that many Member States lacked the necessary resources and capacity to provide legal assistance. It therefore called upon the United Nations Office on Drugs and Crime (UNODC) to “study ways and means of strengthening access to legal aid in the criminal justice system” and “assist African States, upon request, in their efforts to apply the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa”.

The present *Handbook on Improving Access to Legal Aid in Africa* is derived from that mandate. The intention is to provide an overview of the progress that has been made towards improving access to legal aid services in criminal justice systems in Africa in order to assist policymakers, practitioners and all stakeholders (considered to include development partners, Governments, bar associations, NGOs and grassroots action groups) actively involved in criminal justice reform in three ways: by providing the general information needed for developing national legal aid service delivery strategies, by offering alternatives to conventional models of legal aid delivery and by outlining promising practices on the continent, some particularly suitable for post-conflict societies.

The *Handbook* draws together innovations and lessons learned across African countries in the intricate area of legal aid service delivery in the criminal justice system. It highlights many instances of promising grassroots initiatives in a wide variety of countries. It is hoped that these practices will encourage and stimulate further innovative efforts to provide more inclusive access to justice for all in the criminal justice system, particularly for the poor and marginalized. The breadth and depth of information in the *Handbook* allow for better adaptation to specific country contexts, as well as for better coordination between the various participants.

Overall trends

The right to legal aid in criminal cases is formally recognized in legal systems throughout the continent. Countries cite and draw upon regional and international human rights instruments to inform and incorporate that right in the national legislative framework. National constitutions are in general unequivocal about the right to legal representation in specific criminal cases. Variance exists in the express and operational definitions, scope of coverage and delivery of legal aid services across the continent. The Constitution of South Africa states that everyone who is detained, including every sentenced prisoner, has the right to have a legal practitioner assigned to the accused by the State, at State expense, if substantial injustice would otherwise result, and to be informed of this right. A similar provision, to be represented by a legal practitioner of his or her choice or where it is required in the interest of justice, to be provided with legal representation at the expense of the State and to be informed of these rights, appears in article 42.2f(v) of the Constitution of Malawi. Article 28(3) of the Constitution of Uganda limits the right to State-aided counsel to criminal cases with a possible sentence of death or life imprisonment. In Zambia, the Constitution mandates the definition of scope and eligibility to national legislation. Kenya, Rwanda and the Sudan have similar legal arrangements.

Constitutional provisions such as these constitute a legal basis and provide a vehicle for States to deliver legal aid services. It is expected that individuals and actors on the beneficiaries' side use these provisions as a mechanism for demanding legal aid services for the indigent. In practice, it remains a long road to full actualization of this right across the continent:

- The philosophy and conceptualization of criminal legal aid services are replicas of the regional and international standards, conceptualized broadly and not in certain terms. At the country level, the coverage by the State legal aid systems is narrowly defined to specific criminal cases and incomplete in practice. Most available forms of State-aided legal aid take the form of legal counsel during trial in court. Legal aid services are not provided throughout the chain of the criminal justice process. The ratio of lawyers to population and justice claimants remains low, higher in urban than rural areas across the continent.
- Non-State actors have put a lot of effort into providing legal aid services across the continent. To date, these efforts have usually been scattered, uncoordinated, urban-based and unpredictable due to limitations on donor financing. Most efforts are focused on service delivery, making these efforts more instrumental than transformational. At the same time, there is a visible effort by non-State actors to engage with Governments in order to effect functional legal aid systems.
- Post-conflict settings are doubly impacted due to the fragility of the State and the need to accord priority to stabilization and the establishment of legitimacy. The demand for legal aid is highest in such settings, to protect the rights of groups affected by the conflict and to bring to justice perpetrators of violations.

The *Handbook* recognizes the gradual and incremental processes involved. A number of promising practices have been shown to catalyse action in countries across the continent in a similar direction:

- The legislative, policy and regulatory framework for the provision of criminal legal aid services are at different stages of development in Ethiopia, Liberia, Malawi, Sierra Leone, the Sudan, Uganda and the United Republic of Tanzania, among others. The intention to strengthen legal aid services is stated in strategic action plans in Burundi, Nigeria, Rwanda, Sierra Leone, Uganda and the United Republic of Tanzania, among others. There are windows of opportunity for stakeholders in legal aid to engage and cause evolution and broadening of the focus of criminal legal aid services. The need to demonstrate the contribution of national legal aid services to the criminal justice system, the administration of justice and rule of law and national development provides another opening for interventions.
- Important efforts have been made towards implementation of the stated policy in South Africa by establishing a body to manage the delivery of legal aid services, by allocating funds to support the system and by establishing coordination among stakeholders to improve the effectiveness and efficiency of the system.
- Innovations by non-State actors in legal aid service delivery in criminal cases abound. Through paralegal advisory services, community mobilization teams, rule of law promoters, justice centres and pro bono public defender services among others, non-State actors fill the gaps in the criminal justice system from the point of crime detection to the point of reintegration of offenders into the community after they have served their sentences. The promising practices are at two levels: the first level includes innovations in service delivery, which have been scaled up and replicated across the continent. One case in point is the concept of linking those who require legal aid services and those who provide services in the criminal justice system by the use of paralegals, which has been adopted and adapted in Kenya, Malawi, Sierra Leone and Uganda. The second is at the level of self-organizing and regulation to provide a voice for legal aid provision and improve the quality of services. One example is the Legal Aid Providers Network in Uganda.
- Efforts are being made at the national level to support the provision of criminal legal aid services by Governments. However, the resources allocated are currently inadequate. Promising financing options include increases in governmental allocations to criminal legal aid services, the establishment of legal aid funds, the institution of a legal aid basket fund by international development partners, pro bono services by the legal profession and grant-seeking by non-State actors.

Definition, criteria and categorization of promising practices

Any conclusion about what constitutes a promising practice in legal aid service delivery in Africa has to take into account a number of factors. One is the context of criminal justice systems in Africa, well-intentioned in terms of ratification of international norms and principles, but severely constrained in terms of resources and implementation capacity. In addition, a number of countries are operating both State (formal) and traditional (informal) justice systems. The practices identified in the present *Handbook* conform to national constitutional guarantees and international human rights standards.

A second determining factor draws from emerging good practices in criminal justice programming, the adoption of a system-wide as opposed to institutional approach to legal aid service delivery. A system-wide approach denotes multiple stakeholder participation (both State and non-State) and specific attention to target reforms on removing congestion along a continuum that catalyses other reforms. A third factor is the simplicity of the practices, which allows for flexibility and is open to adaptation to suit the local context (they should be transferable, low-cost and high impact, and target the poor and marginalized).

Some of the practices described in the *Handbook* are proven, while others are unproven but show signs of promise. Some may be more relevant than others to specific circumstances in African countries. Several, such as camp courts and the village mediation programme, are taken from models developed in South Asia and adapted to the context of Africa. Others, such as street-law and clinical law programmes, draw on programmes developed in the United States of America. This serves to reinforce the notion underpinning the *Handbook* that the problems in the criminal justice system cited above are not unique to any one country but are shared by most, though they may vary in degree.

Structure of the *Handbook*

Chapter I, entitled “Legal aid in criminal justice systems in Africa”, provides the definition, legal basis and rationalization of legal aid services in the criminal justice system, with a special emphasis on Africa. Premised within the ongoing reforms across the continent, the chapter explores the concept of legal aid as a right and a public good that delivers returns not only for offenders and for victims of crime, but for society at large. The specificities of legal aid service demands in post-conflict settings are explored in this chapter.

Chapter II, entitled “Country actions to incorporate regional and international standards”, explores the governing legal, policy and regulatory framework for legal aid. It reviews the legal frameworks in terms of the regional and international obligations of Governments and the standard-setting instruments and focuses on the

Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and conference *travaux préparatoires*.

Chapter III, entitled “Providers of legal aid services”, examines the specialized role of the lawyer and the generalist role that can be played by trained non-lawyers to complement and supplement the work of lawyers when they are not available or not required. It examines the pre-trial, trial and post-trial stages and demonstrates a role for a trained non-lawyer at each step. It ends by demonstrating the impact of paralegal advisory services in East Africa, as well as the currently under-utilized potential of law students.

Chapter IV, entitled “Legal aid services across the criminal justice system”, explores service delivery and practices in the community, at police stations and during prosecution, at the point of trial and during incarceration. The *Handbook* explores legal aid in village and rural areas, where most people in low-income countries live and where lawyers are not available. It summarizes some of the useful practices developed by police services: extending advice and assistance to victims of crime; paralegals’ assistance in tracing parents, extending assistance to diversion programmes, and attending police interviews; rosters of lawyers and paralegals providing services in police stations; and visual aids that have been used to inform suspects and detainees. Section D, entitled “Legal aid at court”, notes the shortage of lawyers in the lower courts in Africa and the absence of legal representation for people charged with serious offences and facing long prison terms. Finally, section E, entitled “Legal aid during incarceration and rehabilitation”, illustrates the use of empowerment strategies in prisons in East Africa (through paralegal aid clinics) that enable the unrepresented detainee to represent himself or herself in court, in bail proceedings, and at the plea and trial stages. These also apply to convicted persons in facilitating appeal applications. The chapter also describes the practice of camp courts.

Chapter V, entitled “Legal aid services for the poor and marginalized”, provides an analysis of legal aid services for special interest groups of women, children and disadvantaged communities in post-conflict settings.

Chapter VI, entitled “Management and administration of legal aid”, explores programming and management practices in legal aid service delivery across the continent. It proposes a practical tool for assessment of the baseline pre-reform situation. The role of Government in providing an encouraging framework of operation and integration of legal aid into national and sector planning frameworks is explored. Innovative and promising practices of organizing external support at the national level are brought to the fore.

I.

Legal aid in criminal justice systems in Africa

A. Introduction

The foundation of the right to legal aid in the criminal justice system is premised in the universally accepted principle of “fair trial”. The right to a fair hearing is universally recognized and documented in national constitutions and regional and international human rights instruments.¹ It is the foundation for the protection of individual liberties. Governments worldwide devote considerable resources to establishing functional criminal justice systems to try suspects of crime. It is also telling that persons with means make use of the legal profession to represent their interests in the criminal justice system. For without this support, those who come into contact with the intricacies of the system and rules of procedure would be unfairly pitted against the stronger, publicly funded criminal justice system machinery. Thus, the right to legal aid is a demonstration of the need to level the powers of the State to those of the suspect. The right to legal aid and representation at the expense of the State becomes a constituent element of the right to a fair trial.

The purpose of legal aid provision is to inform those in contact with the law of the extent of their rights and provide assurance of the existence and availability of services, irrespective of social and economic means. Similarly, because criminal justice systems are deeply rooted in the protection of rights, providing for inbuilt checks and balances, a functional legal aid system becomes a source of system efficiency and equity, and plays a significant role in protecting the rights of all that come into contact with the law.

Commonly cited symptoms of an ineffective legal aid system are huge case backlogs, the increasing cost of criminal justice administration, high remand prison populations² and minimal levels of public confidence in the criminal justice system.

At the time of compilation of the present *Handbook*, not a single country in Africa had an optimal prison population, a symptom of system inefficiency and a pointer to the need for increased investment in legal aid provision. Djibouti, Swaziland and Zimbabwe operated at under 100 per cent (95, 96 and 77 per cent capacity respectively). Post-conflict countries such as the Sudan (255 per cent), Sierra Leone

(237 per cent) and Burundi (264 per cent), are only surpassed by Kenya, at 340 per cent.

The *Handbook* demonstrates that countries across the continent are grappling with the development and the effective implementation of legal aid systems. The initial stage, which all countries have attained, is setting the legal framework. The laws of every country across the continent guarantee fair and prompt trials for all those who come into contact with the criminal justice system. Governments across the continent have also taken important steps towards achieving more responsive, efficient and effective criminal justice systems.

In practice, the effect of these commitments remains weak. Legal aid service reforms are often lost or narrowly cast when subsumed into broader criminal justice reforms. One effect of such low visibility is that the scope of legal aid offered by Governments in the criminal justice system is narrowly defined and the resources committed remain at a dismally low level. Non-State actors have filled the gap at the level of service provision in all parts of Africa. There is a need to enjoin Governments to pay more attention to the delivery of legal aid services across the justice system, and particularly in the criminal justice system. Specific areas of focus are the legal, policy and regulatory frameworks, planning and budgets, and special protection for disadvantaged groups.

What is documented in this *Handbook* are innovative practices by policymakers and practitioners taking important and promising steps to put into effect the constitutional right to criminal legal aid services. These practices strive to rise beyond the commonly cited concerns of cost, convenience and lack of political gain in providing legal aid services.

In the context of this *Handbook*,³ legal aid simply means free or inexpensive legal services provided to those who cannot afford to pay the full cost. The definition in the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa is broader than the conventional scope of legal aid as representation by a lawyer in a court. Legal aid covers a range of justice services, from advice, assistance and education to alternative dispute resolution and representation. The Declaration broadens legal aid to include legal advice, assistance, representation, education and mechanisms for alternative dispute resolution. These services may be provided by a wide range of stakeholders, such as non-governmental organizations (NGOs), community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.⁴

B. The legal standard

“For the United Nations, ‘justice’ is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.”⁵

The Universal Declaration of Human Rights⁶ sets in general terms, as a common standard of achievement for all peoples and all nations, that everyone charged with a penal offence should be granted all the guarantees necessary for his or her defence (art. 11, para. 1). The International Covenant on Civil and Political rights obliges the State to provide State-funded counsel for indigent persons. The Covenant states that an accused offender is entitled “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it” (art. 14(3)). The provision for legal aid in this article is set out among the minimum guarantees to which everyone is entitled, in full equality in determination of any criminal charge. Thus, the Covenant asserts that in criminal matters one of the necessary guarantees is the right to defend oneself in person or through legal assistance of one’s own choosing. The Covenant further asserts the right [of the defendant] 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 (art. 14, para. 3(d)). These two criteria leave a margin of discretion for the State to decide when free legal representation should be given by the State, but the decision must be made in each individual case and the discretion is not without limits.

The African Commission on Human and Peoples’ Rights, of which all African countries excepting Morocco are members, has adopted a series of principles and guidelines governing legal aid, which include the Dakar Declaration and Recommendations (1999), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003), and adopted a resolution supporting the Lilongwe Declaration (2004). The Lilongwe Declaration recognizes the right to legal aid in criminal justice and broadens legal aid beyond the notion of legal advice and representation.

The Declaration emphasizes the need to sensitize all criminal justice stakeholders to the crucial role of legal aid. It fosters development and maintenance of a just and fair criminal justice system. The societal benefits that result from the elimination of unnecessary detention, the speedy processing of cases, fair and impartial trials and the reduction of prison populations are enormous for a State.

The Declaration requires access to legal aid at all stages of the criminal justice system, including investigation, arrest, pre-trial detention and bail hearings, in addition to trial and appeal processes. It recommends a diverse legal aid delivery system,

employing a variety of available options and provided by a range of actors to spread legal literacy among the population.

It is therefore safe to conclude that, in Africa, the legal framework for providing legal aid is established at both the regional and international levels.

C. Why does legal aid matter?

The rationale for the provision of legal aid in each era is linked closely to the social, political and legal philosophy of the time.⁷ Within the rights discourse, it is recognized that no meaningful development can ensue without the simultaneous availability of access to legal services that can be utilized to enforce all generations of rights and thus ensure the empowerment of all persons in society. Springing from this premise, the concept of access to justice has attained the status of a right in society today as it promotes the establishment of a legal culture that contributes to development processes.

In the case of Africa, legal aid must be considered as a necessity, given the origination of the criminal justice system and the context of operation, characterized by low levels of literacy, high incidences of poverty and a sizeable distance between the criminal justice system and its users. By design, the provision of legal aid services is meant to assist the socially and economically disadvantaged. Poor members of society with negligible access to legal services are often disproportionately represented in the criminal justice system. The reality in many countries is that, while those with education do commit crimes, they are more likely to know their rights, and to be able to successfully defend themselves or cheat the system on the basis of their wealth.⁸ Legal aid secures the rights of all who come into contact with the law, irrespective of their social or economic status.

Legal aid benefits persons arrested by providing a mechanism to establish their innocence. Those accused of a crime get a fair trial under a legal standard that society can trust. When this occurs, legal aid benefits the victims by providing them with a legal system that addresses the gravity of the crime and the conviction of the right person. Perpetrators are also assisted. Where this fails, the results can be drastic.⁹

The provision of basic justice services helps poor people to feel more secure in the relevant jurisdictions and increases their confidence in the justice system. In general terms, as the Lilongwe Declaration states, the immediate societal benefits of providing effective legal aid include the elimination of unnecessary detention, speedy processing of cases, fair and impartial trials and the reduction of prison populations (para. 2).

D. Who benefits from legal aid?

Within the continental context of national budgets constrained in addressing national priorities, pitching for legal aid funding is an arduous task. It is now recognized that prioritization by the national treasury can only be obtained if the benefits of legal aid and/or the potential losses in priority sectors can be demonstrated. The Lilongwe Declaration draws attention to the societal benefits of providing effective legal aid.

In prisons in several African countries, incidents of vandalism and massive jailbreaks have been reported, often linked to overcrowding and long delays in prosecution. As the majority of inmates were awaiting trial, these incidents were associated more with a cry for justice than with poor conditions, as some of these prisons had been recently renovated. In one case of a jailbreak in a post-conflict country, the United Nations Mission in Liberia Corrections Advisory Unit estimated that over US\$ 1.8 million had been spent on rehabilitating and equipping prisons in the country and that, as a result of the damage caused by rioting detainees, a further \$500,000 worth of damage had been inflicted on facilities and equipment. The damage caused as a result of simmering frustrations is not only to infrastructure and the frustration of prisoners on remand (awaiting trial) is not only occurring in post-conflict countries.

The provision of primary justice services in prisons in Africa has reduced the risk of such violence occurring. The societal benefits of effective legal aid alluded to in the Lilongwe Declaration include:

- Speedier hearing of cases and reduced hardship to accused and their victims' relatives
- Improved case management
- Reduction of the backlog and breaking down the remainder into manageable numbers
- Substantial savings to the judiciary in terms of judge days and costs spent trying the cases.

E. Who provides legal aid?

Primary responsibility of the State

The provision of legal aid services in the criminal justice system is primarily the responsibility of the State. This position is rooted in national, regional and international human rights instruments. States are mandated to promote the right of everyone, especially victims of crime and vulnerable groups, to basic legal advice, assistance and education. They are also mandated to establish an independent national legal aid institution accountable to parliament and protected from executive interference; to ensure the provision of legal aid at all stages of the criminal justice

process; to recognize the role of non-lawyers and paralegals and clarify their duties; and to recognize customary law and the role non-State justice forums can play in appropriate cases (such as cases diverted from the formal criminal justice process).

Governments are therefore under an obligation to formulate legal aid policies, enact national legislation for legal aid service delivery and create institutions and working practices to ensure effective legal aid service provision to all categories of claimants.

The legal profession

An effective criminal justice system requires the legal profession to provide the demand side of justice with all legal services necessary and of a standard equal to those provided by the State. According to the Lilongwe Declaration, “it is universally recognized that lawyers are officers of the court and have a duty to see that justice systems operate fairly and equitably. By involving a broad spectrum of the private bar in the provision of legal aid, such services will be recognized as an important duty of the legal profession. The organized bar should provide substantial moral, professional and logistical support to those providing legal aid. Where a bar association, licensing agency, or Government has the option of making pro bono provision of legal aid mandatory, this step should be taken. In countries in which a mandatory pro bono requirement cannot be imposed, members of the legal profession should be strongly encouraged to provide pro bono legal aid services” (para. 8).

Lawyers then have a duty to lead in the provision of legal aid and Governments have a duty to provide the resources to enable a range of service models and service providers to operate.

In practice, however, the number, coverage and range of services provided by lawyers to indigent clients in Africa are extremely limited. Not only is the number of lawyers per head of population one of the lowest in the world, but access to legal aid by criminal justice claimants is further hindered by cost, distance and technicalities. Inability to access affordable legal aid services increases feelings of social exclusion and powerlessness.¹⁰ The ratio of lawyers to population in specimen countries is shown in the table below:

Country	Population (millions)	Percentage of rural-based population	Number of lawyers
Angola	13	43	570
Burkina Faso	16	80	131
Burundi	9	90	106
Central African Republic	4	80	38
Côte d’Ivoire	21	51	420
Ethiopia	80	84	4 000
Ghana	22	90	5 000

Country	Population (millions)	Percentage of rural-based population	Number of lawyers
Guinea-Bissau	2	70	45 *
Kenya	37	84	3 817
Malawi	13	75	300
Mali	12	70	265
Mozambique	22	63	779
Niger	13	80	112
Rwanda	11	82	131
Sierra Leone	5	60	100 *
Sudan (North)	40	70	3 000
Sudan (South)	8	90	<50 *
Uganda	32	86	2 000
United Republic of Tanzania	39	85	1 135

Note: Exact figures are cited as registered by the national law society. Rounded figures are a mean estimate collected from a range of sources. Figures marked with an asterisk (*) represent the number of lawyers estimated to be in practice, although more may be registered by the law society.

The complementary role of non-State actors

The reality that many States in Africa lack the necessary resources and capacity to provide legal assistance in criminal cases requires States to recognize the impact of action by civil society organizations in improving access to legal aid in criminal justice to promote the participation of civil society organizations in that endeavour and to cooperate with them (Economic and Social Council resolution 2007/24).

Legal aid provided by non-governmental organizations

In the Lilongwe Declaration, it is stated that there are not enough lawyers in African countries to provide the legal aid services required by the hundreds of thousands of persons who are affected by criminal justice systems. Non-lawyers, including law students, paralegals and legal assistants should therefore play a complementary role in legal aid service provision, providing access to the justice system for persons subject to it, assisting criminal defendants and providing knowledge and training to those affected by the system to enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants (para. 7).

NGO-administered alternative dispute resolution has emerged in South Asia as an option for poor people to choose in place of traditional practices. It was notably

pioneered in Bangladesh in the 1980s, for example, by the Madaripur Legal Aid Association as a way of building on, but gradually modifying, the gender-biased and otherwise problematic aspects of the dominant traditional dispute resolution system known as *shalish*. Numerous other legal aid, gender-oriented and community development NGOs across the continent have since adopted many variations on the Madaripur Legal Aid Association model, some as stand-alone approaches and others integrating dispute resolution into their broader development work.

This approach has been adopted and welcomed in Malawi, where the Paralegal Advisory Services Institute, with the guidance of the Kenyan Dispute Resolution Centre, is working in rural areas, and in Sierra Leone, where Timap for Justice is working in rural areas.

In 2008, the Government of Sierra Leone, on the basis of its recognition that the vast majority of the population did not have access to satisfactory legal services and that civil society could play a valuable role in providing them, particularly through the provision of community-based paralegal services (for example, Timap for Justice), decided to explore the potential for scaling up the provision of such services, for example through contracting out or through public/private partnerships. It recognized that extended paralegal service provision had the potential to provide a step change in access to legal services in an extremely cost-effective manner.¹¹

F. Legal aid in post-conflict settings

In post-conflict settings, priority is given to the delivery of effective security and basic human support services. The State is faced with the dual task of re-establishing its capacity by building institutions and processes, and ensuring its own legitimacy by addressing the needs of its citizens. The shortage of basic legal services is particularly acute in States recovering from conflict, where much of the legal profession may have been targeted or decimated by one or more of the factions engaged in the conflict. As a result, many lawyers may have been forced to flee the country or killed in the conflict, with the result that in the post-conflict, literally a handful of lawyers are operational in the country. Even where the Constitution and laws guarantee the right to counsel, in such situations, they may simply be unavailable, requiring that alternative sources of legal assistance, including volunteers from outside the country or paralegals who can provide limited legal assistance, be sought until the population of qualified lawyers can be restored.

In post-conflict countries, the number of prisoners and rates of imprisonment are generally low in the early post-conflict stage. This is often because, during or at the end of the conflict, the criminal justice system will have ceased to function either entirely or partly. Abandoned prisons decay quickly. As the police and court systems are gradually rebuilt, the numbers of those arrested and imprisoned often exceed the capacity to build sufficient accommodation. The rate of imprisonment increases, but experience indicates that the increase is not necessarily uninterrupted and does

not necessarily become a cause for concern. Liberia, for example, had an initial rapid growth in the imprisonment rate, but seven years after the conflict a relatively low rate of imprisonment had been attained.¹²

In post-conflict countries such as Burundi, the Democratic Republic of the Congo, Liberia, Timor-Leste and South Sudan, where the court system collapsed, the majority of the prison population will inevitably be pre-trial detainees. Some are held for sound reasons grounded in the national laws. Many, however, are held unlawfully and/or for excessive periods of time. Given the complexity of court systems, it is inevitable that re-establishment of court processes will take considerable time and this means that alternative practices must be developed to ensure that the rights of detainees are safeguarded.

Within an active conflict setting, communities tend to develop coping mechanisms. The challenge is to accord priority to the provision of legal aid services as soon as the country re-establishes its legal system. In this way, the legal framework will create a platform for the protection of the rights of individuals, particularly women victims of rape and domestic violence. Both categories of crime can reach epidemic proportions, not just as a direct result of war, but as a result of conditions in displacement camps and war-affected communities. In addition, child survivors of forcible military recruitment may turn delinquent after demobilization. Cross-border refugees, many of whom find themselves imprisoned as illegal immigrants in countries of refuge, are without any external means of assistance. Internally displaced persons and refugees returning home may be detained in disputes over their rights to their former lands and property. Many individuals may be illegally detained and abused or tortured in detention by irregular forces emerging in armed conflict, or by regular police or gendarmerie acting abusively in situations of gross overcrowding and stress. Clear and consistent programming is essential in these circumstances, as the promising practice in Southern Sudan demonstrates.

II.

Country actions to incorporate regional and international standards

A. Introduction

The majority of countries in Africa have ratified the relevant regional and inter-national treaties and conventions. The promising practices documented in this chapter are in countries that have taken the next requisite step to incorporate the international standards into national legislation. This is an ongoing process in all countries with new legislation under development (e.g. Sierra Leone Legal Aid Bill, 2010) and old legislation under review and reform.¹³ In Ethiopia, the legislative enactment process has yet to be launched. In Nigeria, South Africa and Zambia, Legal Aid Acts provide for the scope of legal aid in both civil and criminal cases and the institutional structures to implement the purposes of the Acts.

A key lesson is that the implementation of the spirit of the regional and international treaties regarding legal aid service provision is, on the whole, a work in progress. Promising practices exist where countries have enacted national laws, have drafted national legal aid policies and included legal aid provision as a measurable indicator for poverty reduction in national development plans. More importantly, these are processes where countries require expert guidance, sharing experiences and lessons learned.

Motivating and ensuring full implementation of the legal and policy intentions require constant and consistent monitoring at all levels. In Kenya, Ethiopia, Rwanda and Uganda among others, there is no distinct national unit responsible for the delivery of legal aid services.

Non-State action is critical within the country to mobilize public pressure and ensure impact on the discussions of scope, funding and delivery of legal aid services. United Nations bodies and civil society organizations have an invaluable role to play in enhancing the visibility and awareness of the regional and international instruments described below as tools for guaranteeing legal aid service delivery.

B. Regional and international legal framework

The applicable regional and international instruments include the International Covenant on Civil and Political Rights,¹⁴ the Convention on the Rights of the Child,¹⁵ the Convention on the Elimination of All forms of Discrimination against Women,¹⁶ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁷ These conventions establish the right to legal aid and are binding on those States that have ratified them.

At the regional level, the African Commission on Human and Peoples' Rights, of which all African countries excepting Morocco are members, has adopted and endorsed a series of principles governing legal aid and penal reform. These include the Kampala Declaration on Prison Conditions in Africa and Plan of Action (1997), the Kadoma Declaration On Community Service Orders in Africa and Plan of Action (1997), the Dakar Declaration and Recommendations (1999), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and Plan of Action (2002) and the Lilongwe Declaration and Plan of Action (2004).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa guarantees access to justice and equal protection before the law. It provides that women and men are equal before the law and shall have the right to equal protection before the law. States parties are enjoined to take appropriate measures to ensure effective access by women to judicial and legal services, including legal aid, and to support local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid.¹⁸ A total of 27 of the 53 member States have ratified the Protocol to date.

Article 17 of the African Charter on the Rights and Welfare of the Child enjoins States parties to ensure that every child accused in infringing the penal law shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence, shall have the matter determined as speedily as possible by an impartial tribunal and, if found guilty, be entitled to an appeal by a higher tribunal.¹⁹

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²⁰ provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he or she does not have sufficient funds to pay. The United Nations Standard Minimum Rules for the Treatment of Prisoners²¹ provide for untried prisoners to be allowed to apply for legal aid where such aid is available.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice²² provide that throughout proceedings, children in conflict with the law have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country. Where children in conflict with the law are detained under arrest or awaiting trial, they have the right to legal counsel and are to be able to apply for free legal aid where such aid is available.

C. From regional and international to national laws: legal aid bill of Sierra Leone

The Government of Sierra Leone has ratified the international conventions with a bearing on the right to legal aid.²³ Sierra Leone recognizes that the vast majority of its population does not have access to satisfactory legal services. The development of a functional legal aid system is therefore a deliverable under the Government's Justice Sector Reform Strategy and Investment Plan. Sierra Leone has set up a leadership group to direct policy and ensure accountability. The Group, which is under the chairmanship of the Vice-President, meets regularly to play an active role in overcoming problems in the justice sector.

The Constitution mandates parliament to make provision for the rendering of financial assistance to any indigent citizen where his rights have been infringed or with a view of enabling him to engage the services of a legal practitioner to prosecute his claim. It adds that the infringement of the right must be substantial and the need for legal aid real.

The Sierra Leone Legal Aid Bill 2009 draws heavily on the spirit and language of the Lilongwe Declaration and Plan of Action. It makes reference to the binding nature of the international law framework and refers to the relevant provisions of the Dakar Declaration, 1999, and the African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001.²⁴

The draft legislation establishes an independent Legal Aid Board funded by parliament. It establishes a public defender scheme and allows for cooperation agreements with accredited legal aid service providers. It provides for mandatory 24-hour free legal services from lawyers every year. In addition to the above, the draft law recognizes potential providers such as NGOs and university law clinics. The legislation requires front-line criminal justice agencies such as the courts, prisons and police to put a suspect in contact with a legal adviser or service provider and further requires automatic review by the High Court of any sentence in excess of three months' imprisonment where the defendant was unrepresented.

D. Policies and strategies in South Africa

The Constitution of South Africa provides that everyone who is detained, including every sentenced prisoner, has a right to choose and to consult with a legal practitioner, and to be informed of this right promptly (section 35(2)(b)). Such a right does include a legal practitioner assigned to the detained person by the State, at its expense, especially if injustice would otherwise result. It is mandated that a detainee should be given a reasonable opportunity to obtain the services of counsel, for example, by the authorities allowing the detainee to contact a relative, the Legal Aid Board or a lawyer.

It is upon that basis that South Africa has achieved progress towards implementation of a National Legal Aid Strategy. The strategy is implemented through a Legal Aid Board, an autonomous statutory body established by the Legal Aid Act of 1969. The service is regulated by the Legal Aid Board, which started its operations in 1971. Membership of the Board is drawn from the judiciary, the Bar Association, Government departments and independent experts on legal aid.

The Board views itself as a facilitator of indigent peoples' access to justice in relation to matters that concern their livelihood. The Board adopted a four-pronged approach, including the operation of justice centres, cooperation agreements, impact legislation and a national legal aid internship programme.

Justice centres are one-stop centres for legal aid clients. The centres incorporate the different constituents of the legal aid scheme under one umbrella, including qualified public defenders, law clinics and interns. The centres employ salaried legal practitioners whose entire focus is on service to the poor. Cases may be referred to private lawyers if the centre lacks the professional competence to handle the case. However, one of the goals of the Legal Aid Board is the provision of quality legal assistance, as good as the best private lawyers can provide. The centres take on matters that fall within certain priority areas of the law, including criminal matters, women and children. In practice, the services offered include consultation, representation and bail applications after an accused has been charged with a crime. The centres are under the guidance of a National Access to Justice Director whose duty is to ensure that the centres deliver access to justice in its fullest sense to the poor. There is general agreement that justice centres have improved the efficiency of the delivery of legal aid services compared to the ills of the Judicare system. At the management level, focus is on client service. The Board has justice centres and operates public defenders' offices countrywide. Where there are no offices, the Board relies on the assistance of legal aid officers in the employment of the Department of Justice.

Cooperation agreements are specifically made with NGOs capable of delivering legal services. These also include public-interest law firms, independently funded clinics and paralegal advice offices. The bulk of the funding provided by the Legal Aid Board should be used to directly benefit the poor through the delivery of legal services. If the costs per case in any three-month period exceed the average cost of Judicare, the Board has the right to terminate the agreement. However these mostly relate to civil and not criminal matters. The contract is with organizations with a proven track record in public-interest law, effective community service, or who have established infrastructure in the region where the Legal Aid Board has no presence.

Board activities are dictated by rules that are incorporated in the *Legal Aid Guide*. Under the *Guide*, legal aid is to be administered under the supervision of the Director of Legal Aid, who is an officer of the Board. The *Guide* further recognizes that legal practitioners should be paid for their work.

Under the National Legal Aid Internship Programme, law clinics provide free legal services to the needy. Qualified legal staff represent clients in the Courts of Judicature

in both criminal and civil matters. The law clinics funded by the Legal Aid Board employ supervised law graduate interns as public defenders in the district criminal courts and a restricted number of civil cases. Approximately 3,000 law graduates are trained annually by the South African law schools. The clinics have proved to be an efficient and cost-effective method of delivering legal aid services for the Board. The clinics are mandated to employ a principal, who is an attorney with sufficient practical experience, to supervise the graduates in the community service programme. The candidate attorneys appear in the district courts and the principals in the regional and high courts. Interns who have been articled for more than a year may also appear in the regional courts. Candidate attorney interns may be employed to do community service at a maximum ratio of 10 interns to one supervising attorney.

State-funded internship programmes tap into the country's vast under-utilized human resources and thus contribute to Government service provision in a number of key ways. First, in countries requiring law graduates to undergo internships in law firms before admission to practice, such interns can play a valuable role by providing legal aid services as public defenders in district courts. Second, legal services can be offered at reasonable cost to indigent members of the public. Third, interns who may otherwise not be able to gain access to the legal profession are provided with placements, practical training and an opportunity to serve the community. Properly trained and supervised, their standard of service in the field of criminal law will be equal to that of qualified lawyers or privately employed legal interns.²⁵

The law students raise the level of legal literacy among the public, in addition to providing them with valuable advice and assistance through a "street law" programme. The programme explains how the law affects people in their daily lives, when they need the services of lawyers and where they can obtain assistance, particularly if people are poor and cannot afford legal services.²⁶ The rationale is that, unless people are aware of their legal rights, they will not know that they have a right to apply for legal aid.

The South African Street Law Project is a preventative legal education programme that provides people with an understanding of how the legal system works and how it may be used to safeguard the interests of people on the street. The programme has proved effective in South Africa in educating ordinary people, schoolchildren and the incarcerated about the law, human rights and democracy.

The programmes are mainstreamed into university budgets or the budget of the national legal aid body. This is because their financial position would be unpredictable if they had to rely on local or foreign donor funding. An alternative source of funding is to seek cooperation agreements to conduct legal literacy and human rights workshops.

Under impact legislation and progressive policies, the Government of South Africa has developed a policy paper towards recognition of paralegals in providing access to justice. The policy provides recognition of services of advice offices and seeks to link paralegals into the integrated justice system, while they retain their

independence. The policy also strengthens and develops skills and the capacity of advice offices and paralegals and works to integrate in the justice sector independent networks of advice offices, community-based organizations and professional bodies.

E. Joint national justice strategy in Uganda

In Uganda, over 11 institutions with a core mandate of administering law and order implement a joint strategy to reform the justice system.²⁷ The Justice, Law and Order Sector Strategy prioritizes access to justice for all, particularly the poor and marginalized groups. Therefore the removal of barriers to access to justice, including the provision of legal aid services, has become a measurable indicator of sector performance. The strategy recognizes the complementary roles of non-State actors, civil society organizations and the legal profession, development partners and the regulatory institutions in the delivery of legal aid services. To improve the quality of services delivered, the Uganda Law Council is strengthening the regulatory framework for legal aid provision, including setting and ensuring compliance with standards of legal aid service delivery. The Government of Uganda, working with development partners, is supporting the joint efforts of legal aid service providers to coordinate and develop joint plans and strategies and ensure wider and equitable geographical reach through the provision of funding to providers in underserved areas and for special interest groups. The latter include children in conflict with the law, minorities, women and those in detention.

Legal aid service providers are now organized under the Legal Aid Service Providers Network, an innovation that has strengthened the voice for legal aid provision in the strategy implementation process. The Network is encouraged to innovate and provide input and alternative models for consideration by Government. As the Government develops a legal aid policy, experiences from previous projects and the inputs of civil society organizations are informing the formulation process. The benefits of inclusion of legal aid service provision in the country strategy for the administration of justice, law and order are visible. Legal aid is recognized in policy, planning and resource allocation forums as a vital component of access to justice. Performance of the sector now includes progress towards establishing a functional legal aid system. The collectivization of providers and funding has reduced duplication and waste of resources. Important, too, is to ensure that those in most need are identified and that deliberate strategies are devised to guarantee their access to legal services. Innovations in expanding access are numerous and are informing the development of the legal aid policy. The reintroduction and enactment into law of the requirement for mandatory pro bono services to be provided by members of the legal profession, the expansion of paralegal advisory services, the piloting of justice centres (based on the South African model) and exploration of the intersection between the formal and informal justice systems are all geared towards improving access to justice for the poor and marginalized groups.

F. Governance, justice, law and order in Kenya

The Ministry of Justice, National Cohesion and Constitutional Affairs of Kenya launched a National Legal Aid Scheme in September 2008. The initial target of the Scheme is legal advice, with plans to roll out to legal representation in later years. Under the Scheme, pilot projects are designed to test the implementation of the model under the supervision of the Government. The pilot programme includes a mechanism for coordination both within Government and with other role players. The Scheme defines the duties and responsibilities of all participants. To drive this process, Kenya has established a steering committee comprised of representatives from the Law Society of Kenya, Kenya National Commission of Human Rights, the Police Department, Children Services Department, Probation and After Care Services, International Commission of Jurists (Kenya chapter), the Kenya Community Paralegal Network, Federation of Women Lawyers, Kenya and the deans of public university law faculties.

G. Security justice and growth programme in Nigeria

The Security, Justice and Growth Programme in Nigeria, funded by the Department for International Development of the United Kingdom of Great Britain and Northern Ireland, strives to improve the quality of governance and the protection of human rights in Nigeria. The Programme supports the development of a country-led justice sector reform grounded in the implementation of pro-poor justice sector policies. To activate the provision of legal aid services, the Programme focuses on developing the planning capacity within Government, providing a platform for sharing ideas on the development of legal aid services in Nigeria and redrafting the legal aid bill. In addition, the Programme provides support to law and mediation centres in Benue, Enugu, Jigawa, Kano and Lagos states.

H. Non-State action in favour of progressive legal, policy and regulatory frameworks

Public-interest litigation is an area that needs to be further explored to catalyse progress in the legal, policy and regulatory frameworks. Unfortunately, this area is not widely developed in Africa. This may be due to the undeveloped state of public-interest litigation in sub-Saharan Africa (excluding South Africa). But it may also result from a fear of unintended negative consequences such as institutions (e.g. prisons and police) withdrawing their cooperation. One promising practice is a legal challenge to the status quo presented by the Centre for Human Rights Education, Advice and Assistance in Malawi.

Legal challenge to detention in Malawi

In December 2008, the Centre for Human Rights Education, Advice and Assistance in Malawi and students and faculty of the Walter Leitner International Human Rights Clinic (Leitner Clinic) at Fordham Law School in New York City jointly submitted petitions on behalf of three Malawian prisoners to the Working Group on Arbitrary Detention of the Office of the United Nations High Commissioner for Human Rights, arguing that Government violations of the prisoner's right to timely trial and other due process rights amounted to arbitrary detention (the three prisoners had been detained without trial for periods ranging from two to five years).

In November 2009, the Working Group notified the Leitner Clinic of a decision in its favour. As a result of the filing by the Centre for Human Rights and the Leitner Clinic of the petitions to the Working Group, all three prisoners were given access to counsel. Two were promptly listed for trial (both were convicted: one was released from prison for time served in March 2010 and the second will have served his sentence by 2011). The third was listed for trial later in 2010. The Malawi Human Rights Commission indicated that it was to carry out a full inspection of all detention centres in the country as a result of the Working Group decision.

I. Summary and recommendations

The regional and international legal obligations, as well as the national laws of each country, generally provide for the right to a fair trial in the criminal justice system. Since one of the pillars of a fair trial in the criminal justice system is the right to free legal representation, States are under an obligation to provide a functional legal aid system for those who come into contact with the criminal justice system.

National Governments should not narrowly define the right to legal aid by restricting it to serious cases or to limited stages of the criminal justice system. A broader definition or understanding of legal aid services improves the quality of criminal justice services and narrows the gap between the prosecution and defence arms of the law. Research shows that legal aid services are needed across the criminal justice chain. Approaches should be adopted with a complementary mix of legal and social skills.

Presently, legal aid systems are in their infant stages of development and, where in existence, are operating suboptimally. In Kenya, Rwanda, Uganda and the United Republic of Tanzania, among others, there is no national body responsible for legal aid. Southern Sudan has a Directorate of Legal Aid within the Ministry of Legal Affairs and Constitutional Development, but has not yet adopted a plan of action on legal aid.

Governments should develop legal aid policies, especially as far as criminal justice is concerned. In post-conflict countries, while institutions are being rebuilt and human resources developed, people still need access to lawful and effective mechanisms to manage their disputes and keep the local peace.

A good legal aid strategy is one that adopts a system-wide approach, as opposed to an institutional lens in programming and results monitoring. For the system to be complete, the State should devise a deliberate strategy to create voice and space for the poor and marginalized in the criminal justice system.

An important element of each strategy is the assignment of responsibility for guidance and monitoring of State progress in providing a functional legal aid system. Incremental steps by Governments need to be guided and supported to fruition. One recommendation in this direction is that States appoint a Rapporteur on Legal Aid within a broader context of access to justice (made at the Conference on Access to Justice and Legal Aid in Africa, held in Kigali, 1-4 December, 2008).²⁸ Rapporteurs can play two distinct roles: they can provide recourse to and guidance for actors within Government and outside as they strive to implement legal aid laws and policies, and they can monitor and report the progress made in effecting functional legal aid systems.²⁹

In post-conflict settings, Governments strive to re-establish legal norms and values. In relatively stable countries, legal aid needs are accorded low funding priority. Therefore, non-State actors can be empowered to demand of the State a greater commitment to the provision of criminal legal aid and stronger protections for witnesses, victims of crime, suspects and special categories.

Public-interest litigation to promote the right to legal aid at courts is an option that could be further explored by actors. Examples of actual court cases filed to seek a broader definition and/or request Governments to do more in this area are difficult to find.

III.



Providers of legal aid services

A. Introduction

Both regional and international standards frame legal aid as a collaborative effort involving State and non-State actors.

The United Nations Basic Principles on the Role of Lawyers³⁰ stipulate that:

- Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources (para. 3).
- Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics (para. 25).

At the regional level, the Lilongwe Declaration provides details in this area and calls on Governments to diversify their legal aid systems:

- Each country has different capabilities and needs when consideration is given to what kind of legal aid systems to employ. In carrying out its responsibility to provide equitable access to justice for poor and vulnerable people, there are a variety of service delivery options that can be considered. These include Government funded public defender offices, Judicare programmes, justice centres, law clinics, as well as partnerships with civil society and faith-based organizations. Whatever options are chosen, they should be structured and funded in a way that preserves their independence and commitment to those populations most in need. Appropriate coordinating mechanisms should be established (para. 6).

A number of legal aid delivery models are applied across the continent. These include Government-provided legal aid such as the State Briefs Scheme in Uganda, justice confidence centres in South Africa and Uganda, and the utilization of lawyers associations, law schools and NGOs.

B. Government-delivered legal aid

Free legal aid in Kenya is available to persons charged with capital offences in the High Court. The Children Act of 2001 also provides for free legal representation of unrepresented children before courts of law. In Uganda, State-aided legal representation is structured through a scheme commonly referred to as “State briefs”. The scheme is managed by the judiciary. To access the scheme, suspects meeting the statutory criteria, upon proof of indigence, are assigned legal counsel at the point of trial. The offences punishable by death or life imprisonment are handled, starting at the level of Chief Magistrates Court and going up. It is estimated that over 80 per cent of trial cases meet the criteria for statutory legal representation. This is the only existing legal aid initiative by the Government and is targeted at only capital offenders (Constitution of Uganda, art. 28(3e)). This method entails the State enlisting the services of private legal practitioners to conduct the defence of poor indigent persons caught up in the criminal justice system.

C. Pro bono schemes by lawyers and bar associations

Another option for providing legal aid is the utilization of bar associations. Members of the legal profession come together and make a joint, organized effort to deliver legal aid services. Tanganyika Law Society in the United Republic of Tanzania, with a membership of about 1,500 advocates, runs a pro bono scheme for criminal defence. The problem is that the scheme is not properly organized and the services rendered fall below the required standards.³¹ Pro bono schemes are uncompensated legal services performed by legal practitioners for the public good. Some States (e.g. Uganda) have a policy obliging legal practitioners to provide these free services when called upon to do so or to pay a fee in lieu. In Ethiopia, the requirement to offer pro bono services is statutory. The Federal Court Advocate’s Licence and Registration Proclamation imposes an obligation on practising lawyers to render 50 hours of pro bono legal aid service to the poor annually.

In Uganda, pro bono regulations came into force in 2009. To effect their operation, the Uganda Law Society has instituted a pilot pro bono scheme to track and document lessons. These will, in turn, inform the national roll out.

The Law Association of Zambia established a Legal Aid Committee to oversee the provision of pro bono services to the poor. The committee works hand in hand with

civil society organizations to identify worthy cases. The Law Association is also in the process of establishing advice centres at law schools and at the Zambia Institute of Advanced Legal Education.

D. Universities and law clinics

Practical legal training is being increasingly introduced into law courses throughout Africa.

The South African law clinics provide free legal services to the needy. Qualified law clinic staff represent clients in the lower and high courts in both criminal and civil matters. Approximately 3,000 law graduates are produced annually by South African law schools. It has been calculated that if each final-year law student were to do only 10 criminal cases a year in the district courts, mainly during the summer and winter vacations, annually this could provide criminal defences for 30,000 accused persons.³²

In Kenya, students volunteer legal services in slum areas of the major cities. In Nigeria, under the National Youth Service, the Government provides stipends for recently graduated law students to work for a year outside their home state. At Witswatersrand School of Law, South Africa, undergraduates are required to render free service in the Wits Law Clinic in their final year of study.

Other examples include:

Mozambique. Eduardo Mondlane University in Maputo enrolls 24 law students to provide a range of legal aid services, including community education and legal literacy courses to prisoners in Maputo Prison. Recently, the clinic partnered with a local NGO to train rural community paralegals in law and human rights.

Sierra Leone. Fourah Bay College in Freetown, Sierra Leone, enrolls 20 students to provide legal assistance and legal literacy courses on human rights-related issues relevant for Sierra Leone. These vary from individual case work to human rights awareness and public education work and campaigns. The clinic is supporting paralegals in rural communities.

Ethiopia. Mekelle University Faculty of Law Centre in Tigray has provided training to the region's social court judges, so far training 42 per cent of them. It has also conducted advocacy workshops for vulnerable groups. In 2007, the Centre was contacted by two universities in Ethiopia to share its experiences in community legal education and in providing legal aid to vulnerable populations.

Nigeria. Four universities are piloting legal aid clinics: University of Maiduguri, Abia State University, University of Uyo and Adekunle Ajasin University. They provide legal aid and empowerment to various vulnerable groups and individuals. The Network for University Legal Aid Institutions provides cost-effective legal services to the

indigent while training a new generation of skilled law students with a commitment to public service. The Network provides legal assistance to adult prisoners awaiting trial and children in conflict with the law, as well as dispute resolution services.

Student practice rules

Student practice rules refer to rules that set out the conditions under which law students can appear, under supervision, in the courts. These rules have been in operation in the United States and applied in South Africa for many years.

In South Africa, law clinics funded by the Legal Aid Board were established to employ supervised law graduate interns as public defenders in the district criminal courts and to do a limited number of civil cases. The clinics have proved to be an efficient and cost-effective method of delivering legal aid services for the Board. The clinics are required to employ a principal (an attorney with sufficient practical experience) and to supervise law graduates in the community service programme. The candidate attorneys appear in the district courts and the principals in the regional and high courts. Interns who have been articulated for more than a year may also appear in the regional courts. Candidate attorney interns may be employed to do community service at a maximum ratio of 10 interns to one supervising attorney.

Street law-type clinics

Street law-type clinics and legal awareness programmes exist in a number of countries around the world. The rationale is that, unless people are aware of their legal rights, they will not know that they have the right to apply for legal aid.

The South African Street Law Project is a preventative legal education programme that provides people with an understanding of how the legal system works and how it may be utilized to safeguard the interests of people on the street. Street law students at universities are taught how to use interactive learning methods when teaching school children, prisoners and ordinary people about the law. The programme has been conducted in hundreds of high schools throughout South Africa and involves a combination of training law students and guidance teachers from the schools to use a street law student text for the pupils and a teacher's manual for teachers. Guidance teachers and law students participating in the programme are trained to use the learner's³³ and educator's manuals³⁴ in a classroom situation.

In the United States, street law programmes have attracted some State funding because they appear to have assisted in reducing the crime rate among children and to have encouraged young people to become more responsible citizens.

However, unless these programmes are mainstreamed into university budgets or the budget of the national legal aid body, their financial position remains precarious as they have to rely on local or foreign donor money. Another way to source funds is

by entering into cooperation agreements to conduct legal literacy and human rights workshops.

E. Paralegals

Where there is no lawyer to provide advice and assistance, a role for paralegals has emerged and is well established in many parts of Africa (operating through a network of NGOs), where they are called “barefoot lawyers”. They provide basic legal services appropriate to the needs of the community and are usually volunteers who have received a short training.³⁵ Until relatively recently, these paralegals stayed in the community and referred serious and complex cases to lawyers. This is changing as paralegals are demonstrating impact in the formal justice system, especially in the field of criminal law. With the system inundated with cases and under pressure to perform, the notion that trained non-lawyers can provide appropriate and accurate information, advice and even representation is less far-fetched today than it was seen to be 10 years ago.

The Paralegal Advisory Service Institute in Malawi

In Malawi, paralegals in the Paralegal Advisory Service Institute engaged in an innovative experiment in public/private partnership, whereby independent, trained non-lawyers from four civil society organizations submitted to codes of conduct to work in prisons and police stations to provide front-line advice and assistance to people in conflict with the law.³⁶

The scheme comprises four pillars:

- Legal advice and assistance to those in conflict with the law in prison, in police custody and at court
- Legal empowerment of prisoners so that they can represent themselves through conducting paralegal aid clinics inside the prisons on a daily basis
- Linking up the criminal justice system by facilitating communication and better coordination among police, prisons, courts and the community
- Informing policy on legal aid.

The advice and assistance offered by paralegals is appropriate to the needs of the individual in the early stages of the criminal justice process. Paralegals work with groups of prisoners in prison and family members, or with the accused at court. They do not offer the confidential service provided by a lawyer to his or her client since they are not lawyers. At the police station, they interview children in conflict with the law with a view to screening them for possible diversion away from the criminal justice system and attend (where they are admitted) at police interrogations of adult suspects.

In prison, paralegals employ interactive learning techniques and forum theatre skills to empower pre-trial prisoners, in particular to understand the law and procedure and to apply it in their own cases.

Paralegals aim to work with justice agencies and assist individuals in applying their legal rights and the protection offered under the constitution. They discuss cases with prosecutors, draw up lists for magistrates and assist them in visiting prisons and conduct “camp courts”. They also assist the police, both in tracing parents (of children in conflict with the law), sureties and witnesses (to attend court) and at formal interview with a suspect. Finally, they service monthly meetings of justice agencies and refer cases to lawyers. In short, they act as the link in the chain.

In terms of policy development, the Law Commission in Malawi formally recognized a role for paralegals in a legal aid bill and the Government is considering a strategy for legal aid based on the extensive use of paralegals (under the supervision of a lawyer).

An independent evaluation of the Paralegal Advisory Service Institute noted that the impact that the Institute had had extended beyond the changes it had made to the lives of prisoners and the workings of the criminal justice system. It had been reflected also in the following:

- The universal recognition of the extent of the contribution that could be made by a professionalized paralegal service in Malawi
- The success of the Institute in demonstrating how effectively public/private partnerships could operate in the justice system between the not-for-profit sector and Government
- The impetus given by the Institute to the development of an expanded national legal aid scheme
- The collaborative partnerships that had enhanced Malawi’s reputation for bringing about changes in the criminal justice system, particularly as they affected the treatment of children in conflict with the law and remand prisoners.³⁷

The impact of the work of the Paralegal Advisory Service Institute in Malawi has led to the adoption of the scheme in Bangladesh, Benin, Kenya, Niger and Uganda. It has catalysed the introduction of similar interventions elsewhere (e.g. the Legal Aid Board in South Africa currently employs paralegals to screen the remand population in 20 of the most congested prisons based on the work of the Institute, as does the pilot national legal aid scheme in Sierra Leone).³⁸ The scheme has been visited by delegates from Cameroon, Liberia and Rwanda (in addition to the countries indicated above), who all expressed interest in starting the scheme in their countries.

The work of paralegals has been variously described as energizing, bridge-building, voices of the voiceless and pioneering. The key to success lies in the mutual trust and respect that has been engendered with partners.

The role of these paralegals is constantly evolving as the demands on the ground for legal services grow. The sensitivities involved in introducing non-lawyers into the criminal justice process have required setting high standards at the outset. Each paralegal operating in Kenya, Malawi and Uganda signs a strict code of conduct regulating his or her work in prisons and police stations. The Institute is working with the University of KwaZulu-Natal (Durban, South Africa) to develop a standardized, two-year diploma tailored to paralegals working in the criminal justice system. An evidence-based approach is adopted, as paralegals need to demonstrate impact to change established mindsets and prove their worth.³⁹

The table below shows figures from the most recent Paralegal Advisory Service Institute evaluation, for 2002-2007:

	<i>Nov. 2002- Oct. 2003</i>	<i>Nov. 2003- Oct. 2004</i>	<i>Nov. 2004- Oct. 2005</i>	<i>Nov. 2005- Oct. 2006</i>	<i>Nov. 2006- March 2007</i>	<i>Total</i>
<i>Prisons</i>						
Paralegal aid clinics held	506	865	755	995	383	3 504
Attendance	16 586	19 346	20 304	34 249	14 257	104 742
Released prisoners	461	686	437	661	177	2 422
Court users committees	27	20	3	28	34	112
Camp courts	19	12	8	26	27	92
Referred to community service programme		90	2	0	110	202
<i>Police</i>						
Children in conflict with the law screened		232	463	741	270	1 706
Children in conflict with the law diverted	20	55	123	130	49	377
Children in conflict with the law bailed		104	215	336	104	759
Children in conflict with the law to approved school		17	33	94	6	150
Parents or guardians traced		87	133	238	67	525
<i>Court</i>						
Accused assisted	158	1 531	3 487	5 809	2 936	13 921
Witnesses assisted		666	696	836	257	2 455
Bailed on application		157	222	294	43	716
Children in conflict with the law diverted		46	104	86	31	267

The table below shows updated figures garnered from the Survey of Legal Aid for 2008 and January and February 2009:

<i>Prison</i>	
Paralegal aid clinics conducted	1 150
Prisoner attendance	48 000
Prisoner releases through Paralegal Advisory Service Institute	671
<i>Court</i>	
Accused assisted at court	12 000
Witnesses assisted at court	700
Bail granted	350
Children in conflict with the law diverted from formal justice system	47
<i>Police</i>	
Children in conflict with the law screened by Paralegal Advisory Service Institute	497
Number bailed	228
Number diverted	51

Replication of a good practice: the Paralegal Advisory Service in Uganda

The Paralegal Advisory Service in Uganda employs 78 paralegals and social workers at 11 sites throughout the country to provide basic legal aid to persons in conflict with the law, from the entry into the justice system at the police station through the prosecution department, trial process in court, and in prison if a person is remanded or is serving a sentence. Paralegals and social workers ensure that those on the demand side of justice, including the accused persons, victims, complainants, witnesses and sureties understand the process and procedures of accessing justice at different stages in all justice institutions. They also raise awareness about the rights and responsibilities of users of the justice system. This is all aimed at making justice system users active players and partners in the administration of justice.

The Paralegal Advisory Service also acts as a link between the users and administrators of justice through activities of paralegals and social workers. They hold the administrators of justice accountable by reminding them of their operational standard procedures and guidelines. This is achieved through civic engagement, advocacy and follow-up of cases to ensure that they progress through the justice institutions without undue delay.

Through continuous follow-up of cases and liaising with the administrators of justice, the sick and elderly are identified and presented to resident judges and trial magistrates to have their cases expeditiously heard and concluded. The Paralegal

Advisory Service also engages in advocacy and lobbying for minor offenders who qualify for non-custodial sentences such as fine payment, cautions and community-service sentences, or when they could benefit from alternative dispute resolution instead of going through the entire justice system. This is aimed at limiting custodial sentences for deserving serious offences and consequently addressing the challenge of congestion in detention facilities.

Over the last five years, the quality of self-representation among minor or petty offenders in court has greatly improved. This is a result of awareness-raising and education on self-representation, demystifying the court processes through role-playing on what to expect in court and knowledge on mitigation of cases. Users of the justice system have also become active players and partners in the administration of justice, and the numbers of successful police bond and court bail applications have increased. As a result, the Paralegal Advisory Service has also helped to check corruption in the criminal justice institutions. Knowledge of the processes and procedures of the criminal justice system by the public reduces vulnerability to manipulation and extortion of money by corrupt officials and impostors.

Overall, paralegals and social workers have generally been accepted as partners in the administration of justice, especially through their role of facilitating daily linkages among the administrators of justice, linking suspects and inmates to the outside world for required assistance and raising awareness among users of the justice system about the processes and procedures of access to justice.

The table below shows annual Paralegal Advisory Service statistics on achievements in key result areas for the period June 2009 to May 2010:

<i>Key result area</i>	<i>Number of cases</i>
Mandatory bail	3 448
Mediation or diversion	1 294
Court bail	2 661
Police bond	8 613
Community-service orders	2 538
Release on fine payment	217
Other releases (caution, dismissal, acquittals)	8 719
Total cases handled	27 490
Sureties traced	33 385

Paralegal programmes have been initiated in several other African countries. One additional example is the programme operated by the Zanzibar Legal Services Centre in the United Republic of Tanzania. Paralegals participating in this programme are paid about \$60 per month and can receive bicycles to enable them to move around in their constituencies, pursue cases and offer legal information. Paralegals come from within the communities with which they work. They have other occupations,

as teachers, clerks or medical officers, and their work as paralegals is in addition to their regular job. However, their standing in society is important for impact purposes. Currently, paralegals are trained on the basis of the law school syllabus, but the Centre is considering introducing a more sustainable method of introducing paralegals to law for a period of two years on a part-time basis.⁴⁰

The legal system in Zanzibar recognizes a category of people who are not qualified advocates, but semi-trained lawyers who are allowed under the law to represent clients in the lower parts of the judiciary, primary courts and Kadhi's courts (Vakils). For one to become a Vakil, the approval of the Chief Justice of Zanzibar is required. By providing thorough training, paralegals may qualify to be recognized as Vakils and later pursue that route in the legal profession. This allows for the use of paralegals in court without revising legislation and has advantages both in the short and long terms.

Legal empowerment

The empowerment of prisoners to apply the law themselves is a key objective of paralegal work throughout Africa. Paralegal schemes are increasingly demonstrating their value, even in countries where there is no shortage of lawyers. Paralegal schemes benefit from having clearly defined objectives. The Paralegal Advisory Service confines its activities to the criminal justice system and is proving that paralegals can provide an essential function in bridging the gaps between justice providers, such as judges, magistrates, prosecutors, police and prison officers, and users of the justice systems. Paralegals make information about the processes and content of law more accessible. They help those who are caught up in the system take control by providing practical advice and assistance, thereby contributing to what is increasingly referred to as legal empowerment.

The Paralegal Advisory Service, Uganda, in its latest annual report, demonstrates that self-representation of suspects and inmates resulted in the following:

- Commencement of custodial or community-service sentences, or fine payments
- Releases and acquittals
- Receipt of bail and police bond.

The Paralegal Advisory Service supports these claims in the table below.

<i>Number of persons accessing legal advice</i>	<i>Number of sureties traced</i>	<i>Number of community-service orders issued</i>	<i>Number of accused persons screened</i>	<i>Paralegal Aid Clinic attendance</i>
26 759	16 928	1 503	25 443	166 048

The Kenya Prisons Paralegal Project operates with over 20 paralegals and reported the figures for 2006 shown in the table below:

<i>Paralegal aid clinics</i>	<i>Prisoners in attendance</i>	<i>Number commuted to community service orders</i>	<i>Acquitted</i>	<i>Released on bond</i>	<i>Bail or bond terms reduced</i>
800	30 859	502	906	277	917

These figures also attest to the urgent need of people in the criminal justice system for accessible and meaningful advice and assistance.

F. Informal justice mechanisms

Informal justice systems vary considerably and represent a continuum with regard to all the concepts that form part of the term. The different types of systems on the continuum will have various characteristics in terms of composition and appointment, sources of legitimacy, organizational arrangements, process and outcome, linkages to the formal system, normative or legal frameworks, monitoring, supervision, appeal mechanisms, fees and costs.⁴¹

Informal and traditional mechanisms of justice are the most accessible to poor and disadvantaged people and may have the potential to provide speedy, cheap and meaningful remedies to the poor and disadvantaged. However in developing economies, meaningful improved access to justice may require both formal and traditional systems for obvious reasons. The formal systems need to be informalized, to become user-friendly, and traditional systems need to be formally recognized under the oversight of the courts to ensure fair and impartial justice. There is a need to build on the comparative advantages of both formal and traditional adjudication.

Traditional adjudication⁴² can be best suited to conflicts and disputes between people living in the same community who seek reconciliation based on restoration. When attempting to understand and develop policies or programmes on the roles and mandates of the informal justice systems, it is of the utmost importance to address each informal justice system not in isolation, but as part of a wider landscape of primary justice providers in each particular context. Appropriate functioning linkages and consideration of real referral mechanisms between different types of systems (e.g. traditional courts, formally recognized local courts, mediation courts) have to be considered and, in many contexts, paralegals operating in the formal system and community-based paralegals can play a central role in this. Such efforts for linkages should include alternative dispute resolution mechanisms established within the two systems and supported by professional and political actors within the formal justice

system. Dialogue between formal and informal actors is also paramount as a means of facilitating the flow of information, coordinating legal information and awareness-raising activities, and maximizing scarce resources. Linkages may exist directly between primary justice providers, such as between the lowest-level State courts and customary courts, or happen through intermediaries such as the State police or paralegals. These linkages can be official and unofficial and both types will often co-exist.

However, informal and/or traditional justice systems can only help meet the goal of accessible justice when they are consistent with the rule of law and respect for human rights. The operations of both formal and informal justice systems should ideally be complementary. In this respect, there should be no discrimination on the basis of sex or any other status by either formal courts or traditional justice forums. Punishments imposed by formal courts and informal justice forums should be consistent with relevant constitutional and legal provisions.

The United Nations Development Programme, United Nations Children’s Fund and United Nations Development Fund for Women study on informal justice systems uses the term “functional linkages” to refer to the kinds of collaboration between primary justice providers that exist in terms of handling cases, such as appeal procedures, information-sharing, cross-referrals, labour division for types of cases handled, financial and logistical support mechanisms, and regulation and monitoring of performance by the State of informal justice system providers. Such functional linkages may exist directly between primary justice providers, such as between the lowest-level State courts and customary courts, or occur through intermediaries such as the State police or paralegals.

There are positive examples of training provided jointly to adjudicators in informal justice systems and other primary justice providers, especially paralegals.⁴³ Joint training of this kind can foster cooperation and productive relationships.

G. Summary and recommendations

Meeting the demand for legal aid services requires a range of services and actors to support the criminal justice system. Governments are starting to recognize that they have to launch legal aid provision programmes, drawing on a range of service providers, including lawyers, otherwise legal aid will remain a remote aspiration for ordinary people. The *Handbook* provides the following recommendations:⁴⁴

- Governments should diversify legal aid services providers, adopting an inclusive approach, and enter into agreements with the Law Society, as well as with university or law school clinics, non-governmental organizations, community-based organizations and faith-based groups to provide legal aid services. Law students are a great untapped potential in most developing countries. Government and development partners should find a platform to encourage the development of student practice rules that allow law students in their

final year to practise in courts under the supervision of qualified lawyers or faculty staff

- Governments should encourage lawyers to provide effective and real pro bono legal aid services as an ethical duty
- Governments should agree to minimum quality standards for legal aid services and clarify the role of paralegals and other service providers by developing standardized training programmes, monitoring and evaluating the work of paralegals and other service providers, requiring all paralegals operating in the criminal justice system to submit to a code of conduct, and establishing effective referral mechanisms to lawyers for all these service providers.

IV.

Legal aid services across the criminal justice system

A. Introduction

The criminal justice system bears two key characteristics: first, that it is a mutually reinforcing system, that there is a symbiotic relationship between the Government's duty to provide a service (the supply side) and the justice claimants' right to demand justice (the demand side). Second, the actors and structures of the criminal justice system are mutually dependent: every actor and structure has to play its role for the system to function successfully. The failure of one actor or structure is bound to precipitate that of other structures and processes. These characteristics form the basis of the sense of collective responsibility that is taking root in criminal justice programming. It is no longer beneficial to invest in the supply side of criminal justice without corollary support to the demand side.

A key assumption of the criminal justice system is one of equality of arms between the prosecution and defence sides of justice. The assumption of an equally empowered accused person underpins the right to legal aid. As a result of poverty, low levels of education⁴⁵ and utilizing a highly technical system, accused persons, witnesses and victims of crime find themselves without a voice and disempowered by the system that is supposed to help them. As often noted, the unaided poor receive a low quality of justice, which is dogged by low quality of self-representation, sureties and witnesses, unfettered systemic failures, symptoms of which include lost files, delays and harsher sentences. This low-quality justice throws the poor into deeper forms of poverty as it is itself a source of poverty. Because of this intimidation, the interaction between the public and the criminal justice institutions is adversely affected. A broader construction of legal aid services improves the quality of the demand side for criminal justice services and narrows the gap between the prosecution and defence arms of the law.

Justice processes encompass the continuum, including detection of the crime, statement-taking, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, regional or international

criminal justice system for adults or children in conflict with the law, or in a customary or informal system of justice. A number of innovations have happened across the continent that unfortunately have pigeonholed legal aid services to particular entry points in the criminal justice system. Acknowledging their obligation to provide legal aid to the indigent, State constitutions have limited access to the point of trial and in capital cases. As noted already, however, many countries make lawyers available only when a court decides that the interests of justice so require. Application of this standard leaves many defendants who face serious consequences, including imprisonment and the acquisition of a disabling criminal record, unrepresented.

Research shows that legal aid services are needed across the justice system in all branches of law: family, land, commercial, tort and criminal justice. Within the criminal justice system, legal aid services are pertinent across the system.

B. Legal aid in the community

Legal aid services in the community usually help to resolve civil disputes and minor criminal matters. They can also prevent their escalation into more serious criminal offences or reoccurrence of conflict.

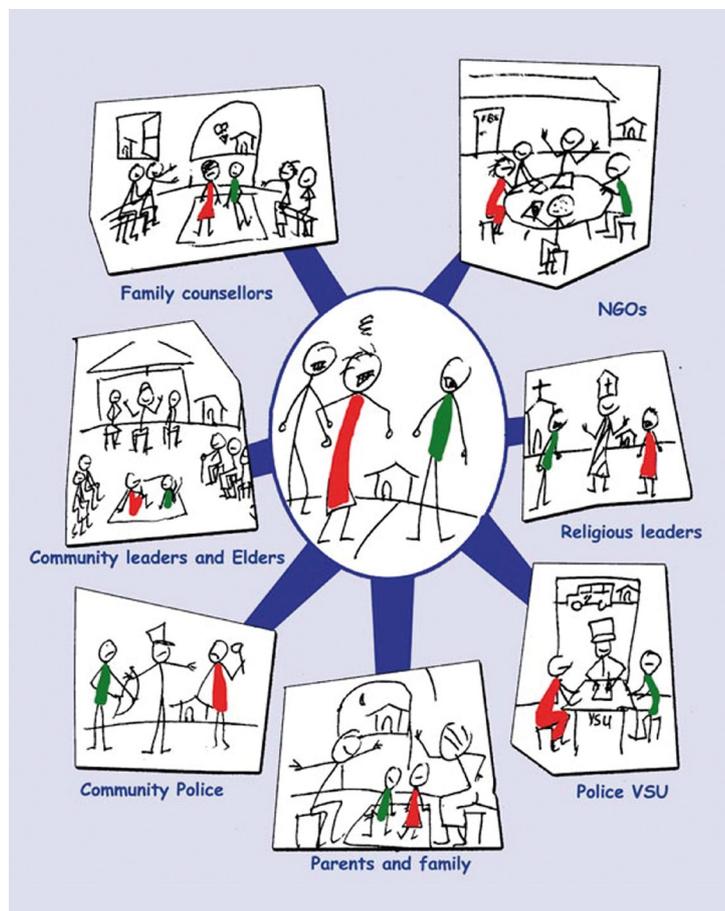


Figure 1

Promising models of community-based legal aid and primary justice delivery

Community legal services: Timap for Justice, Sierra Leone

Timap for Justice in Sierra Leone trains and equips an association of paralegals to provide community legal services to poor Sierra Leoneans to solve the wide range of justice problems they face. Timap also pilots a village mediation programme. The common justice problems include domestic violence, child abandonment, forced marriage, corruption, police abuse, economic exploitation, abuse of traditional authority, employment rights, right to education and right to health. Timap employs 25 community-based paralegals who work in 13 paralegal offices in the northern and southern provinces of Sierra Leone, as well as in the capital, Freetown. The paralegals are supported and supervised by two lawyers.

Timap combines education, mediation, organizing and advocacy in addressing intra-community breaches of rights, as well as justice issues between people and the authorities. In severe and intractable cases, the Timap lawyers employ litigation and high-level advocacy to address injustices that the paralegals cannot handle on their own. Because litigation or even the threat of litigation carries significant weight in Sierra Leone, Timap's capacity to litigate adds strength to its paralegals' ongoing work as advocates and mediators. Timap's impact has been praised by observers such as Transparency International,⁴⁶ the International Crisis Group,⁴⁷ and the Commission on Legal Empowerment for developing a creative methodology for addressing local justice needs in the challenging and complex context of Sierra Leone.⁴⁸

Data collected by Timap show that, between 2008 and 2009, community legal advisers provided assistance in 1,719 cases. Over 60 per cent of cases related to economic injustice and family disputes. Private violence and abuse by authorities made up almost 30 per cent. The most frequent forms of abuse by authorities were wrongful detention or arbitrary arrest. Men opened more cases concerning economic injustice and abuse by authorities, while women (representing 44 per cent of the caseload) opened more cases concerning family disputes and private violence. The median time to process a case was six weeks and 25 per cent were closed within one week. Community legal advisers solved 42 per cent of the cases and referred the balance to other institutions (referring 50 per cent to non-State justice systems and 42 per cent to State justice systems).

The village mediation programme in Malawi

In Malawi, the Paralegal Advisory Service Institute piloted the village mediation programme⁴⁹ to ensure that outcomes at the village level were just and equitable, and to provide a mechanism for diverting cases away from the formal justice system. The goal of the village mediation programme is to complement both State and non-State justice processes and relieve them of the plethora of smaller cases that do not require adjudication or arbitration. In so doing, the village mediation programme provides quick and affordable justice to members of the community in conformity with human rights standards. Villagers are empowered to deal with their own problems in their own way. The disputants are said to begin by owning the dispute and to conclude by owning the settlement.

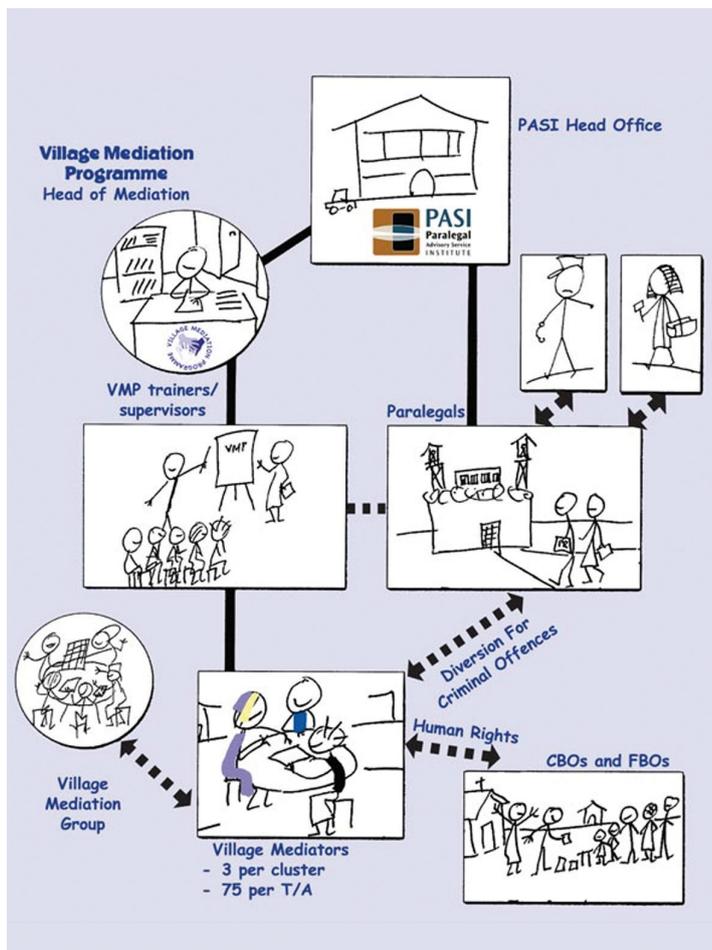


Figure II

Structure of the village mediation programme

Note:

CBO = community-based organization

FBO = faith-based organization

PASI = Paralegal Advisory Service Institute

Village mediation programme: 10 steps

Step 1

One of the disputing parties contacts the village mediator living in the immediate community.

Step 2

The mediator completes a case record and helps the party to explain the nature of the problem and the identity of the other party or parties.

Step 3

If the matter seems suitable for mediation, the village mediator explains in simple language how the process works:

- The mediators act impartially to facilitate a resolution on the parties' own terms and will not make any decision on their behalf
- Participation is voluntary
- The mediation is confidential unless the parties agree otherwise
- Information shared with the mediators is not disclosed to the other party or parties
- Mediation is free of charge. If not deemed suitable, the case is referred to the village mediation group and paralegals under the Paralegal Advisory Service Institute for possible referral to the State justice system.

Step 4

With the agreement of the disputant, two village mediators visit the other party, explain the process and encourage the party to participate in mediation.

Step 5

A mutually convenient date, time and venue is agreed for all disputing parties to meet with the village mediators.

Step 6

At the first meeting, the village mediators remind the parties of the nature of the mediation process and ask everyone to sign an agreement on confidentiality.

Step 7

The disputants each state their case in a neutral environment.

Step 8

The village mediators then meet with each disputant privately in order to give them the opportunity to discuss any confidential matters directly with the village mediators. The element of confidentiality has proved to be a strength of the village mediation programme as disputants are able to disclose matters that they would not feel able to disclose in an open meeting; and the mediators assist in having these issues addressed in settlement. In particular, women suffering domestic abuse have been shown to access the village mediation programme for this reason alone. The village mediators also explore with the parties their real interests and needs in settlement. They will revert to joint meetings once common ground is uncovered.

Step 9

Once agreement is reached, the parties sign a mediation settlement witnessed by the village mediators and anyone else present. The case record is completed and filed with the settlement at the village mediation programme head office.

Step 10

After an agreed period of time, the village mediators visit the parties to check that the settlement is working and give any further assistance needed.

One of the most important elements of the village mediation programme is the village mediation group, which plays a key role in supporting the village mediators. One group (comprising five members) supports up to 25 village mediators. The members of the group are selected by the village mediators and paralegals from among the mediators already trained.

The members of the village mediation group are literate and able to manage village mediator programme standard documentation, such as case records and mediation settlements, and are thus able to help the less literate village mediators. They receive more specialized training and are clear as to the kind of cases that mediators are not permitted to handle, and how to refer those cases to paralegals and back to the State justice sector. Members of the village mediation group also oversee the application of the village mediation programme code of conduct and report any violation to the Paralegal Advisory Service Institute.

Linking the community to the State justice system

The introduction of the village mediation programme has enabled paralegals operating in police stations, prisons and courts to link up with the community and to divert appropriate cases to the mediators.

Where mediators receive referrals from the courts to resolve a minor criminal matter, a remand prisoner may be granted bail in order to participate in the mediation, subject to the agreement of the parties. Paralegals provide the key link in the process by:

- Locating sureties or persons to guarantee the bail bond so that a person can be allowed out on bail
- Overseeing the mediation
- Ensuring that a report is made to the court on the outcome of the mediation
- Checking regularly with the village mediators and the parties themselves that any settlement is still working
- If the matter is not settled, notifying the court or prosecuting authorities.

Paralegals work with the Malawi police to assist them in identifying cases suitable for referral to the village mediation programme. Where a case is referred, the process is overseen by the paralegals and a report made to the police when the matter is settled. To protect the confidential nature of the mediation process, details of the mediation are not given, only the terms of settlement to ensure accountability, avoidance of impunity and respect for the human rights of the parties. If the matter is not resolved through mediation, it is returned to the police.

Thus the judiciary can direct courts to amend their records to include the following information:

- Suitability of case for referral to mediation
- Record of whether mediation has been offered
- Record of whether mediation took place
- Outcome of mediation and terms of settlement.

For cases referred by the court, a mediated settlement is recorded by the court and adopted as a consent order (or whatever equivalent would be appropriate according to local procedure) and parties who renege on the mediated agreement remain answerable to the court.⁵⁰

Prison and prosecuting authorities can also take a more active role by adapting the case files to indicate:

- The length of time the defendant has been held in custody
- The suitability of a case for referral to mediation
- The record of whether mediation has been offered
- The record of whether mediation took place and the result.

Linkages between actors and programmes

Paralegals play a key role in linking actors in the criminal justice process by diverting cases both from and to the State justice system. They divert cases from the system by assisting litigants in gaining access to mediation, persuading victims to participate in mediation and locating sureties for remand prisoners to apply for bail while they attempt to mediate a solution. They divert cases to the system when mediation fails or when serious offences are involved, such as murder or rape, which must be reported to the authorities.

In Rwanda, the Government's Justice, Reconciliation, Law and Order Strategy, 2009-2020 highlights the importance of bridging the State and non-State justice sectors. It identifies as key outputs the development of the *Abunzi*, building trust and reconciliation, and confidence in the rule of law.

The *Abunzi* deal with minor civil and criminal matters. *Abunzi* committees are elected by their communities for two years. They are volunteers, providing their services without charge. Each committee comprises 12 members selected from local residents. *Abunzi* are required by law to attempt to reconcile parties through mediation and, only if that fails, to proceed to making a decision based on law, which is then recorded. Parties are asked if they are satisfied with the *Abunzi* decision before signature. If one party later feels dissatisfied, he or she may initiate a new case in the Court of First Instance within 30 days, or the *Abunzi* decision is considered binding and enforceable by the court.

C. Legal aid during investigation

The legal standard

While a person's right to the assistance of a lawyer in pre-trial proceedings is not expressly set out in the International Covenant on Civil and Political Rights (which seeks to guard against arbitrary detention in art. 9 and provide a series of protective measures to provide for a fair trial in art. 14), nor in the regional human rights conventions, the Human Rights Committee, Inter-American Commission and European Court have all recognized that the right to a fair trial requires access to

a lawyer during detention, interrogation and preliminary investigations.⁵¹ This basic right also finds a range of support in resolutions of the United Nations and the African Commission on Human and Peoples' Rights.

Pursuant to the Basic Principles on the Role of Lawyers, all persons are entitled to the assistance of a lawyer at all stages of criminal proceedings (principle 1), access should be promptly after arrest (principles 1 and 17) and, in any case, no later than 48 hours from the time of arrest (principle 7).

Principle 18(3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that this right may be suspended only in exceptional circumstances, when it is considered indispensable by a judicial or other authority to maintain security and good order.⁵²

In the African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Access to Justice in Africa 2001, clause M.2.f states that "any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present".

The Lilongwe Declaration provides for access to legal aid at all stages of the criminal justice process:

A legal aid programme should include legal assistance at all stages of the criminal process, including investigation, arrest, pre-trial detention, bail hearings, trials, appeals and other proceedings brought to ensure that human rights are protected. Suspects, accused persons and detainees should have access to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited paralegal, or legal assistant. Governments should ensure that legal aid programmes provide special attention to persons who are detained without charge, or beyond the expiration of their sentences, or who have been held in detention or in prison without access to the courts. Special attention should be given to women and other vulnerable groups, such as children, young people, the elderly, persons with disabilities, persons living with HIV/AIDS, the mentally and seriously ill, refugees, internally displaced persons and foreign nationals (clause 3).

The Economic and Social Council, in its resolution 2007/24, endorsed the Lilongwe Declaration, recognizing that providing legal aid to suspects might reduce the length of time suspects were held at police stations and detention centres.

The Lilongwe Plan of Action states that, in police stations, Governments should introduce measures:

- To provide legal and/or paralegal services in police stations in consultation with the police service, the law society, university law clinics and NGOs. These services might include:
 - Providing general advice and assistance at the police station to victims of crime, as well as to accused persons
 - Visiting police cells or lock-ups
 - Monitoring custody time limits in the police station, after which a person must be produced before the court
 - Attending police interviews
 - Screening children and adults for possible diversion programmes
 - Contacting or tracing parents, guardians and sureties
 - Assisting with bail from the police station
- To require the police to cooperate with service providers, advertise these services and explain how to access them in each police station.

Developing simple diversion schemes at the police station

A restorative process, which includes diversion, is defined as any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.⁵³

It can be as simple as a formal caution by a police officer or act of apology for the offence committed, with or without an offer of restitution or compensation. It is rooted in a restorative approach to criminal justice (see more in chapter IV).

In appropriate cases, good practice suggests that the criminal justice process should allow for such matters to be settled amicably outside the formal justice system. However, where such practices are not widely known or applied, they can be introduced informally.

In Malawi, paralegals sought admission to police stations to assist accused at the interview or interrogation stage. This faced initial resistance. Paralegals then continued to drop in on police stations on a daily basis to introduce themselves and their work. In the course of these courtesy calls, the police admitted to severe resource constraints that impeded their ability to trace parents or guardians of children who had come into conflict with the law.

The paralegals' consequent offer of assistance was accepted and when, some hours later, they returned with the parents or guardians, the relationship altered at once. It was agreed that paralegals should work with the police victim support unit in

continuing to trace those responsible for young offenders. In a short time, the Paralegal Advisory Service Institute met with police officers to agree to a code of conduct governing paralegal entry to and work in police stations. This provided partial recognition of the paralegals and placed them under the authority of the police (when on police premises) and began the process of building up a degree of trust.

Early on, it became apparent that in many cases the young persons were suspected of minor offences or had been brought to the police by the community and/or family members themselves. The police had no other recourse than to remand the accused to custody (namely the juvenile section of the local adult prison). This led to exploring with family members and the police how young suspects might be diverted away from formal custody. More meetings were held, including with overstretched social welfare officers, to explore a mechanism for screening young persons (in terms of their background, family situation, circumstances surrounding the alleged offence and their attitude towards what happened). An interview form was agreed upon, which paralegals were invited to use in the case of each young person brought to the police station.

Since 2004, paralegals in Malawi have diverted 77 per cent of children in conflict with the law away from the criminal justice system.

This approach is based on the active participation of police and paralegals working jointly towards a common end, which they have agreed to and in which the roles of each are clearly demarcated (here through a code of conduct agreed with the police, by whose terms individual paralegals working in police stations agree to be bound).

This approach has worked well in Malawi, where an evaluation jointly conducted by the Malawi police and the Paralegal Advisory Service Institute noted that, in juvenile matters, both social welfare officers and parents or guardians were rarely available to assist the police in the administration of juvenile justice and, as a result, juvenile cases could take overly long before they were concluded. Most children who were in conflict with the law ran the risk of being treated as an adult while in the hands of the police because it was difficult to determine their age in the absence of a birth certificate. It concluded that the joint evaluation meetings that had taken place in the four police regions had confirmed that this partnership between the Paralegal Advisory Service Institute and the Malawi police service, if correctly utilized, could benefit accused persons during pre-trial stages, immediately on arrest and detention.

As seen in the preceding chapter, the advent of the village mediation programme has enabled paralegals to provide direct referral of cases to mediators in villages.

Attending police interrogations of suspects

Experience shows that once the door has been opened, even in a small way, opportunities arise to develop new initiatives with the police service. For example, paralegals approached Malawi police trainers under a United Kingdom Department for International Development-funded police reform programme to explore options for training paralegals in investigative skills.

Police trainers agreed to provide paralegals with a three-day training course in the investigative interviewing skills that they provide to investigating police officers. The course aimed to provide officers with the skills to interview effectively rather than oppressively. This then opened the way to paralegals gaining access to suspects during the interview or interrogation stage. The police trainers advocated for the inclusion of paralegals in police interrogations as they subsequently toured the police stations conducting the training course.

Developing a roster system

In Angola, Malawi, Nigeria and Uganda, police stations have agreed to a roster system whereby lawyers and paralegals attend at police stations to provide advice and assistance to those in police custody.

The Bar Association of Angola developed a programme of assistance to suspects in police custody in 11 police stations in Luanda District, employing young graduate lawyers. These “*estagiarios*” attended police stations with public prosecutors to advise accused persons at interviews. In one three-month period, they assisted at over 1,400 interviews and filed 69 actions requesting the release of illegally detained persons. They were paid a small stipend for each interview they attended.⁵⁴

In Malawi, paralegals have agreed to a paralegal roster with central police stations so that when a young person is brought into custody (at whatever time of day or night), they are able to make a call on a mobile phone (held by the paralegal on call), to attend at the police station to assist in tracing parents and/or conduct a screening interview (during the day) or reassure the young person (at night) and visit him or her early the next day. The costs of the call are negligible since the police allow the suspect to “flash” the paralegal on a police mobile phone (i.e. ring, but disconnect prior to the call being answered) so that the paralegal can either ring back and speak to the suspect or attend at the police station in person. Paralegals have put up a notice in each police station with the local cell phone number to call. Duty paralegals are on call 24 hours per day and seven days per week.

In Nigeria, the Nigerian Police Service and Legal Aid Council embarked on a duty solicitor scheme involving 16 young lawyers with the National Youth Service Corps in designated police stations in four states to reduce pre-trial detention, improve legal assistance and enhance coordination between justice agencies.⁵⁵

The Legal Aid Council initiated a dialogue with the police and invited senior police officers to a conference to explore a pilot scheme. The outcome was a Memorandum of Understanding between the Legal Aid Council and the Nigerian Police Service and launch of a duty solicitor scheme in major police precincts throughout the country.

Lawyers were then stationed at designated police stations to provide a 24-hour duty schedule to provide assistance to suspects and detainees (including bail from the police station). The Memorandum of Understanding places an obligation on police officers to ensure that suspects are given access to duty solicitors within the police stations.

The scheme is monitored by a duty solicitor advisory committee, which meets every three months to review, advise on and resolve any outstanding issues.

In 2008, the scheme facilitated the release of 2,645 detainees. Between January and June 2009, the scheme facilitated the release of 1,779 detainees.

The project has noted increased professionalism in standards of police investigation, as well as a marked improvement in police/lawyer relations.

Paralegals in Uganda were granted permission to work in police stations and, in the course of 12 months in the period 2008-2009, assisted 5,751 accused in obtaining bail at police stations. Ondo state has 2 prisons in the capital city of Akure, 32 police stations, 8 high courts and 6 magistrate courts. In the capital city of Sokoto in north-western Nigeria, there are 1 prison, about 15 police stations, 9 high courts, a minimum of 7 magistrates' courts and 8 lower sharia and informal courts. This translates to about 0.1 duty solicitors to each identified establishment in these capital cities.⁵⁶

Paralegals and law students have a complementary role to play in such schemes, as most cases do not require the expertise of a lawyer and useful assistance can be rendered by a trained non-lawyer, with supervision and guidance provided by a lawyer. The growth of clinical law programmes in Africa (with the support of the Open Society Justice Initiative, the Ford Foundation and others) to provide law students with practical exposure to and grounding in the application of the law, usually with emphasis on public-interest law, provides a useful resource for legal aid service providers working with police officers, as well as a practical learning experience for the students, under the supervision of law professors or practising lawyers.

Providing information

People in police stations (whether as suspects or victims) need simple guides explaining their situation according to the law. Visually accessible aids not only inform people, but also serve to remind law enforcement officers how the law operates. In South Africa, Legal Aid SA provides information to arrested persons by way of “branding” messages at police stations (i.e. in charge offices and holding cells). Every police station is branded with important information such as the rights to legal representation, to apply for bail and to remain silent. Legal Aid SA also has a police link project, which details an arrangement between Legal Aid SA and the police regarding access to the lawyers by anyone requiring assistance.

Paralegals in Malawi developed a “10-step guide” to the criminal process in consultation with sitting magistrates, police and prison officers. It was field-tested in police stations, courts and prisons, then translated into local languages and pinned up in police stations, courts and prisons across the country. The poster was subsequently adapted and translated by paralegals in Kenya and Uganda.

Visual aids are of particular importance where illiteracy rates are high. Nevertheless, simple leaflets written in language stripped of legalese are swiftly produced and of assistance to suspects on arrival in police stations.

In Sierra Leone, Advocaid and the Sierra Leone Court Monitoring Programme, with the support of the Special Court for Sierra Leone, has prepared a booklet entitled *Afta We Den Arrest Yu: Wetin Neks* (After you’ve been arrested, what next?). The booklet contains photographs and visual aids in the Krio language, which is spoken by most people, and is designed to help explain the criminal justice process in Sierra Leone to accused persons after their arrest so that they understand their rights when faced with criminal proceedings.

There are a number of door-opening opportunities; some are local initiatives rather than the product of any national policy, for instance to see that custody time limits are adhered to in police lock-ups.

In Guinea-Bissau, the Human Rights League in Gabu regularly visits the local police station and detainees in the police holding cell. The NGO representatives then inform the local court and presiding judge of any concerns that arise in terms of people overstaying or being held unlawfully. They also provide humanitarian assistance. The Catholic Commission for Justice and Peace operates a similar visiting mechanism in the capital, Bissau. Neither body has official authorization; the practice has emerged based on the relations established between the NGO and local authorities.

In Freetown, Sierra Leone, the NGO AdvocAid operates a duty counsel scheme for women suspects in police stations, whereby a lawyer visits the police station and negotiates their release on bail, while Timap paralegals visit police cells and facilitate the early release of detainees by linking them to Timap lawyers.

Developing trained police units

In the Sudan, prior to 2006, police did not have special guidelines for cases involving vulnerable people and there was no specific system in place for evidence-gathering. Families of victims themselves often had to provide the evidence to support any complaint. There was no legal support to child victims, nor medical or psychosocial care services available. The lack of a child-friendly system for dealing with cases of abuse and exploitation meant that many crimes were simply not reported.⁵⁷

The Sudanese authorities, with the support of the United Nations Children’s Fund, piloted a Family and Child Protection Unit in 2007, which aimed to provide a “one-stop shop” of professional services to women and child victims, witnesses or accused. The Family and Child Protection Units have rapidly expanded throughout Northern Sudan, providing:

- A special policing approach employing trained police officers to deal with sensitive cases and vulnerable people in a non-threatening environment
- Services that include psychosocial support, social services, legal aid and forensic investigation
- Proper investigation of cases (the conviction rate of the unit is over 50 per cent)
- Awareness in local communities about sexual and gender-based violence and encouragement to communities to report such matters
- A system of close collaboration with other specialists (social services, legal aid, prosecution, judiciary and health professionals)
- A database of all cases reported.

The staff wear civilian clothes and, in investigating cases, apply technology (such as video recordings) to take statements and so reduce the trauma of court appearances. In addition, they provide counselling and support to the victims and their families.

The figures for 2007 are shown in the table below:

<i>Cases ready for trial</i>	<i>Cases dismissed</i>	<i>Cases in progress</i>	<i>Convictions</i>
813	96	189	473

The impressive conviction rate is attributed to the prompt follow-up of reports of abuse and violence, gathering of evidence and effective presentation at court. This in turn has enhanced the professionalism of the units and led to increased public confidence in reporting such cases.

It has also led to closer collaboration between the police, courts and a network of lawyers providing legal advice and assistance. The collection of data has also created a source of information on trends in crimes against children and led to further changes and reforms within the justice sector. These include creating child prosecution offices at State level, including specially trained staff to conduct investigations into cases involving children, raising the age of criminal responsibility from 7 to 12 years and establishing a telephone hotline.

D. Legal aid at court

The legal standard

The right to counsel when charged with a criminal offence is integral to the right to a fair trial, which is a fundamental right recognized by the Universal Declaration of Human Rights (arts. 10 and 11), the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child (art. 37(d)) and the African Charter on Human and Peoples' Rights (art. 7).

The International Covenant on Civil and Political Rights states that, in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: 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 (art. 14, para. 3).

The European Convention on Human Rights and Fundamental Freedoms adopts an identical wording to the International Covenant on Civil and Political Rights and, as a result, the case law of the European Court of Human Rights has been used to interpret the meaning of the provision set down in the International Covenant.

The European Court of Human Rights has ruled that, where deprivation of liberty is at stake, the interests of justice mandate legal representation.⁵⁸

The United Nations Basic Principles on the Role of Lawyers stipulate that any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services (principle 6).

The African Commission on Human and Peoples' Rights has further recognized the reality in Africa that most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees, stating that it is the

duty of Governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.⁵⁹ The contribution of the judiciary, human rights NGOs and professional associations should therefore be encouraged.

The Lilongwe Plan of Action states that, at court, Governments should introduce measures:

- To draw up rosters for lawyers to attend court on fixed days in consultation with the Law Society and provide services free of charge
- To encourage the judiciary to take a more proactive role in ensuring the defendant is provided with legal aid and able to put on his or her case where the person is unrepresented because of indigency
- To promote the wider use of alternative dispute resolution and diversion of criminal cases and encourage the judiciary to consider such options as a first step in all matters
- To encourage non-lawyers, paralegals and victim support agencies to provide basic advice and assistance and to conduct regular observations of trial proceedings
- To conduct regular case reviews to clear case backlogs and petty cases, refer or divert appropriate cases for mediation and convene regular meetings of all criminal justice agencies to find local solutions to local problems.

During prosecution

A recent survey of legal aid in Africa found that the low number of lawyers, together with the high cost of their fees, made it unlikely that a person on a low income could afford to retain the services of a lawyer at court. It also found that Governments lacked the resources to provide free services, except in cases attracting the death penalty. As a general observation, the lower courts in many countries in Africa function in the absence of a lawyer. Police prosecute in common law countries, while in civil law countries the task is allocated to *procureurs* and *procuradores*, some of whom are qualified in law. The accused is seldom represented, even when he is accused of serious offences. The proceedings in courts of first instance tend to be swift and the accused, if he is produced in court, is remanded in custody until the next opportunity, which may amount to weeks. Bail is seldom canvassed by the courts.

In these circumstances, perhaps there is a need to identify a more strategic role for lawyers, so that their expertise can be employed in a more time-efficient manner. Promising approaches include the following:

- Encourage lawyers to draw up rosters to attend court on fixed days and provide services free of charge for those without sufficient means. Law students could work to support these lawyers. Examples may be seen in Liberia through the Arthur Grimes Law School and Washington and Lee University; in Malawi,

through the work of Northwestern University law students working with paralegals and State lawyers to speed up the process of homicide caseloads; through paralegals working in the pilot national legal aid scheme in Sierra Leone; and through the work of Timap for Justice with the Open Society Justice Initiative

- Encourage lawyers' associations and bar associations to support the provision of legal aid by offering a range of services, including pro bono services, in line with their professional calling and ethical duty. A concern of practising lawyers is that the number of case adjournments and slow process of the courts militates against pro bono work. Were the courts to work more efficiently, they would be able and willing to take on more pro bono work⁶⁰
- Identify incentives for lawyers to work in economically and socially disadvantaged areas. States can offer tax advantages or financial incentives to encourage lawyers to work in these areas or operate an award system to reward public-spirited action of this kind
- Encourage lawyers and bar associations to organize regular circuits of lawyers around the country to provide free legal aid to those in need. The growing use of mobile courts (see section below entitled "Law in action: mobile courts") offers an opportunity to lawyers to attach themselves to these mechanisms on a regular roster basis
- Law students have a greater role to play and Governments and donors might encourage the development of student practice rules that allow students in their final year to practise in the courts under the supervision of qualified lawyers or faculty staff.

Building the capacities of the defence

In countries that provide Government-funded legal aid services, another practice aimed at addressing inequality of arms is the strengthening of the capacities of Government legal aid providers. This can be achieved, for example, through training of public defenders and linking them with other actors in the criminal justice system.

In Liberia, the National Association of Criminal Defence Lawyers, together with UNODC, conducted training for public defenders on the different stages of trial, including presentation skills. The Association also created model forms and compiled legal precedents, to assist in trial preparation. The United Nations Development Programme in Liberia has also been supporting public defenders in the country by funding the purchase of equipment and activities such as training.

Problems with accessing legal aid

On arriving at court, the average defendant or member of the public with limited means at his or her disposal must navigate an obstacle course rather than be assisted. The accused may have to file a means test to establish poverty before he or she can obtain legal advice, assistance or representation. The witness/victim/member of the

public has no one to approach for advice (i.e. which court to attend, what stage of the proceedings the case has reached, what will happen in court or how to reclaim any expenses incurred).

Even when counsel is assigned, however, the lawyer may fail to attend court because compensation paid by the Government is either low, slow or both.⁶¹ Where there are public defenders available at public expense, they are often overwhelmed by their caseload, such that many cases are repeatedly adjourned in court. Magistrates may then attempt to avoid delays by trying criminal cases without legal representation of the defendants.⁶²

These factors do little to restore public confidence and trust in the judicial process and contribute to a growing backlog of cases and high numbers of prisoners on remand (awaiting trial) in the country's increasingly congested facilities as witnesses and victims or complainants give up attending court.

According to a United States Agency for International Development report, individual judges reported pending caseloads of up to 1,000 each, and it was routinely reported that both civil and criminal cases could take up to a decade to resolve. Meanwhile, large percentages of pre-trial detainees remained in custody without having been formally charged or even having seen a judge.⁶³

Since lawyers are often unfamiliar with defending and prosecuting criminal cases, they are often unprepared and under-trained. Trial advocacy skills and court craft techniques are needed, not only to improve competency levels, but also to provide adequate levels of representation to accused persons and ensure that cases flow more readily through the system.

Getting the level of aid right: providing appropriate advice and assistance at court

Courts are confusing places for most people. They throng with police and prosecutors, there are court staff in unusual costume and magistrates and judges who appear stiff and remote. The atmosphere is formal and often unfriendly. There is little to help the person visiting the court area to navigate his or her way round.

Court-based paralegals in Malawi offer general advice and assistance to the accused, relatives and sureties for the accused, defence witnesses and members of the public to orient them at court on where to go, what to do and what is going to happen. They explain the general procedure rather than advise anyone individually on the merits or not of their case. They assist those eligible to do so in reclaiming their expenses.

Linking people to the courts

The role of paralegals operating in the courts in Kenya, Malawi, Uganda, and increasingly in Sierra Leone, is to link those coming to the courts with those working there.

They follow up cases from prison (and paralegals based there) and ensure that prioritized case lists are discussed with police prosecutors before they are placed before the magistrate or judge. They meet with the court clerk, magistrates, prosecutors and any other criminal justice agencies (e.g. social services) and acquaint them with their presence and seek the necessary permission to meet with people in custody. They follow up any matters from the previous day or week. especially bail forms, release orders and old case lists.

They meet with defence witnesses and check the summons he or she brings to court, containing his or her particulars and the signature of the prosecutor handling the case. They also explain the layout of the court and introduce the witnesses to the court clerk. They explain the role of a witness, the meaning of the oath and procedure (e.g. first hearing, bail, guilty or not guilty pleas, adjournment for trial). They follow up at the end of the case and advise what to do if the matter has failed to take place or has been adjourned.

They check the daily court record and identify numbers of remand prisoners and the status of their case. They seek permission to visit the accused and ask if he or she is expecting a lawyer or witnesses to attend, or persons to stand surety. They follow up outside with these witnesses and establish if they are present. They check that the accused is familiar with the process. They follow up at the end of the court hearing with a courtesy call. With police agreement, they deliver messages (from witnesses, relatives or other accused) and any necessary supplies (e.g. food, tobacco).

As concerns the accused on bail, they check the daily court record, identify the accused and check whether it is his or her first appearance and whether he or she is familiar with the court layout and procedure.

Where a person is granted bail, they communicate with their team member in prison so that he or she can follow up for prompt release. Where a person has been refused bail due to absence of a surety, they inform their team member in prison so that the accused can be advised to contact his or her family to organize a surety.

Assisting the State justice system by diverting appropriate cases away from the courts

Diversion mechanisms can continue at court and remain available to the point of conviction. Lower courts should be encouraged to refer appropriate cases back to the community for settlement, especially in post-conflict settings where, without such informal venues, the capacity of any formal judicial system is likely to be overwhelmed.

Therefore, good practice suggests that provision be made at court for mediators or paralegals to mediate between the parties under the direction of the court and report back on the outcome.⁶⁴

The Criminal Procedure Act of the Sudan states that an injured or interested party may relinquish his private right in the criminal suit by pardon or conciliation at any time before the passing of final judgement by the court (art. 36, para. 1).

Lawyers and NGOs apply this provision regularly to release prisoners awaiting trial, including those facing homicide charges. The lawyers or NGO representatives communicate the regret of the offender to the victim(s) and family and ask for their forgiveness, offering compensation for the harm caused (or *diyya* in cases of homicide).

Early disclosure of evidence

As a general rule, the accused are not served with the case papers outlining the witness statements against them, nor are they even provided with a summary of the case against them. Prosecutors and police argue that they lack the stationery or means to reproduce the case files or that the witnesses may be compromised by early disclosure and become subject to pressure to withdraw their testimony. None of these reasons stand close examination as the identity of witnesses can be protected and summaries of the prosecution case can be produced.

The absence of early disclosure prejudices the accused from mounting his or her defence. It precludes him or her from entering an informed plea to the charge and allows the police or prosecution to continue the practice of adding holding charges at the whim of the charging officer.

Redressing the equality of arms through an increased role for judges and magistrates

Judges and magistrates can actively redress the equality of arms and the imbalance that arises from an unrepresented accused appearing before him or her. Bail should be a presumptive right available to all rather than a privilege restricted to the wealthy few or the well-connected. Early disclosure of evidence against an accused should be a matter of course. Sentencing practice could be reviewed to ensure greater uniformity of approach, especially by junior or lay magistrates. Summarized below are a series of measures that could be implemented by the judiciary at little or no cost.

Where an accused is unrepresented in the lower courts, it is often the case that he or she faces the double prospect of a hostile bench and hostile public prosecutor. The magistrate is there to see that justice is done. He or she can use the neutrality of the bench to ensure that the evidence is probed and that witnesses who may assist the case of the defendant are brought to court.

In Guinea-Bissau, the court may appoint the clerk as a competent, though unqualified, person to assist the accused, while in England, the court clerk, who is legally qualified, will take the part of an unrepresented accused. In Sierra Leone and South Africa, lawyers available in the court are invited to represent an accused if they are available to do so (this is also known as a “dock brief”).

A proactive magistrate can ensure, for instance, that police investigations are not permitted to drag on, that charges are promptly and fairly framed, that the

presumption in favour of bail is properly explored and that conditions are not unduly onerous. This would serve to reduce the pre-trial population and speed up the flow of cases through the courts.

Relaxing conditions of bail

Bail is a presumptive right guaranteed in many constitutions with a common law tradition. Bail should only be refused where the offence is serious and there is a reasonable risk that the offender will (a) fail to appear for trial, (b) commit further offences, (c) interfere with the evidence, or (d) be at personal risk or a risk to others were he or she to be released from custody.

In Sierra Leone, the Chief Justice issued a bail policy note in 2009 to magistrates to remind them of the presumption in favour of bail and to guard against imposing overly harsh conditions.

Many people are remanded in custody because they cannot meet the conditions for bail set by the court. If an accused is charged with a minor offence and is unable to pay the surety set by the court to be released on bail, then justice requires that the person should be released pending trial. Otherwise, people end up serving a longer time on remand than they would have served if found guilty of the offence under a sentence of the court.

In Accra, Ghana, prison authorities estimated that the courts had granted bail to between 65 and 75 per cent of the 650 prisoners in St James Fort Prison. These prisoners remained locked up because they could not raise the money to pay a surety to the court for their future attendance. An inquiry revealed that only seven out of the 650 remand prisoners had legal representation.

A case review of three prisons by the Kenya Prison Service revealed that, of the total number of prisoners who had committed bailable offences, 86 per cent were granted bail but could not afford the financial terms set by the court and only 6 per cent had the means to hire lawyers.⁶⁵

Bail conditions should take account of the means of the offender. A surety of \$10 may be insignificant to a person of means, but a considerable amount for a poor person to raise.

In Gauteng, South Africa, there are instances when magistrates invite community leaders to address the court on the issue of bail, to establish whether or not the community would be willing to have the accused back on provisional release. This serves several purposes:

- It provides the magistrate with an informed view as to the character of the accused, the seriousness with which the offence is considered and the likely threat of harm to the accused (i.e. whether to remand for his or her own protection or find an alternative address far away)

- It also serves to inform the community about the purpose of bail
- It publicizes the return date to the community so that they can ensure the accused returns to the court on the day of trial.

Justice practitioners in Malawi developed simple bail forms to assist the courts in processing non-contentious cases from prisons more speedily.

The information is entered by paralegals from the prison file and signed and stamped by prison officers as an endorsement of the accuracy of the contents. The form is then passed to the prosecuting authorities, who can add their comment (“no objection” or enter objections), and placed before a magistrate. In this way, simple cases can be moved swiftly along without the need for formal argument in court.⁶⁶

In addition, Malawi practitioners (police, judiciary, lawyers, prisons, social services and paralegals) developed a visual aid following the practice adopted at Gauteng, described above. The poster was translated into vernacular languages and made widely available in police stations, courts, prisons and community centres. It was also reproduced in KiSwahili in Kenya and Uganda. The last frame provides a key message that has proved to be of considerable assistance to police and courts as it shares the responsibility of ensuring a person returns to court for his or her trial.

Court practices to ensure fair trial

The following practices present simple ways in which courts can ensure the right to fair trial of the un-represented accused and apply the law equally to different defendants.

Guidelines to promote consistency in sentencing practice. The senior judiciary can take more of a lead in ensuring that the lower courts achieve greater consistency in the sentences they pass in the form of guidelines or practice directions.

Taking into account time spent in custody on remand. Many people spend long periods in prison on remand prior to conviction and sentence. Sometimes the time spent on remand is not taken into account by the sentencing or the prison authorities. Whether through legal amendment or express directive to sentencing and prison authorities, this period should be taken into account as a matter of course when passing sentence.

Credit for an early guilty plea. Encouragement can be given to accused persons to enter an early plea of guilty to a charge. By pleading guilty to an offence, an offender shows remorse and saves court time and witness’ pain and expense. In some jurisdictions (e.g. in the United Kingdom), a plea of guilty automatically reduces the sentence by one third compared to the sentence the person would have received following a contested trial.

Pre-trial hearings. The judiciary can institute pre-trial hearings, which enable the court to assess whether:

- A case is ready for a trial (witnesses have been warned and both defence and prosecution are ready)
- The case may turn into a plea of guilty
- For other reasons, the case will not proceed.

This saves expense and court time. It also provides an opportunity for prosecuting and defence counsel to meet and consider a plea bargain.

Plea bargains. These are a common, legitimate device to encourage an accused to enter a plea of guilty to the charge or to a lesser charge in return for the promise of the prosecutor to recommend a specific sentence and/or a promise of the judge to impose a specific sentence. This is a process that provides predictable results and that addresses problems caused by excessive court caseloads. However, prosecutors, judges, defence lawyers and paralegals must ensure that the system is not abused by encouraging or compelling defendants to enter pleas to crimes when they are innocent or where there are significant extenuating circumstances.

In a number of countries, the plea bargain is less a bargain than a request that the police or State prosecutor state the correct charge in the indictment. For instance, in many jurisdictions the police routinely prefer to indict on a more serious charge than the facts of the case disclose purposely to keep the accused in custody (e.g. by charging the accused with murder when the facts disclose manslaughter, or adding a more serious holding charge, such as conspiracy).

Sentencing guidelines for specific offences. The judiciary can also issue sentencing guidelines for specific offences. Many prisoners awaiting trial would enter a plea of guilty to a charge if they knew with a degree of certainty the length of sentence they would receive from the courts. Sentencing guidelines and tariffs for specific offences (e.g. manslaughter, robbery, burglary, simple theft, supply or possession of drugs) issued by the senior judicial authority help prisoners to determine their plea at court.

Speeding up the case flow

The case flow may be expedited by the following means.

By discharging those cases that have taken too long to investigate or come to trial. Where the police have not proceeded speedily and the accused is thereby prejudiced, courts may discharge the accused rather than hold him or her in custody. When the police are ready with their evidence they can re-arrest the accused and proceed to trial. This mechanism costs nothing, acts as an incentive to police, checks abuses of process and protects the accused. Where statutory custody time limits exist, beyond which an accused cannot be kept any longer in custody, they need to be strictly enforced by the courts and closely monitored if they are to be effective.

By making cost orders against lawyers for unnecessary adjournments. “Adjournment syndrome”, whereby cases are routinely adjourned to another date because a lawyer fails to appear, is not ready or is absent for any reason, is an issue in many jurisdictions. In a number of instances, lawyers deliberately protract proceedings to wear the complainant down. This causes justice to be delayed. It also contributes to the stress on the system, as well as on defendants, victims and witnesses. Courts should make cost orders against lawyers for costs incurred because the lawyer is unprepared, fails to attend, double books himself or herself in another court or seeks an adjournment on unmeritorious grounds.

By speeding up judgements. Many prisoners languish for months in a state of uncertainty pending a written ruling on their case. A practice direction or circular to all judges and magistrates, stating the maximum time a judge or magistrate is allowed to deliver a judgement, would quicken this process. A monthly report by the registry naming the judge or magistrate, the cases for which judgement is due and the date of conclusion of evidence might be issued to the judge responsible for the criminal division. These relatively simple administrative actions raise standards and promote greater confidence among the public.

By conducting regular visits to police stations and prisons. In most countries, the judiciary has a statutory right to visit places of detention (prisons and police stations). In some countries, they have a positive duty so to do. Judicial inspections ensure that prisoners are granted bail when appropriate, appear in court as scheduled, are legally incarcerated and have their trial heard speedily.

Law in action: mobile courts

In South Asia, the judiciary is proactive in bringing justice to the people. Magistrates go on to the streets to check the security of factories or the hygiene standards of restaurants or whether articles for sale to the general public are fit for purpose. They issue on-the-spot rulings and are empowered to confiscate items or order the closure of a business until it has remedied the breach.

Although the judiciary in Africa tends to be cautious, need is driving innovation there as well. In the following section, “camp courts” are shown to operate in prisons to screen the remand caseload.

In countries where the courts have been devastated by conflict or unable to reach remote rural locations, the court, or *chambre foraine* as it is known in the Democratic Republic of the Congo, operates like any court and is staffed by judicial officers, administrative personnel and lawyers. They announce their arrival in advance, establish the court in the open air and proceed to hear the cases brought before them.

Between 2004 and 2006, *Avocats sans frontières* piloted a mobile court programme in three provinces in the Democratic Republic of the Congo with United Kingdom Department for International Development funding. In a period of 18 months, they

conducted 16 mobile courts, targeting those areas where there were no courts (or *tribunaux de grande instance*) and heard over 1,000 cases (40 per cent of them old cases, some of which had been waiting for years to come to trial; 70 per cent of them criminal) and entered judgement in 70 per cent of cases. Each court session was attended by between 300 and 1,000 members of the public. Aside from bringing the courts to the people, the magistrates spent time explaining the law and justice process to the general public. User surveys conducted afterwards found broad satisfaction with the process and surprise at seeing people deemed untouchable being held to account or even convicted by the court. Such people included a police commander, a priest, a traditional chief, a businessman, policemen and public officials.

Mobile courts also operate as itinerant courts in Sierra Leone under the Justice Sector Development Programme, which records a high rate of case disposal at the first hearing. Between August 2009 and February 2010, the itinerant court was working out of Moyamba, on 324 cases in a number of villages, of which it concluded 59 per cent.

Inter-agency coordination

When the system fails to function, it delays the process as a whole. Court administrators watch their files and dossiers grow in their registries, police delay in their investigation because of the delays in court and prisons move into lockdown as the only method of securing the increasing numbers of people sent to their facilities, and detainees fall into despair as they feel they have been forgotten.

The result is an inefficient system of justice administration, which has a knock-on impact on public confidence and trust. The problem is not only a matter of resources. More can be done to move cases through the process by improving communication and coordination across the criminal justice agencies. While these agencies do face resource constraints, they also tend to operate in isolation from each other.

As already observed, the causes of overloaded court registries and overcrowding in prisons are the result of decisions by a number of different actors. They need to be addressed in concert so that case backlogs can be approached in a systematic manner and pressure on prisons can be relieved by the joint action of police, prosecution and courts.

The Chain Link Initiative in Masaka Magisterial District, Uganda, has demonstrated that the justice agencies were all part of the same chain that makes up the administration of justice process and that they all stood to benefit from working more closely together and sharing information. Under the chairmanship of the local magistrate, prosecutors, police, prisons and civil society meet regularly to review the criminal justice situation. Some of the immediate benefits include:

- Identification of old cases for discharge or dismissal
- Joint prison visits with agreed action in relation to priority prisoners identified, including release of those found to be imprisoned unlawfully

- Development and distribution of agreed performance standards for different stages in the administration of justice process
- Introduction of the concept of court "open weeks"
- Joint meetings to weed out weak cases and coordinate the scheduling of trials.

The Chain Link Initiative has been rolled out nationally in Uganda through the Justice, Law and Order Sector Programme. In addition to improving coordination between courts and prosecutors, the Initiative has recognized that improved case management also requires coordination with citizens. For instance, among other innovative ideas, a chief magistrate has assigned a clerk to monitor the grounds around the court to ensure that persons sitting there know what to do, where to go and so forth (see the section below entitled "Legal aid in practice: paralegal advisory services"). Posters and guides for court users in various languages have been designed and posted at the entrance to the court. These measures make it more likely that defendants will arrive promptly in court, prepared to present their cases. The Chain Link approach has been replicated in Malawi and Kenya.

This case-coordinating and management mechanism costs very little (in Malawi, \$20 is budgeted for each meeting, to cover the costs of local transport and provide light refreshment to those who attend). This is considered a key element of the mechanism, since it demonstrates to local actors the added value of communication, coordination and cooperation, and that real change can be brought about with little funding.

In Nigeria's Ondo and Sokoto states, all the agencies of criminal justice administration meet regularly at the state level (fortnightly in Ondo and monthly in Sokoto) to network, review case files and adopt a common course of action on behalf of identified detainees.

In Kenya's Kisumu, Meru, Nakuru and Thika districts, court users' committees (which include prisoners, police officers, the judiciary, probation officers, children's department staff, provincial administrators and others) meet in a round-table to discuss the obstacles faced by the system collectively and by each of the agencies, with a view to establishing practical solutions. The Legal Resources Foundation (Kenya) reports that these committees have increased the use of non-custodial sentencing, improved the delivery of justice, increased the competence of personnel in criminal justice agencies and provided timely feedback from clients of the criminal justice system.

E. Legal aid during incarceration and rehabilitation

The legal standard

The International Covenant on Civil and Political Rights stipulates that pre-trial detention should not be the general rule (art. 9.3). The United Nations Standard Minimum Rules for Non-custodial Measures⁶⁷ stipulate that pre-trial detention should be used as a means of last resort (rule 6.1). However, in many prisons in Africa pre-trial detainees are held together with sentenced prisoners. The national, regional and international legal frameworks agree that people accused of committing an offence shall be tried within a reasonable time,⁶⁸ kept separate from those convicted of an offence,⁶⁹ and be allowed to apply for free legal aid where it is available.⁷⁰

The Kampala Declaration on Prison Conditions in Africa (1996) notes that prison conditions are inhuman (preamble) and that, so far as remand prisoners are concerned, there should be a system for regular review of the time detainees spend on remand.

The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (2002) emphasizes the need to reduce the prison population: criminal justice agencies should work together more closely to make less use of imprisonment. The prison population can only be reduced by a concerted strategy. It should be based on accurate and widely publicized information on the numbers and kinds of people in prison and on the social and financial impact of imprisonment. Reduction strategies should be ongoing and target both sentenced and unsentenced prisoners (recommendation 1).

The Lilongwe Declaration provides that Governments should introduce measures to ensure that magistrates and judges screen the remand caseload on a regular basis to make sure that people are remanded lawfully, their cases are expedited and that they are held appropriately. It also encourages prison officers, judicial officers, lawyers, paralegals and non-lawyers to conduct a periodic census to determine who is in prison and whether they are there as a first rather than a last resort, and that custody time limits are enacted and paralegal services are established in prisons.

Services should include the legal education of prisoners so as to allow them to understand the law and process, and apply this learning in their own cases; assistance with bail and the identification of potential sureties; assistance with appeals; special assistance to vulnerable groups, especially to women, women with babies, young persons, refugees and foreign nationals, the aged, the terminally and mentally ill; and access to prisons for responsible NGOs, community-based organizations and faith-based groups not subject to unnecessary bureaucratic obstacles.

Legal aid in practice: paralegal advisory services

Civilian prison authorities generally welcome legal aid providers within their walls, unless they do not understand the crucial role that legal aid providers can play in reducing the number of prisoners held in their facilities. The introduction of paralegals to provide legal advice and assistance to prisoners has been actively embraced by prison administrations in Malawi (2000), Benin (2002), Kenya (2004), Uganda (2005), Niger (2006), Liberia and Sierra Leone (2009). Paralegal advisory services have been invited to start by the Ministry of Justice in Lesotho, the prison services of the United Republic of Tanzania and Zambia, and the Chief Justice in Liberia.

In South Africa, paralegals visit prisons and target 20 specific prisons where more than 80 per cent of detainees awaiting trial are held. They conduct prison clinics that entail the provision of legal advice around bail applications, plea bargaining, sentencing options, as well as petitions and appeals.

In Wau Province in the Sudan, 10 paralegals have been trained to provide legal assistance to unrepresented accused before the court and to prisoners in Wau prison.⁷¹

In Sierra Leone, with the support of the Open Society Justice Initiative, Timap for Justice launched a pilot scheme in July 2009 for an initial period of 12 months in the provinces of Bo, Makeni and Magburaka, with seven paralegals working under the supervision of Timap lawyers. The paralegals provide basic legal advice, prepare documents, collect information necessary to secure bail and refer cases to lawyers for further assistance.

By allowing legal aid providers inside prison, prisoners gain from the advice and assistance they obtain and prison authorities see a higher outflow of prisoners. As a result of establishing a baseline (who is in prison), identifying priority groups of prisoners to assist and forging links with police prosecutors and courts to whom to refer the caseload, prisons see the numbers of remand prisoners moving more quickly through the prison system. They see human rights in action.

Establishing the baseline

In many countries, a visitor to a prison will find a record on a blackboard of the numbers of prisoners in the facility on that day. This is public information. It will indicate the total number of prisoners and break this figure down into those who have been convicted by a court and those awaiting trial. The data will further reveal the numbers of men, women and young persons. It may even disclose the range of offences and numbers of prisoners held under each category, how many are in hospital, at court or out at work (where such facilities exist).

These aggregate data will not include for how long those on remand have been awaiting trial, who has legal representation, who has been granted bail by the courts but cannot afford the terms set by the court, or how many in the prison constitute a real risk to society and how many do not. Ascertaining these details would require

further enquiry, which may take the form of a profile or census of who is in prison on a given date.

In Uganda, a 2007 prison census found that 1,257 remand prisoners (11 per cent) had stayed on remand beyond the period stipulated in the Constitution (i.e. 60 days for petty offenders and 180 days for capital offenders).⁷²

The presumption of innocence attaching to those awaiting trial on the charge for which they are held in custody is not a legal fiction. Significant numbers are falsely charged by malicious neighbours or people in power whom they have crossed in some way. Others are charged with a more serious offence than they actually committed. Murder is routinely charged in place of manslaughter, even where the facts clearly indicate manslaughter. A few are held as “hostages” by police officers until their robber or gang-member relation surrenders to police custody. Others are caught up in the general round-up by police of those involved in a public disturbance, and the list of examples goes on. As stated in chapter I, it is the economic status of the person that appears to determine whether or not he or she is committed to prison rather than any determination of guilt or innocence.

Developing a census form to establish the baseline may be simple; such a form would need to be tailored to the context of each country. It records in summary the personal details of the accused, the nature of the charge, the time spent in custody, whether a person is represented or not and other matters that can be simply verified from the prison file.⁷³ The paralegals then analyse the forms with prison officers to identify priority groups (women, young persons, foreign nationals) and categories of prisoner who excite no controversy: the overstayers (those having spent time in prison that either exceeded the statutory time limits for custody or any sentence imposed by a court) and those who cannot afford the terms for bail set by the court. They refer these lists to the prosecuting authorities for comment and go through them with the officer concerned. The lists are then passed to the court to take such action as it sees fit.

Paralegals working for the Kenya Prisons Paralegal Project reduced the remand population in Langata Women’s Prison from 80 per cent to 20 per cent in a six-week period.⁷⁴ Paralegals are credited with reducing the remand population from 40 to 18 per cent in Malawi⁷⁵ and from 63 to 58 per cent over a six-month period in Uganda.⁷⁶

In Bo Prison, Sierra Leone, two Timap paralegals and one lawyer reduced the remand population by 50 per cent between August and November 2009, while three paralegals and three lawyers working as a six-person team under the pilot National Legal Aid scheme in Freetown opened 405 cases and secured the discharge of 112 cases for lack of prosecution in the main prison in Pademba Road. They also secured bail for many more accused persons, 30 per cent of whom were unable to access bail due to a lack of sureties, lack of funds or onerous bail conditions.

In countries recovering from conflict, prison populations are generally low. However, as the police are trained and courts re-established, they have a tendency to steadily

increase. The post-conflict situation provides an opportunity to open the prison space to responsible partnerships with legal aid providers in the community who, working with the prison authorities, can introduce a cost-effective and systematic approach to improve communication between the courts and prisoners, ensure prisoners are held legally and their cases moved forward or released, and improve communications between prisoners and the outside world.

Recently, in two post-conflict countries, prisons destroyed by conflict were rebuilt. Police officers were recruited and trained. Courts were built. The number of persons held in prisons soon began to increase. The courts could not function because the judges and lawyers were being trained. Prisoners languished for months in prisons with nothing to do, waiting for their case to come to trial. Eventually they rioted and broke out, causing extensive damage to the structures that had recently been newly built to house them. In both countries, follow-up reports identified prisoners on remand as the rioters.

Legal aid in prisons: role of paralegals in Kenya, Malawi and Uganda

When paralegals first started working inside prisons in Kenya, Malawi and Uganda, the initial release rate of prisoners was high in these countries. This helped build confidence and trust with the prison authorities, as well as with prisoners. Paralegal aid clinics inside prisons have reduced the remand population by taking prisoners who have no lawyer to represent them (the majority) through a course on criminal law and procedure that employs theatre and interactive learning skills to empower them to apply the law in their own case when next they appear in court.

Empowering prisoners

Paralegals in Malawi have developed a manual for paralegals working in prisons that is of generic application to all countries applying English common law. The manual sets out 19 modules, covering arrest and detention through to appeal. The manual uses “forum theatre” and interactive, highly participatory techniques to enable prisoners to understand the law and process for themselves. Two paralegals regularly lead a clinic attended by 100 to 200 prisoners. Since the development of the clinics in 2004, the 38 paralegals in Malawi have trained over 150,000 prisoners, while in Uganda, 72 paralegals trained over 160,000 prisoners in 2008-2009 alone.

Magistrates notice in court that prisoners understand the process without needing to have it explained to them. Prisoners are able to apply for bail, conduct their own simple defence to the charge and enter a plea in mitigation. They can enter an informed plea to the charge, thereby obviating the need for a trial and improving the flow of cases.

After paralegal aid clinics were conducted in prisons by paralegals in Malawi, prisoners in one prison approached the paralegals and indicated that they wished to enter pleas to manslaughter. The paralegals drew up a list of 33 prisoners and

informed legal aid lawyers and the court. These were listed and 29 pleaded guilty at court and were sentenced (two were not produced at court and two pleaded not guilty). This resulted in savings to the judiciary of some \$36,000 and enabled a number of prisoners to return home at once (having already served time on remand) or to plan towards a release date.

As a result, paralegal teams focused on the over 800 homicide cases awaiting trial in Malawi. They found that, after clinics had been conducted, over 50 per cent of those accused of murder were willing to enter a plea to manslaughter. Legal aid lawyers were informed and invited to visit the defendants to advise them on the law and on their individual cases. The list was referred to the Director of Public Prosecutions, whose lawyers then reviewed the files and agreed to reduce the charge to manslaughter in 30 per cent of the cases. In other words, over 250 cases could have been disposed of by way of plea. In Kenya, paralegals have instituted legal aid days in prisons. In the course of their daily work, the paralegals identify a range of cases that call for expert legal advice. They draw up a list of these cases and organize with their network of lawyers a day when they can visit the prison and sit with the people on the list to advise them on their case. The lawyers do not charge for their services. The paralegals sit with the lawyers and describe the background to the case and the particular difficulty they have identified. As a result, the individual benefits and the paralegal learns from the legal advice rendered. These legal aid days are prepared in advance by paralegals so that the lawyers can maximize the use of their time at the prison. In addition, time is set aside for prison officers to consult with the lawyers on any matter of concern to them.

Camp courts: bringing the court to the prison

In many countries, prisons lack the transport to bring the prisoners to the court or the courts lack the space to hold the prisoners at court in cells. In order to overcome these difficulties, paralegals invite the magistrates to establish “camp courts” inside prisons.

Paralegals draw up lists of those on remand who have overstayed, are held unlawfully or have been granted bail but cannot afford the terms set by the court. They discuss the lists in advance with the prosecuting authorities. Magistrates attend court with the court clerk and police prosecutor and work through the list. They grant bail to some, reduce the amount set by an earlier court by way of bond or surety for bail and dismiss cases where the accused has overstayed, or set a date when the accused must appear for trial. The camp court is not a trial court, since the public cannot attend and witnesses are not produced.

The chief benefit of this mechanism is that prisoners see the law in action. Magistrates visit the prisons and are able to do something practical to alleviate the situation. As a consequence, tensions in prison are reduced and the lower judiciary becomes more thoughtful about the utility of alternatives to prison in appropriate cases. Prison staff also come to recognize that facilitating access to justice is part of their role. In Liberia, following a study tour to Malawi, the Chief Justice instituted

a Magistrates Sitting Programme in Monrovia Central Prison applying similar principles and drawing on the support of law students from the Arthur Grimes Law School and paralegals from Prison Fellowship. A similar mechanism has been established by the Ghanaian judiciary in Nsawam prison.

In Nigeria, mandatory review of custodial orders by magistrates has been ordered by the chief judges of Imo, Ondo and Plateau states. Management of custodial orders by the issuing authority has been crafted to include a review of all remand orders and the capping of these reviews to three. These reviews would amount to a maximum detention period of nine months under a court order.

The Rights Enforcement and Public Law Centre and the Legal Aid Council have engaged the magistrates in discussions with a view to agreeing upon a monitoring procedure to determine the impact and effectiveness of the practice direction. In Sokoto and Ondo states, it has been agreed that quarterly reports can be compiled from information ordinarily passed on to the Chief Registrar by the magistrates. This information will include the date on which a remand order was issued by a magistrate, the number and date of reviews of the order and the action taken by the magistrate after the third review.

This so-called judicial practice direction has been well received among magistrates in Ondo state. The magistrates have unilaterally relied on the practice direction to limit remand order of criminal suspects to three months.⁷⁷

In processing simple and non-contentious cases, which constitute the majority of cases, these innovations have proved highly successful and operate at little cost beyond that of fielding paralegals. They are an example of the concerted strategy called for by the Ouagadougou Declaration and demonstrate how, by linking the key actors, much can be done by improved communication, coordination and cooperation.

Training prison officers to serve as court liaison officers

In Southern Sudan, as part of a comprehensive project on prison reform, UNODC worked with the Southern Sudan Prison Service to organize two national workshops on alternatives to imprisonment, held in June 2008 and April 2009. One direct response from these two workshops was the creation of the function of a court liaison officer within the Sudan Prison Service. In October 2009, a workshop on court liaison functions for the Southern Sudan Prison Service was conducted with the objectives of training the first group of 16 court liaison officers.

Court liaison officers in the Sudan Prison Service play an important role in ensuring the effective and fair administration of justice. Regular communication between the prisons and other criminal justice agencies, such as the police, prosecutor and judges, provides an effective link among the rule of law institutions. This can reduce unnecessary delays, which diminish justice and increase the cost of housing individuals in prison, as well as respond to the problem of overcrowding. This work

will not only assist in cases of individuals who are not lawfully imprisoned, but will also contribute to identifying the root causes of delays in the criminal justice system and reduce the length of pre-trial detention. In addition to the training of court liaison officers, written guidelines were also developed to assist the officers in their work.

Objectives of court liaison officers

The objectives of the court liaison officers' programme are threefold: first, to link the criminal justice system by improving communication, cooperation and coordination among the prisons, courts, prosecutors and police. Second, to draw the attention of the relevant criminal justice agencies to specific cases by collecting data on remand, convicted and other prisoners, screening those cases that require attention and ensuring the flow of accurate information to the courts, prosecutors and police. In those cases that have been seriously delayed, the court liaison officer can request the relevant authorities to deal with them more quickly. One of the main purposes of the court liaison officer is to ensure that all those in prisons are there on a lawful warrant of commitment, including prisoners on remand and convicted, as well as others, such as debtors. Third, officers offer advice and support to prisoners, including by writing appeals and explaining the criminal justice process (see box).

Core functions of court liaison officers

1. Monitoring remand prisoners

Monitoring remand prisoners to ensure warrants of detention are lawful and not expired. Bringing to the attention of the police, prosecutor and courts those cases that have expired and seeking assistance from the criminal justice agencies to ensure an appropriate legal response.

2. Reviewing sentences of convicted prisoners

Review sentences of convicted prisoners to determine whether the sentences are clear and correct or whether grounds for appeal or application for mercy could be made. As appropriate, assist the prisoner in submitting a request for review of sentence, an appeal or an application for mercy and ensure timely follow-up.

3. Reviewing situation of others in prison

Review the situation of all other prisoners who are not on remand or convicted. This group might include mentally ill prisoners, civil debtors and those in default of compensation orders. Seek assistance from the appropriate justice agencies to address any issues arising from non-compliance with the law.

4. Facilitating visits

Facilitate regular visits by the appropriate courts, the public prosecution attorney and human rights commissioners.

5. Creating a directory of legal professionals

Create a directory of local criminal justice agencies and professionals. This should include the names and contact coordinates of the relevant local courts and senior judges, the public prosecution attorney, the police commissioner, the police criminal officer and human rights commissioners.

6. Writing internal monthly reports

Write and submit a monthly report to the director of the prison at which the court liaison officer is functioning.

Case management committees

Legal aid is a crucial component of the criminal justice system. Where it is lacking, cases get stuck or overlooked and the system fails to function. As seen in the previous section, by bringing agencies together at regular intervals to discuss cases, they can be managed more systematically. Legal aid providers can have a key role to play in this process, as seen in the description above on camp courts, where legal aid providers working with prison officers identify the caseload and refer the list to the case management committees.

In Liberia, for example, a case flow management committee was used to weed out those minor cases where people were overstaying in prison.

The principal cause of prison disturbances in many countries in Africa is attributed to delays in the prosecution of criminal cases, the absence of a system that gives people fast and fair trials, and justice failures. Improving prisoners' access to legal aid is a priority issue.

In Malawi, court user committee meetings are minuted and action points agreed. This has enabled the committees to identify local blockages and solve them. For instance, overcrowding in one prison became so bad that prisoners were taking turns sleeping. Paralegals, supported by prison officers, raised the matter in the committee, the Chief magistrate visited that night, and the next day he returned with three magistrates, police prosecutors and court clerks and released a number of prisoners to ease the congestion.

These low-cost, simple mechanisms serve to move cases through the system and contribute to reducing overcrowding. They form part of a strategy for controlling rather than solving prison overcrowding, which can be achieved only through the concerted action of all players to review sentencing practices and alternatives to imprisonment, through the penal laws to decriminalize those who do not put society at risk, and through more responsible and responsive policing so that deserving cases may be diverted from a criminal process that leads, in the absence of alternatives, to prison.⁷⁸

Providing legal aid to sentenced prisoners

Persons convicted of an offence have a right to appeal⁷⁹ and the right to counsel to advise on appeal and draft any grounds. However, where a person is unrepresented at trial, he or she is unlikely to be assisted with mounting any appeal whether against conviction or sentence. The numbers of appeals before the superior courts of appeal are low in many countries. This may be because those convicted do not wish to appeal. It may also be because many prisoners do not know they can appeal, or how to appeal, or fear that the appeal will be rejected and a stiffer sentence substituted. Or it may be that the case files are not typed up for the higher court or that case files are not transferred from the lower to the higher court and get lost somewhere between the two.

Paralegals under the Paralegal Advisory Service do not offer advice on appeals against conviction as this requires a level of expertise in the law they do not necessarily possess. Appeals against sentence are, in common law countries at least, a different matter.

Paralegals in Malawi have developed simple forms for an appeal against sentence, which they complete following the same procedure as set out for the bail form above. They then lodge the form at the criminal registry of the high court so that the responsible judge can come to a judgement on the face of the document where (a) the lower court has passed a sentence in excess of its jurisdiction in general or for any given offence, (b) a sentence should have been made to run concurrently with another rather than consecutively or (c) the time spent on remand should have been taken into account in passing sentence. These mistakes are common and can be simply rectified.

In countries that include sentences of community service (*travail d'intérêt général*), the court makes a determination that an offence merits a term of imprisonment of x years, but that, if the person consents, the court can impose a number of hours working for the good of the community rather than sending the person to prison. The number of years varies from country to country. However, the court is required to consider community service before sentencing a person to prison.

Paralegals can review the prison register to identify persons who have been sentenced to a term of imprisonment who may otherwise have been eligible for community service and refer those cases to the community service officers in the local area. They then visit the prison and screen the prisoner who, if he or she satisfied the criteria, is then referred back to court for substitution of sentence.

In Uganda, paralegals facilitated the release of 1,503 prisoners to community service in the period 2008–2009 by the following means: by informing prisoners about community service and how to get it, by compiling lists of offenders eligible for community service and submitting these lists to the magistrate, by attending community service meetings with community service officers, and by creating links with probation officers, community service officers and others to jointly hold sensitization talks for inmates in prison about community service and its advantages.⁸⁰

After-care services for ex-offenders are rarely available, even in peaceful countries in Africa. People living in close-knit communities are wary of outsiders. In some countries, the link paralegals established between prisoners and their families is being expanded as they are asked by prisons and prisoners to provide assistance on release. Often this is limited to a request for funds to get home. Increasingly however they find a need to advise communities of the release date of a prisoner and so encourage local community activists to prepare the community for the return of the prisoner, or advise if his or her return would not be welcome and to seek alternative temporary accommodation. The work of the village mediators discussed above in this chapter may also be enlarged to accommodate services of this kind.

F. Summary and recommendations

In the community

Restorative justice processes can increase community engagement and facilitate the involvement of the community in response to the problems of crime and social disorder and, when properly trained, community volunteers can be as effective in facilitating restorative processes as criminal justice professionals.

Private legal aid providers have emerged as a response to the serious shortcomings of many traditional and customary law forums, but as complements rather than substitutes to these forums. Effective mediation services at the community level:

- Assist non-State justice systems in managing their own caseload
- Serve to decrease the workload for the State justice system
- Provide cheaper and quicker justice services than the State justice system can
- Protect and respect the privacy of the individual in the community.

Perhaps the key ingredient is that the solutions tend to be of better quality. They instil a culture of dialogue. In mediation, the process focuses on the will of the parties, allowing them to come away with a conclusion that is mutually satisfactory.

During investigation

Trial observations of 91 capital cases conducted during 2000-2001 in one African country resulted in the following findings: police lacked the resources to gather evidence and complete their investigation; they relied too much on confession evidence; they adduced hearsay evidence, which in some cases led to a case being dismissed at trial, years after the offence and after the defendant had languished in prison; individual officers were transferred and case files subsequently lost or forgotten; and case files were lost or mislaid when referred to State lawyers. This

contributed to a blame culture, with each part of the prosecuting process blaming another for delays or loss of files.

The observations above could apply to many courts and prosecuting agencies. While available legal aid service providers cannot address all these problems, they can assist with some of them. The presence of third parties at the formal interview stage can deter abuse of process and over-reliance on coerced admissions of guilt.⁸¹ Cases that have grown old and appear not to be moving can be identified in prison, followed up with the investigating authorities and referred to the court for action when delays are unacceptable.

Where criminal justice agencies open their doors to a rights-based approach, civil society actors need to adapt their response accordingly. Confrontation needs to be jettisoned in favour of a more collegial approach. Civil society groups have demonstrated that, by building on local capacity and engaging with local actors, often on a personal level, they can jointly produce a set of actions that protect the poor, weak and marginalized in the early stages of the criminal justice process when they are most vulnerable.

Governments should provide legal or paralegal services at police stations and prisons in consultation with police and prison authorities, law societies, law school clinics, NGOs and other legal aid providers.

At court

By improving cooperation between justice agencies and actors, especially locally, and by examining the caseload more closely, more can be done through opening lines of communication and diverting appropriate, minor, cases away from the State justice system, releasing time and resources for courts and lawyers to try those cases that are serious or complex, where the interests of justice require the assistance of competent counsel. The competency of these counsels can be enhanced through training and policy coordination.

When the judiciary is proactive, the process can move more smoothly, to the benefit of all. Dispensing justice need not only take place in a court from a bench, it may also require on occasions stepping off the bench and bringing justice to the people.

In prisons

As illustrated above, paralegals can fill gaps in the system and assist prisoners in accessing justice. Paralegals can interview prisoners and take statements, provide general information to those awaiting trial and assist those who have been convicted. In addition, they can link prisoners to family members, sureties, courts, prosecutors and defence counsel. Prison administrations in East and West Africa have introduced paralegals inside prisons as they help prison staff by pushing cases through the system

more speedily and by reducing tension.⁸² Training of prison liaison officers in Southern Sudan is a promising practice to ensure the rights of prisoners.

V.

Legal aid services for the poor and marginalized

A. Introduction

In order to identify promising practices, two questions need to be asked: first, what models of legal aid have been applied and which of them have had an impact? Second, which models work to reach vulnerable groups such as ethnic minorities, women and children?

Minorities (including persons living with HIV/AIDS, persons with disabilities and other vulnerable groups), children and women face unique challenges in accessing justice, especially in the developing world. Although women constitute a small fraction of the total prison population in most countries (usually less than 2 per cent), they are at particular risk of being abused or disregarded. They are often less likely than men to be able to access legal aid or have knowledge of the legal system and have often been placed in pre-trial detention for reasons that were not in conformity with the formal law.

Poor women in the criminal justice system accumulate handicaps, especially when their violated rights relate to the private sphere, such as family matters or sexual conduct. Seeking to address the practical difficulties that they face and making the criminal justice system more responsive to female victims of gender-based crimes requires a deliberate criminal-justice-system reform strategy. A starting point is to provide legal aid specifically targeted at women and girls.

For children, criminal justice systems function fairly inadequately: for instance, institutions may lack medical facilities and rehabilitation services or the ability to determine a child's or young person's true age. Such inadequacies only make the criminal justice system a revolving door for child offenders.⁸³ The commitment of Governments across the continent to the protection of the rights of children in conflict with the law is based on the ratification of regional and international treaties and conventions that set minimum standards for the treatment of children in conflict with the law. These standards guide the actions of Governments and all actors in the field of juvenile justice administration. Ratification of the Convention on the Rights of the Child and its subsequent domestication into national laws provides

additional leverage for juvenile justice actors to hold the Government accountable for effective juvenile justice administration. The Convention recognizes⁸⁴ the need to adopt appropriate measures to promote physical and psychological recovery and social reintegration of child victims. Such recovery and reintegration should take place in an environment that fosters the health, self-respect and dignity of the child. In addition, the Convention sets standards for the management of children in conflict with the law in the criminal justice system, stating that the arrest, detention and imprisonment of a child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time and that the child should be separated from adult offenders (article 37).

To ensure access to justice for disadvantaged groups, a deliberate identification of entry points is necessary. The “Voices of the poor” report noted that the indifference of police is particularly prevalent in cases of violence against women.

B. Special units for women and children

The establishment of specialized units or designated officers to respond to cases of violence against women is a paramount tool to effectively implement laws that seek to eradicate violence against women. Cases involving violence against women are often complex and require special skills in recognizing the gender aspects of the crime patterns, working with victims and their families, dealing with perpetrators and coordinating with multiple agencies. Developing these skills often requires specialized training, education and experience.

One-stop centre for vulnerable groups: family and child protection units in Northern Sudan

The Sudanese authorities, with the support of the United Nations Children’s Fund, piloted a Family and Child Protection Unit in 2007 aimed at providing a one-stop-shop centre of professional services to women and child victims, witnesses or accused. This model is scaled up in the South Africa Child Justice Centres.⁸⁵ The units apply a special policing approach, employing trained police officers to deal with sensitive cases and vulnerable people in a non-threatening environment. The staff wear civilian clothes and in investigations apply technology such as video recordings to take statements, thereby reducing the trauma of court appearances. These units have been rapidly expanded throughout Northern Sudan.

They provide an assortment of services to their clients, including:

- Psychosocial support, social services, legal aid and forensic investigation.
- Proper investigation of cases, with a conviction rate of 50 per cent
- Awareness in local communities about sexual and gender violence, encouraging communities to report such matters to the police authorities

- A system of close collaboration with other specialists (i.e. from social services, legal aid, prosecution, the judiciary and health professionals)
- A database of all reported cases.

The key success factor of the units is the prompt follow-up of reports of abuse and violence, gathering of evidence and effective presentation at court. This has enhanced the professionalism of the units and led to increased public confidence in reporting such cases.

It has also led to closer collaboration between the police, courts and a network of lawyers providing legal advice and assistance. The collection of data has also created a source of information on trends in crimes against children and led to further changes and reforms within the justice sector. This includes creating child prosecution offices at State level, with trained staff to conduct investigations into cases involving children, raising the age of criminal responsibility from 7 to 12 years and establishing a telephone hotline.

Child justice centres in Bloemfontein and Port Elizabeth, South Africa

The Child Justice Law of South Africa provides for specialized child justice courts and one-stop child justice centres⁸⁶ for all cases involving children. The aim of such courts is to ensure an appropriate environment for child offenders and to facilitate the child justice provisions of the law.

The location and design of the physical space must be conducive to the dignity and well-being of children: proceedings are conducted in a language that the child understands, questions and responses are framed in a way appropriate to the child's developmental level and the proceedings are informal so as to encourage the maximum participation of the child. No leg irons are permitted and handcuffs are allowed only in exceptional circumstances.

The Child Justice Law intends that one-stop centres should streamline the whole process, from arrest to the formal court process. All the major services are in one building: holding cells, assessment rooms, police services, probation services, a courtroom and rooms for presenting diversion programmes so that parents and children do not need to travel.

The law provides that the jurisdictional boundaries of these one-stop centres do not have to correspond with the boundaries of existing magistrates' courts. The Mangaung One-Stop Child Justice Centre in Bloemfontein and Nerina One-Stop Child Justice Centre in Port Elizabeth are examples of centres that already exist.

The law provides that the ministries of justice, social development, safety and security and correctional services are all responsible for the provision of resources and services for the one-stop centres.

Children who had been to court were consulted in the drafting process. They said the experience was scary and that they felt nervous, embarrassed and disappointed. Some 40 per cent felt that they had not been given a chance to tell their story and the majority had been transported or held with adults. However, children who had been through the Port Elizabeth Centre (previously known as Stepping Stone One Stop Child Justice Centre) said the following:

- “Stepping stones made me and my family feel understood”
- “Being there taught me about the law”
- “It gave me a second chance”
- “It prevented me from being sent to prison.”

Family support units, Sierra Leone

The family support units were established with the assistance of the United Nations Mission in Sierra Leone and are currently key to combating previously unchecked areas of crime in Sierra Leone. The first began as a domestic violence unit, established in 2000 at one of the police stations in response to the increasing cases of domestic and sexual abuse in the post-war State. The main beneficiaries are the women and children, especially those in rural areas. In 2003, these units received more than 3,000 reports of sexual and physical violence against girls, estimated to make up around 90 per cent of the victims. Currently, the family support units operate at police stations to deal with matters relating to the family. Mediators in the units had the strong support of the new law,⁸⁷ and have made some inroads into addressing issues of domestic violence.

Scope of family support units

According to the Child Rights Act, the family support units are responsible for handling the following matters:

- Sexual assault
- Physical assault (domestic violence)
- Cruelty to children
- Offences committed by children
- Anti-human trafficking relating to children
- Collaborating and partnering with other units.

Structure of family support units

At the unit level, the family support unit comprises the police officers, social workers and probation officers who conduct joint investigations. In conducting joint investigations, the sole responsibility of the Sierra Leone police is to focus on criminal aspects, while the social workers focus on protection issues.

Presently, there are 30 family support unit stations countrywide, with a total of 229 personnel. The staff receive training on working with victims of rape, sexual abuse, domestic violence and trafficking. They also train in basic crime investigation techniques and attend specialized courses in joint investigations.

The operations of family support units include the following:

- Receiving, censoring and recording reports
- Issuing police medical report forms to victims or survivors for referral and medical treatment
- Investigating, recording and referring cases
- Obtaining statements and sharing details with assigned social workers thereafter (the arrest and detention of offenders is often carried out by the Sierra Leone police)
- Visiting crime scene: it is the role of the Sierra Leone police staff to make necessary preparations to visit crime scenes. Technical and professional support is provided by the Sierra Leone police, including cameras, cordon tapes and exhibit bags and tags
- Prosecuting offenders: at the completion of every investigation, the police will often decide whether a crime has been committed and whether to charge the offender in court. The family support unit staff will be subpoenaed by the court to give evidence against the accused as a prosecution or police witness
- Checking criminal records: a specialized unit within the Criminal Investigation Department (the criminal records office) keeps and maintains criminal records of offenders. The Sierra Leone police/family support unit furnishes the criminal records office with the information required to generate criminal records
- Conducting searches: the police are prompted to conduct searches for the purpose of evidence-gathering (e.g. used towels, condoms, stained clothing, drug paraphernalia or substances and weapons). The suspect will normally make a certification note showing that the search party did not damage or take away or steal anything during the search
- Counselling: trained family support unit personnel now offer counselling services to victims or survivors
- Conducting identification parade: victims and survivors often have difficulty identifying the suspect or offender. The Sierra Leone police or family support unit often facilitates this process, whereby a suspected person or persons are placed amongst other persons to ascertain whether victim or survivor can identify the correct offender
- Obtaining police bail: the Sierra Leone police or family support unit often grants bail to suspected persons, mandating that they continue to report to the station while the investigation continues.

Activities of family support units

The family support unit engages in active and proactive activities to engage the surrounding communities. Unit staff regularly meet with the community to share views on problems affecting them and to identify possible solutions. This is achieved through widespread public awareness campaigns using various tools.

The community also becomes engaged when community members report complaints to the family support units, prompting police investigations and home visits to the victims or survivors. The family support unit personnel investigate and refer matters for appropriate action such as prosecution. The units are mandated to give feedback in writing to the family support unit management at police headquarters on a weekly or monthly basis. Such information is transmitted to relevant policy stakeholders such as the AIG Crime Services and the Inspector-General of Police.

National legal aid clinic for women in Zambia

The Law Association of Zambia established the National Legal Aid Clinic for Women to provide free legal services to indigent women and children. The clinic is present and has permanent employees and offices in all three provinces. The clinic has employed up to 10 lawyers on a full-time basis.

C. Diversion from mainstream criminal justice system

Diversionary mechanisms are commonly applied to children in conflict with the law.⁸⁸ States should seek to establish laws, procedures and institutions with the mandate to handle matters relating to children in conflict with the law. Wherever appropriate and desirable, and provided that human rights and legal safeguards are fully respected, measures for dealing with such children that do not involve resorting to the formal judicial process should be favoured. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice provide that, in appropriate cases, consideration should be given to dealing with children in conflict with the law without resorting to formal trial.⁸⁹

One of the diversion options in use in Namibia and South Africa allows the young person to pay back to the community the harm he or she has caused. The young person works for a number of hours in a non-profit organization. The conditions are that the young person is 14 or above, admits to the commission of the offence and has no history of mental disorder. The young person and parents sign a contract with the placement agency and a social worker. A time sheet is kept and subsequently returned to the court as proof that the young person has completed the order so that the case can be withdrawn. Where alternative dispute resolution processes fail or are inappropriate, the matter comes to the court for adjudication.

Children charged with capital offences are the only ones tried in the mainstream criminal courts, while the rest are tried in family and children's courts. Trials in these courts are to be expeditious. If cases are not completed within three months of the plea being taken, they must be dismissed and the child protected from further proceedings relating to the matter. The use of such terms as "conviction" or "sentence" is prohibited in these proceedings to avoid stigmatization of the child offender. The statute dictates instead the use of terms such as "proof of an offence against the child" and "order".

D. Victim support units in Zambia

Elsewhere on the continent, numbers of victim support units appear to be increasing in police administrations. In Zambia, legal aid service providers report good working relationships with officers of police victim support units and social workers. A formal agreement in the form of a Memorandum of Understanding has been entered into with the police, whereby a police officer from the victim support unit is permanently placed at the offices of the International Justice Mission and National Legal Aid Clinic for Women to assist with cases.

The establishment and running of such units is resource-intensive, both in terms of financial and human resources. Conditions prevailing in these units are considerably better than those found in other police facilities but, while they have helped to ensure a degree of diversion for children and protection and care for women, they have, in some instances, struggled to provide the necessary psychosocial/medical support for victims and suspects, and have not always been able to offer the required legal advice and assistance.

These victim support units were established in 1994 in line with the Zambian police reforms. The units deal with matters such as crimes against the underprivileged and the girl child, property-grabbing, child abuse and sexual offences. The establishment of these victim support units has led to an increased police administration in the country.

In other African countries, efforts to support victims and witnesses are at the nascent stage, with different approaches under consideration. In Ethiopia, efforts to formulate policies and legislation are informed by small-scale pilot programmes driven by NGOs in Uganda. It will be vital for information and lessons learned from these pilot programmes to be shared in the event of replication and adaptation by other countries.

E. Targeting refugees: gender-based violence legal aid clinics in Guinea

The American Refugee Committee (ARC) operates two gender-based violence legal aid clinics in Guinea, working with refugee survivors of gender-based violence from Liberia and Sierra Leone. The clinics provide primary services such as education on the legal rights of women and children and confidential advice to women and children regarding their legal rights and options. Since the early 1990s, the humanitarian community has increasingly focused its attention on the problem of gender-based violence. There are security measures in place and health and psychosocial programmes targeting gender-based violence survivors in the refugee population and nearby communities. Once these services had been established and trust had been built with the community, there was a rapid rise in the number of survivors coming forward for help. Over time, as survivors began their physical and emotional recovery from abuse, many expressed the need for legal justice.

Since the legal justice system in Guinea is not easily accessible for refugees, ARC implemented gender-based violence legal aid clinics in response to the need for assistance and support to survivors seeking legal justice under the law, and provided legal representation for women and children whose rights had been violated. In addition, Government advocacy is emphasized. Throughout the legal aid process, survivors continue to have access to psychosocial support from ARC and other organizations in Guinea. This emotional and social support is essential for survivors pursuing the long and difficult process of legal justice.

The two ARC legal aid clinics process between 400 and 600 cases per year, working only with refugees. The clinics prosecute cases of physical and sexual violence, domestic abuse, sexual exploitation, child prostitution and the pimping of children, forced prostitution, threats, paternity suits and child custody or kidnapping.

F. Witness protection

In many countries, especially in post-conflict States, the prosecution of serious criminal activity has been constrained by the reluctance of witnesses (and even victims) to testify at trial because of threats to their lives and the lives of their family members. Failure to protect the witness or victim leads to the failure of prosecutions and to crimes going unreported. After recent conflicts, a pattern has emerged of witnesses and victims disappearing or being murdered prior to testifying at trial, while others have suffered retaliation after testifying. This pattern is especially familiar in cases of prosecutions of organized criminal activities or of politically or ethnically motivated crimes.⁹⁰

Providing witness protection helps to encourage victims and witnesses to report serious crimes and criminal offenders to work with police and agree to be cooperating witnesses. In some cases, the absence of witness protection measures makes it impos-

sible to get the evidence needed to prosecute and convict perpetrators of serious crimes. In many cases, the physical protection of witnesses is necessary to ensure the safety of the witness during the investigation and trial, and even after the trial.⁹¹

Special measures are needed to deal with the demands of investigating, prosecuting and judging crimes involving violence against women, including rape and other forms of serious sexual abuse.

Protection may be as simple as providing an escort to and from the court (whether accompanied by police or a third party), offering temporary residence in a safe house, providing a lump sum amount to organize self-protection, or using modern communications technology such as videoconferencing or simple screens for testimony.

In South Africa under the former apartheid regime, the protection of witnesses included holding witnesses for protection purposes in custody involuntarily. This restrictive measure was used to coerce witnesses to give evidence. In 2000, a new law on witness protection entered into force, establishing a special sexual offences and community affairs unit under the national prosecuting authority, which provides assistance to victims and witnesses of crime in coordination with a number of stakeholders, including NGOs.

In the Democratic Republic of the Congo, the United Nations mission (MONUC) Office for Sexual Violence⁹² issued the following checklist:

- Follow the “do no harm” approach
- Avoid repeated interviews of survivors
- Use only trained personnel to conduct interviews with survivors
- Protect sources and their confidentiality
- Apply the World Health Organization “Eight ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies”
- Apply the principles introduced to guide humanitarian responses in emergency settings.

The main principles are that action and inaction may have unintended negative consequences. Actions and interventions, or a lack thereof, must not adversely impact upon or expose individuals and their communities: before actions are taken, consequences and potential risk factors need to be assessed and measures need to be taken to eliminate or minimize such risks, and, in the collection of information, the benefits to the community and survivors need to outweigh the risks.

G. Summary and recommendations

Legal aid is vital to ensuring an adequate and multisectoral approach to constraints faced by women, children, victims and refugees, among other groups. To successfully aid vulnerable groups in remaining safe and obtaining justice, legal aid must be instituted in creative ways, at the appropriate time and as part of a comprehensive prevention and response programme. One-stop child justice centres are a creative innovation in this direction. Efforts are under way across the continent to address gender, conflict and all forms of vulnerability in the administration of justice.

If legal aid for poor and marginalized people is to be successfully provided, openness and a deeper understanding of vulnerability in relation to the justice system will be required. This understanding would inform integrated and coordinated action by Governments and non-State actors and enable a broader definition of legal justice, to include both formal and informal systems. This would generate a minimum set of standards to guide policymakers and programmers to carefully assess and plan for marginalized groups. To reach this level of effective, integrated and coordinated action would require the bringing together of collaboration, skills, knowledge, training, coordination and high-level support and commitment at the national level.

All legal aid frameworks, be they legal, policy or regulatory, should be reviewed in terms of gender and vulnerability sensitivity. Typically, the starting point is to identify processes and factors hampering equal access or excluding certain segments of the population from the basic right to access. It is also necessary for technical resource institutions to provide programmers with guidance and standards in mainstreaming these issues and moving these concepts from theory into practice.⁹³

VI.

Management and administration of legal aid

A. Programming for legal aid service delivery

There is a growing commitment by justice programmers to enhance access to justice for all, and particularly for the poor and marginalized groups across the continent. State funding of legal aid in criminal proceedings is essential for justice for the indigent and marginalized groups. The challenge to programmers is how to set about providing this legal aid. In many countries, although legal aid needs are overwhelming, they are a low priority or diluted at the point of programming. The present chapter aims to provide programmers with basic tools in planning for legal aid service delivery. The *Handbook* recognizes the role played by the civil society voice in keeping the issue of legal aid service delivery on the agenda. Civil society organizations can act both as a resource to programmers and as watchdogs to ensure that the design and execution of justice reforms pay attention to legal aid service delivery. The last section of this chapter identifies practices in the organization of civil society organizations that promise to strengthen the civil society organization voice for a strong legal aid system, focused on enhancing access to justice for all in the criminal justice system.

B. Evidence-based programming for legal aid services

Gathering baseline data

Effective programming is a consequence of sound identification of the problem and possible solutions. A reading of the current state of the criminal justice system is pivotal to accurate identification of the problem. A baseline will provide a clear snapshot of the justice system so as to begin to identify the key issues and prioritize a course of action. This baseline information also provides a template against which progress can be measured and potentially useful measures can be scaled up.⁹⁴ In establishing the baseline, the programmer will collect information pertaining to the

legal, policy and regulatory frameworks, the broader administration of justice frameworks and the practice of criminal justice as a whole.

A review of the legal framework is a constitutive element of the baseline. This will map the parameters within which legal aid is provided in a given country. To arrive at the existing legal frameworks for legal aid service provision in a given country, the following questions will be pertinent:

- When, in law, can a person first obtain legal aid (i.e. advice or assistance, and not only representation)?
- Is he or she, in law, entitled to legal aid at the police station? In prison? In court?
- Are there any conditions attached?

The law may clearly state, in line with international standards, that citizens have the right to consult a lawyer upon arrest, to inform family members and to retain the right to maintain silence upon being questioned. As is often the case, the problem is less with the law as stated and more with the law as it is practised. Further enquiries serve to test the application of the law and gaps in enforcement and oversight.

The Lilongwe Plan of Action provides a useful benchmark for the review of the institutional framework. The Plan recommends that States establish a legal aid service that is independent of Government (i.e. not administered by the ministry of justice); that legal aid service providers are diversified, calling on the participation of the law society (to provide free services), law schools, and NGOs and faith-based groups; and that there are mechanisms to ensure quality standards in the provision of legal aid.

How, in view of the above, is legal aid currently administered by the State? And is there a policy to make legal aid systematic and sustainable?

To complete the baseline, it is important to identify the resources accorded to the implementation of legal aid services. A useful comparator is always the equivalent expenditure on the detection, policing and prosecution services. Budgetary allocations tend to be limited. Legal aid is usually apportioned an amount from the justice budget, which includes the judiciary and administration of the courts and may extend to the police and prisons. Documents to consult may be sourced directly from the legal aid department or board (where such institutions exist) and the ministry of justice, under which most legal aid schemes are administered. Supplementary documents may include the country's national development plan or poverty reduction strategy paper, as well as donor reports and any assessments of the sector that are available. Key questions to ask in this area include:

- How much State funding is available for the justice sector as a whole (judiciary, prosecution and legal aid)?
- What is the amount per capita allocated to legal aid and how does that figure compare with allocations for health and education?⁹⁵

What legal aid service providers do

There are a range of legal aid providers operating within the formal and informal justice sectors. Mapping these actors can provide a picture of who is available and where, and what they can offer. This will also show the geographical and jurisdictional gaps in service delivery and inform the prioritization process.

The first port of call may be a profile of the range of legal aid service providers, their geographical coverage, capacity and resources, both financial and human. Chapter III of the present *Handbook* provides a list of possible actors in a given country. Key questions in this realm include:

- What form of legal aid is provided by the State, the legal profession, law schools and non-State actors such as NGOs and faith-based organizations?
- What is the geographical coverage and distribution of each provider?
- What services are provided?
- Where are the strengths? Where are the gaps?

This mapping exercise is also important to the actors at policy level, those that are driving investment in the criminal justice sector and broader justice reforms. The criminal justice system is inherently complex, as it straddles a range of independent institutions across the executive and the judiciary. In the absence of a deliberate effort to coordinate these constituent elements of the system, they fall out of synchronization, driven by institutional as opposed to system goals. This produces a mentality where each element narrowly defines its role: the police to arrest and investigate, the prosecutors to prosecute, the courts to adjudicate and the prisons to incarcerate. As a result, the system fails to function adequately or at all because the parts of the system fail to act in concert.

Programmers need to ascertain the existing coordination mechanisms and the levels of coordination. In some countries that have adopted a sector-wide approach, coordination happens at the stages of policy formulation, planning, budgeting and monitoring. This is the case, for example, in Ethiopia, Kenya, Malawi, Sierra Leone, Uganda, the United Republic of Tanzania and Zambia. Sector-wide approaches are in formative stages in Burundi, Rwanda and the United Republic of Tanzania.

Guiding questions for the mapping exercise may include the following:

- How are policies, plans and budgets developed in the criminal justice system? Is there a meeting point for the different actors in the system to address common concerns, such as legal aid service provision? At what level? Who are the key actors? What tools do they have at their disposal? The answers to these questions may take the form of a strategic investment plan or a policy paper on criminal justice.
- What is the stance of these actors regarding the State's obligation to provide legal aid services at all stages of the system? What information or research is at their disposal regarding the status of legal aid service delivery in the system?

Who is the voice for legal aid services in this unit? What influence do they have? What more needs to be done to create a stronger voice for legal aid in the policy, planning and budgeting arena?

The donor agencies are key players in the delivery of legal aid services in the criminal justice system. Some will give strong support to civil society organizations delivering legal aid services. Key questions are:

- Which donors are active in court and criminal justice issues?
- What projects are under way and at the planning stage?
- What mechanisms for coordination exist between them?

Post-conflict countries need quick answers. They cannot wait for structures to be built and professionals to be trained. They need mechanisms to prevent conflict from recurring. They need mechanisms for promoting reconciliation. They need to rebuild trust in the justice system and confidence in that system to deliver impartial and fair rulings. The speed of events and the need to be seen to be doing something should not, however, prevent strategic thinking. On the contrary, it reinforces the need for it.

Understanding the critical needs of beneficiaries of legal aid services

To answer the questions above, it is important to have a fair understanding of the needs of the criminal justice users and those of the system. Key questions are:

- What categories of people go through the criminal justice system? Disaggregate the data by gender, age, socio-economic variables and geographical location
- Which point of the legal aid system is presently serviced by the broad range of legal aid service providers?
- What point in the system do users say is in most need of legal services?

Supplementary data may be obtained from criminal justice statistics, crime statistics, court case statistics and prisoner statistics, where available. Independent human rights watchdogs may also provide useful information. Where they are not in existence, observations at court, together with enquiries made during visits to police stations and prisons, will disclose whether or not accused persons have access to counsel and other legal services.

The questions below will aid the observation process.

At the police station and in prisons

In seeking to gauge observance of the individual right to legal advice and assistance, note at the police station and in prison what materials are available to those suspected or accused of a crime.

- What advice or guidance do police and prison officers provide to people on arrival?
- Do detainees in police custody understand their legal rights?
 - The right to remain silent
 - The right to consult a lawyer before answering any questions
- Do prisoners understand the charge with which they are faced, when they last appeared in court, whether they were represented, how long they have spent in custody and whether they have applied for bail or why it was refused?

At court

- What legal aid services are available to users of the criminal justice system at the point of trial?
- At what point in the criminal justice system are free legal services made available to a justice claimant? What are the criteria for access? How appropriate are they?
- What are the strengths and weaknesses of the existing system and what are the possible solutions to the latter?
- What are the user perceptions regarding the range and quality of legal aid services provided at court?
- Who pays the lawyer for his or her services? Is there a set fee per case? Are fee levels adequate?

Voices of beneficiaries

The questions above should be complemented by a compilation of voices of those who come into contact with the criminal justice system. Find out their broad and specific demands of the criminal justice system. For instance, what are their current concerns about safety and security? What remedies were available before the onset of conflict and which are currently available? Focus-group discussions can be conducted around a prepared set of questions, which may include:

- What are the main causes of conflict in the community?
- How are they dealt with?
- Were they dealt with effectively before the outbreak of conflict?
- Do you feel safe? Why or why not?
- What are the main offences?
- How are they dealt with?
- How could they be dealt with?
- When an incident occurs (dispute, offence, conflict), to whom do you go for advice or assistance?
- Do the police assist? What problems do you encounter with the police?
- Do the courts provide a final resolution? What problems do you encounter at court?

For those who have experience of the criminal justice system, it is important to ascertain the first point of contact with legal aid service providers, the frequency of contact, points of discussion and the rating given for quality of service in comparison to privately funded legal services.

Not all categories of users are impacted in the same way by the criminal justice system. In different settings and at different levels, different nuances of vulnerability manifest themselves. Women, children, people living with HIV/AIDS and people with disabilities may rank high in order of vulnerability.

Understanding the critical needs and position of the criminal justice system in the national development agenda

The agenda to advocate for a State-led legal aid system should strive to trace and exploit the intersection between the State system, Government priorities and the legal aid goals. For most Governments, concerns surrounding safety and security and justice are high on the agenda. The process of stabilizing the country (disarming and integrating militias, facilitating the return of refugees and internally displaced persons and restoring a sense of normality) is predicated on the reassertion of order and the rule of law in a post-conflict setting. While courts are being rebuilt and lawyers being trained, people still need access to lawful and effective mechanisms to manage their disputes and keep the local peace. Where the objective is to drive national development through private sector investment, the legal aid reform stance should be to make the connection between fair and prompt trials and increased private sector confidence in the economic environment.

In spite of the contribution that a more effective legal aid system can make to safety, security, access to justice and thereby to national development, it continues to be ranked low in many countries due to the failure by advocates to make the case for legal aid in a language that policymakers understand. Key questions are:

- Who and what are the drivers of reform of the criminal justice system? Is it driven by efficiency, access to justice, rule of law or human rights? What policies are in pursuit? Tough on crime? Rights promotion? Justice for all?
- What is the stated contribution of criminal justice reforms to national development? Is it a crime-free society as a contributor to private sector investment? Is it a human rights focus or poverty alleviation?
- Are there any legal economic incentives that impede the flow of cases in the criminal justice system (e.g. lawyers paid per appearance with an incentive to allow cases to drag on)? Are there any illegal economic incentives (e.g. police officers or court officials requiring payment to do their jobs)?
- Is there peer pressure on actors in the system operating against them to address the negative aspects (e.g. if a lawyer wants to press for a case to be decided quickly, will his peers present obstacles)?
- Are there biases against the accused receiving adequate legal representation (e.g. as a result of public attitudes relegating the rights of criminals)?

Collecting and adopting good practices from elsewhere

Lessons of what works and what does not in similar jurisdictions will enrich the analysis. A multidisciplinary team should be formed to conduct research and, where possible, conduct exposure visits to jurisdictions that have these practices. The study team should compile a report and make recommendations on how the practice might be relevant to their country and adapted for application. The NGO Penal Reform International facilitated the replication of the Paralegal Advisory Service Institute (Malawi) in four African countries and one in South Asia; and community service, based on a Zimbabwe model, in 12 African countries. Acting as the facilitator in this process, Penal Reform International applied a simple framework common to each country.

Political will and leadership facilitate the success of any such scheme by unlocking obstacles to cooperation between stakeholders. They are not prerequisites, however. By engaging locally, underneath the political radar, small changes can achieve a measurable impact and create local momentum and consensus, which can lead to policy changes higher up (see box).

Signposts for sharing good practices

- Identify what has worked in Africa or elsewhere (e.g. camp courts were copied from Bihar, India and the village mediation project was based on a practice developed in Madaripur, Bangladesh) to address the prevailing priority
- Conduct a study of promising practices from the region and convene a working group to visit the country to observe and ask questions. The composition of the group is key and should be representative of all justice agencies and actors. It should comprise influential practitioners from these agencies and groups
- Convene a meeting of national stakeholders to review the situation back home and report back on the study visit. The national meeting:
 - Agrees a plan of action that targets short-term gains
 - Nominates a lead agency
 - Agrees the composition of a national steering committee or advisory council
- Adopt an inclusive approach, with all criminal justice actors represented: courts, police, prisons, social services, lawyers, law schools, NGOs, faith-based groups and traditional authorities
- Engage experienced trainers, resource persons from the region and mentors to assist during the first months
- Provide clear, useful training and support materials
- Implement a plan of action at a pace set by the participating agencies, with close support at the early stages and paying attention to data-gathering
- Allow for progressive scaling up or rolling out to new districts.

Developing a national strategy for legal aid service delivery

Once the baseline study has been completed, several steps might be pursued at the same time. The baseline data will need to be analysed and the views from the regional consultations synthesized. They may be presented and discussed at a national conference, where the members of the study team(s) report back on their findings. The national consultation has two objectives: first, to highlight the status of legal aid service provision in the country and its impact on the criminal justice system and second, to develop a strategy for redressing the identified constraints. The consultative process should produce a strategy that would drive reforms in legal aid provision for a specific period of time. All operational-level plans would be derived from and fall within the overarching framework provided by the strategy. The consultations should ideally be driven by a champion for legal aid within Government. They should bring together the Government, civil society, the private sector, system users and development partners.

In visual terms, the component parts of such a strategy might resemble the diagram shown in figure III, which portrays the criminal justice system as it generally appears in countries that follow the English common law system, which can be adapted quite simply to other legal systems.⁹⁶

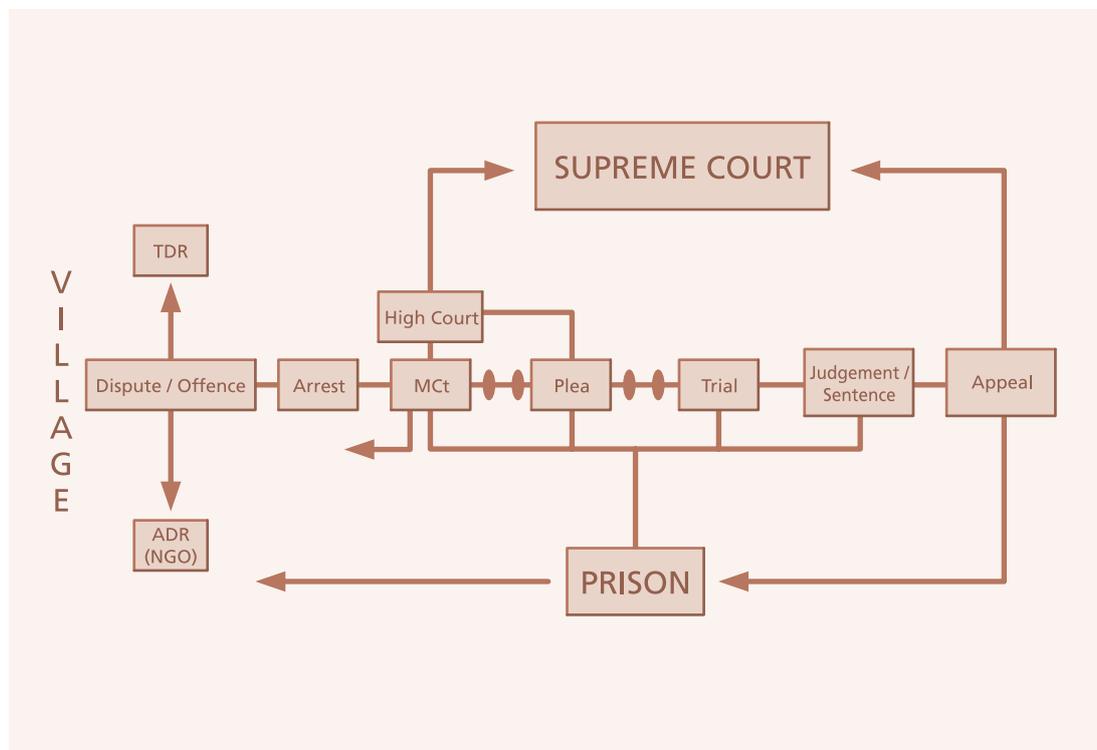


Figure III
The criminal justice system in countries applying the common law

Figure V presents an action-oriented approach. The approach presents a series of small-scale, local initiatives that include all the actors and tests what can be done and demonstrates measurable returns in a short time and at little cost.

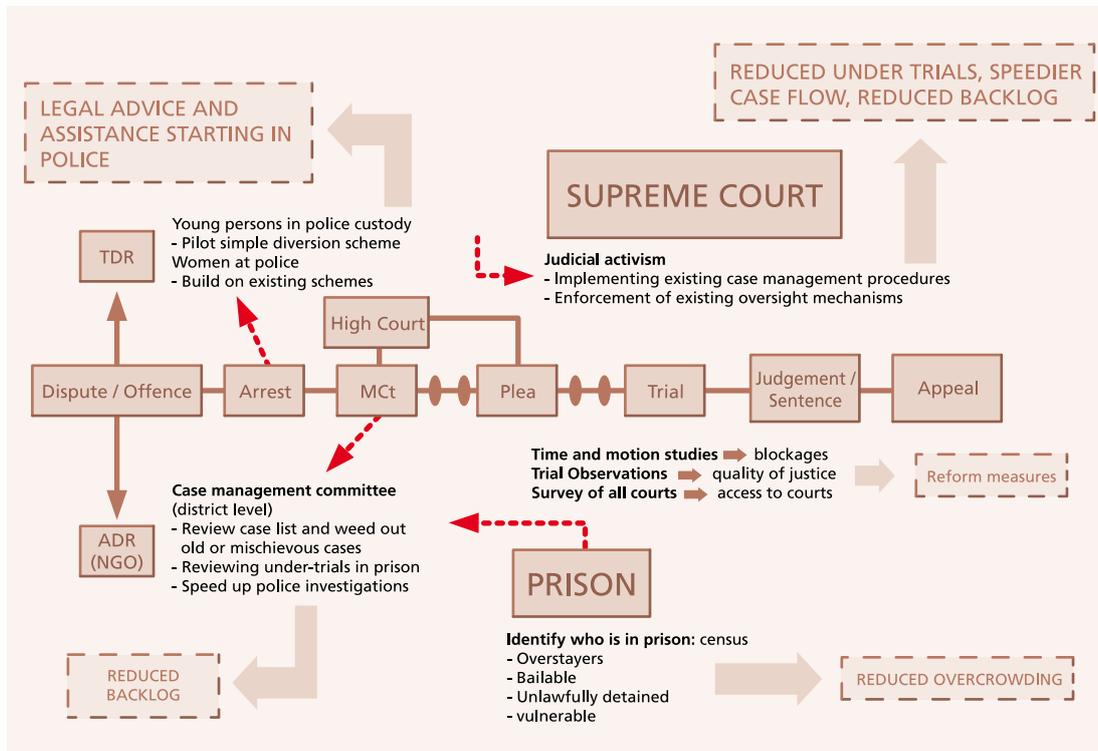


Figure V
Relieving pressure on the formal justice system: the action-oriented approach

Criminal justice systems everywhere are under pressure. Rather than seek to reform the whole system and implement an overall solution, the action-oriented approach is more low-key and less threatening and is based on the notion of “norm graduation”. In other words, the situation is improved through a course of action that:

- Addresses the problems identified
- Presents solutions that are familiar to local actors
- Builds on what is available locally.

In this way, coalitions of interest form between justice actors and civil society partners, local support builds up and momentum is sustained.

Trial observations, for instance, can reveal what works well and what does not. They can focus narrowly on the trial process. They can also step back and enable the practitioners (police, magistrates or judges, court officials, lawyers, prison officers and social services) to provide their insights into the daily pressures under which they work and provide a voice for the users of the system to air their views.

By taking a problem-solving approach that relieves pressure at the local level, momentum for change develops and coalitions of interest form among local actors. The next step then becomes, again at the local level, a move towards a better functioning system (see figure VI).

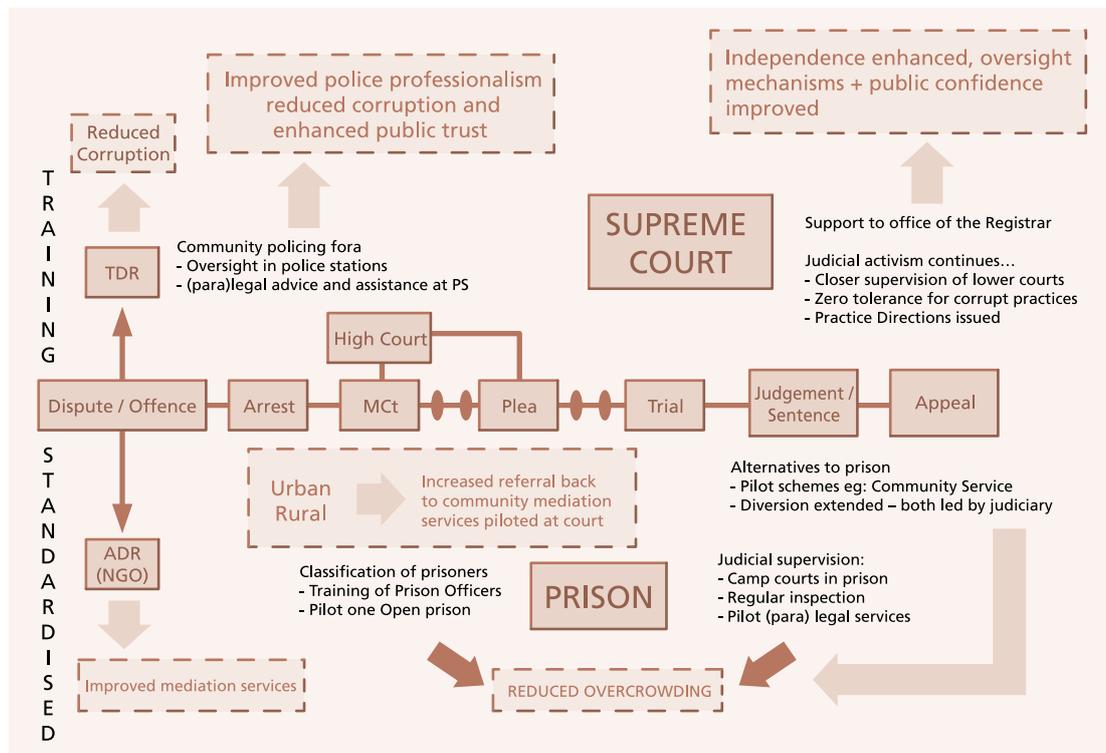


Figure VI
From a dysfunctional to a functioning justice system

The lessons learned in a number of countries need to inform criminal justice programming. The concerted efforts of Government and non-State actors have demonstrated that by, building on local capacity and engaging with local actors, the criminal justice system can jointly produce a concerted strategy at the local level. This strategy can weave these practices into a safety net that protects the poor, weak and marginalized at the early stages of the criminal justice process, when they are most vulnerable.

Sharing knowledge and promising practices

Exposure to the experience of other countries can serve to open minds and inspire actors to what works, what does not and why. As stated in the Ouagadougou Declaration, there is a rich experience available across the continent that has yet to be fully exploited. Each experience started in the small way suggested in the figures above, recognizing that modest initiatives had the potential to create the experience of success, strengthen community resources, conquer remaining hesitations within the criminal justice system and prepare everyone for more challenging initiatives.

C. Allocating resources to the national strategy

There is a need to explore funding mechanisms from the outset. States bear the primary responsibility for resourcing the delivery of legal aid services. Support from development partners and other non-State actors should be viewed as complementary to Government funding. It should not in any way be perceived as supplanting the role of Governments.

Legal aid funds in Malawi, Rwanda, Uganda and the United Republic of Tanzania

The current Law of the Bar in Rwanda provides for the Bar Council to establish an office of consultation and defence (*bureau de consultation et de défense*) for purposes of assisting persons whose incomes are insufficient (subsect. 3, art. 60). It also provides for a legal aid scheme, to be managed by the office of consultation and defence. The law also establishes a legal aid fund. A similar position obtains in Uganda. The funds were not yet operational at the time of compilation of the present *Handbook*.

The reality is that many States lack the necessary resources and capacity to provide legal assistance in criminal cases and rank the delivery of legal aid services low in the policy and budgeting process. Public attitudes and the lack of a counter-voice for legal aid exacerbate the problem. Politicians are aware that votes are rarely garnered by supporting legal aid, but more often by “tough-on-crime” policies. In the eyes of many ordinary citizens, providing funding for the defence of “criminals” is a waste of scarce public resources.⁹⁷ A glance at any country’s budgetary framework within a national development plan or poverty reduction strategy finds legal aid low down the list of Government-spending priorities.

A recent survey of legal aid in Africa⁹⁸ found that while national laws respect a right to legal aid, in many countries State budget allocations to legal aid are minimal. Access to legal aid was not available at any stage of the criminal justice process, it was particularly rare at police stations and only sometimes available in prisons and in the lower courts.

In Malawi, following the recommendations of the Law Commission for broadening participation of all actors in a national legal aid scheme, a national consultation process produced a strategy for lawyers to supervise paralegals in offices around the country. The costs were estimated at 30 cents per capita to provide such a service. This amounted to an increase of 30 times the existing budget, but was agreed to be reasonable in terms of the availability of national resources. However, it was not implemented because it was not seen to be a Government priority at the time.

The United Nations Development Programme has observed that legal aid schemes are usually expensive and many Governments do not consider them a priority. For programming purposes, particular attention should be paid to increasing national funding of legal aid services. This calls for a coordinated and consistent lobby group for an increased share of public revenue. Avenues to complement Government funding

will include the use of pro bono lawyers, university law clinics, the participation of bar associations, paralegals and other public advocates, as well as civil society organization campaigns to increase public awareness. Government campaigns to increase national civic and rights competence are useful in crime prevention and raising competencies to seek redress in courts of law. An alternative source of financing is the multi-donor Legal Aid Basket Fund (LABF), established in 2004 and managed by the Danish International Development Assistance Human Rights and Good Governance Advisory Unit. This was aimed at influencing the creation of an enabling framework for legal aid service provision, capacity development of service providers and support towards equitable legal aid service provision in the country.

Examples of alternative organization resources for legal aid services on the continent are numerous. In the United Republic of Tanzania, development partners provide resources for civil society organizations to deliver legal aid services through the Tanganyika Law Society. In Uganda, a number of like-minded development partners pooled resources into a Legal Aid Basket Fund (see section below). In Southern Sudan, one development partner expressed the view that the fund need not be large at the outset, but should be structured in such a way that it paved the way for increased national investment in legal aid services.

Uganda Legal Aid Basket Fund

The Legal Aid Basket Fund is an initiative supported by five development partners with a special interest in the area of legal aid service provision.⁹⁹ LABF is an interim funding arrangement mobilizing donor resources to support interventions that complement Justice, Law and Order Sector reforms in Uganda. It also seeks to facilitate the development of a sustainable national system for the provision of legal aid. In order to achieve its desired objective, LABF supports (a) the development of legal, policy and institutional framework on legal aid in partnership with the Government of Uganda, (b) the development and implementation of affordable models of legal aid service delivery and legal empowerment of the poor, and (c) pro-poor advocacy and strategic planning among non-State actors concerned with legal aid.

The creation of LABF was spurred by the findings of the first Legal Aid Baseline Survey in Uganda in May 2004, which was critical of the state of legal aid service delivery in Uganda. The Survey revealed the limited role of the State in supporting legal aid (State briefs) and the uncoordinated donor-funding approaches towards legal aid initiatives.

LABF was established against this background and became operational at the end of 2004. Its first strategy targeted interventions aimed at assisting the poorest and most vulnerable groups. The pilot phase ended in December 2006 and was considered a major success. The pilot phase revealed the vast need for support in many areas and thus warranted a further extension. A revised strategy was developed for the second phase, 2007-2010, with a wider scope, including strategic support to develop a comprehensive framework for legal aid. This framework would spell out,

in terms of policy and legislation, the complementary responsibilities of both the State and non-State actors.

This current LABF strategy is informed mainly by the tenets of two frameworks: pillar four on good governance under the Poverty Eradication Action Plan and Justice, Law and Order Sector Investment Plan II, which, *inter alia*, seek to enhance access to justice for all, particularly for the poor and marginalized. The linkage with the State planning framework lays a foundation for continuous collaboration with the State and integration of LABF initiatives into the broader justice, law and order sector. This is a key consideration for LABF, which is also expected to be a premise for long-term sustainability.

LABF is currently comprised of five development partners and is managed by the Danish International Development Assistance Human Rights and Good Governance Advisory Unit under the Access to Justice component, which doubles as an implementation unit for grants beneficiaries and a coordination forum for the development partners. The donors meet on a regular basis and receive periodic updates regarding the performance of LABF. The essence of this harmonization and coordination is to work towards a common trajectory of coordinated growth within the legal aid subsector as part of national efforts to enhance access to justice. This joint effort has also served to encourage the State in prioritizing its responsibility for legal aid.

At an operational level, the primary focus of LABF is on supporting effective approaches to legal aid, as well as working towards changing the current paradigm on legal aid service delivery. The aim is to move away from the conventional practice of supporting isolated partners that deal with the symptom issues of legal aid and towards addressing the root causes. The LABF approach involves shifting from building uncoordinated institutions to supporting impact-oriented programmes that are sustainable in the long term within a coordinated national framework. Partners are encouraged to reorient their organizations towards more critical and systematic approaches to implementing legal aid interventions in Uganda.

LABF provides a range of support, including (a) implementing civil society organizations in areas of primary legal aid service provision, advocacy, basic legal education and strategic litigation; (b) a legal aid coordinating institution, the Legal Aid Service Providers Network; (c) the national regulatory agency for legal aid (Uganda Law Council); research projects aimed at developing better models for legal aid service provision in Uganda; (d) innovative pilot programmes such as paralegal advisory services, justice centres and pro bono pilot schemes; and (e) the development of legislation and a national legal aid policy for Uganda.

LABF is an important arrangement that enhances coordination and the harmonization of programmes, limits resource duplication and complements the Justice, Law and Order Sector reforms on access to justice. It is hoped that a long term and sustainable national legal aid system will be developed, with appropriate structures that would absorb the functions of LABF. This should clearly spell out the State's responsibility and leadership in legal aid service provision.

D. Monitoring and evaluation

Impact will be demonstrated by establishing effective monitoring and evaluation mechanisms that measure impact against the baseline survey. It will assist, therefore, to put systems in place so that:

- Data are gathered on a systematic, ongoing basis, starting early in the development of the programme
- Performance standards and targets are set
- Concerns raised by the judiciary, police, prisons, users and court officers can be met promptly
- Statistical and qualitative information is gathered on, for example:
 - *Caseload.* In police stations: number of young persons screened and diverted, number of adult interviews attended in a month. In prisons: number of paralegal aid clinics conducted, head count of prisoners in attendance, remand rate. At court: number of paralegal aid clinics at court, number of accused, witnesses and members of the public assisted. In villages: number and types of cases brought for mediation, number settled
 - *Qualitative data.* Through observation and interviews and surveys of users, chiefs, prison officers, police, the judiciary, court officers, programme administrators, mediators and paralegals.

The Paralegal Advisory Service Institute places considerable emphasis on clear and open lines of communication, both among the justice agencies themselves and among paralegals. The paralegal teams meet each month. The national director visits all four teams monthly and has done since the project started in 2000. He meets with the teams and with local justice actors to resolve any problems that have arisen and discuss the development of paralegal work to address new challenges or local priorities. The coordinating role of the director has served to strengthen trust between the paralegal cadre and local actors, as well as to develop responsive teamwork among the paralegals.

The community service scheme in Zimbabwe was chaired by a judge of the High Court, who provided his cell phone number to everyone charged with the implementation of the scheme so that he could respond immediately to any problems or questions.

Reporting arrangements should be timely (weekly reporting is appropriate at the outset of a pilot scheme), so that any response required is promptly provided.

Making an impact through monitoring and evaluation feedback

It is not enough to expect, because activities are taking place, that the impact is always positive and lasting, or that the needs of those who seek the services on offer are being addressed. The following indicators may help to assess the impact of the programme:

- The rate of recidivism in cases referred to mediation by the court
- The impact of legal aid service providers on prison overcrowding, case backlogs in the courts and community and family harmony
- The levels of satisfaction in the community when mediators are unlikely to report negative feedback from disputants

Planning needs to provide for funds to cover the costs of independent evaluations and user surveys at regular intervals so that the scheme can build on strengths and correct any weaknesses.

Developing and implementing new ideas in the justice sector is a complex process. Identifying a problem and analysing it discloses a range of causes, all of which need to be treated in order to cure that one problem. There is no quick-fix solution.

The Paralegal Advisory Service Institute of Malawi provides an example of developing an approach to the provision of legal aid in kit form. Evaluation reports concluded that the Institute had demonstrated its effectiveness to the poor and its impact on the system as a whole by providing a cadre of resource persons, mentors, training materials and practical tools.¹⁰⁰

Paralegal advisory services were exported from Malawi to Uganda in 2006. The first evaluation observed that:

[t]he position occupied by most stakeholders is that the Paralegal Advisory Service was donor-driven. It was conceptualized outside the criminal justice sector, then legitimized through stakeholder consultations. The perception of this ‘origination’ notwithstanding, the team is persuaded that, in the case of the paralegal advisory service, the end justifies the means, as one respondent told us. The view here is that the Legal Aid Basket Fund, acting as a partner in the criminal justice sector, simply replicated a good practice from Malawi and it worked. It is critical to mention here that with time, the Paralegal Advisory Service initiative has gained local ownership. Although levels of buy-in vary, its acceptance as a critical plank in the criminal justice system is obvious.¹⁰¹

There are a number of ways of testing a new idea: the rate at which it catches on, its staying power and how far the concept travels.¹⁰²

Another promising development lies in the field of mediation, since, in a country recovering from conflict where the courts are being rebuilt and service capacity is under development, it is within the community that conflicts emerge and at the level of the community where innovation is most needed.

E. Coordination and quality assurance mechanisms

The Chain Link Initiative in Uganda demonstrated that the justice agencies were all part of the same chain. It is this chain that constitutes the administration of justice process and all stood to benefit from working more closely together and sharing information. The concept has been replicated not only in case management, but also in organizing the legal aid service system.

Networks supported by the Danish Institute for Human Rights

In partnership with the Legal Aid Forum of Rwanda, the Paralegal Alliance Network in Zambia and partners in several other countries (e.g. Mali, Nepal and Viet Nam), the Danish Institute for Human Rights has supported improved coordination and collaboration among civil society aid providers, law associations and State legal aid initiatives.

The Institute focuses on improving efficiency in legal aid service delivery through the division of responsibilities, public/private partnerships and the establishment of civil society networks, as well as the development of tools for capacity development. The network concept fosters linkages among actors at the various levels, from lawyers to paralegals and NGOs, to encourage the sharing of knowledge and skills. Horizontal linkages across NGOs are also significant in sharpening the quality of training of paralegals, strengthening case referral and follow-up systems, documentation and advocacy and ensuring compliance with service delivery standards.

The Paralegal Alliance Network in Zambia has expanded from 4 to 12 civil society organizations delivering legal aid services. These include the Law Association of Zambia. The Network seeks close dialogue with the Legal Aid Board of Zambia on policy issues and is positioning itself to provide input for the emerging national legal aid policy.

F. Oversight mechanisms and self-regulation

Legal Aid Service Providers Network in Uganda

The Legal Aid Service Providers Network is a membership-based organization that was established in Uganda to link the NGOs providing legal aid services. It provides a forum for networking, sharing ideas and promoting the legal aid agenda. The Network was established based on the fact that legal aid in Uganda is mainly provided by NGOs, due to the limited capacity of Government to provide legal aid to all those in need. It is thus a means of involving private sector players in addressing the bottlenecks to achieving justice for all, especially the poor and vulnerable. The Network was registered and formalized its status in April 2004 through support from the Legal Aid Basket Fund and works closely with the Justice, Law and Order Sector.

The overall goal of the Network is to establish a functional and effective coordinating institution for legal aid service providers in Uganda. The Network currently has over 30 members, mainly organizations and individuals providing free legal assistance to indigent persons. The secretariat is hosted by the Law Development Centre Legal Aid Clinic. Among other services, it provides technical support to members, coordinates their activities and carries out capacity development for members. Members suggest an area where capacity needs to be built. Thus, capacity development is responsive to the needs of members. Member services include public-interest litigation, rights awareness, strategic litigation, legal representation, legal advice, legal counselling, research and advocacy, and mediation.

The Network aims to provide strategic linkages and a collaboration framework for legal aid service providers and a common front to interface with different institutions in the justice, law and order sector. One of the activities the Network has carried out included a Legal Aid Week, which is a proactive means of counteracting the challenges of inaccessible and inadequate legal services by taking them to the people in various regions of the country. The Network also completed a mapping exercise to assess the legal aid programmes and services that exist in the country and identify strengths and gaps therein.

The Legal Aid Service Providers Network has the following objectives:

- To mobilize various resources to facilitate the common objectives of the legal aid service providers
- To build and strengthen the institutional and human-resource capacity of legal aid service providers
- To improve the cost-effectiveness and geographical coverage of legal aid service provision
- To facilitate the development, use and monitoring of common standards to eliminate overlaps
- To lobby and advocate for issues that are relevant and appropriate to the promotion of access to justice for all
- To research, document and disseminate information on best practices in the enforcement of human rights and the provision of legal aid.

Legal Aid Forum of Rwanda

The Legal Aid Forum in Rwanda is a network of 33 Rwandan and international organizations working in the field of the rule of law and human rights. The Forum is registered under Rwandan law. It has produced a series of tools and materials, including a directory for civil society legal aid providers. The Forum raises public awareness of the need for legal aid services in Rwanda and of the key providers. The Forum holds an annual Legal Aid Week in collaboration with the Ministry of Justice. The Forum is also a joint effort by its members to collectively monitor economic development and poverty reduction strategy indicators in relation to access to justice and legal aid. The Forum engages in advocacy through participation and contribution to the development of a national legal aid policy framework for Rwanda. The Forum runs a legal aid fund, through which rural-based legal aid service delivery is prioritized and funded. Work continues in the areas of capacity development, monitoring and evaluation, research, documentation and policy advocacy.

G. Summary and recommendations

There are numerous national-level efforts to support legal aid services across Africa. However, the resources allocated are currently inadequate in most countries. There are several promising options: increase governmental allocation to criminal legal aid services, establish a legal aid fund, institute a legal aid basket fund with support from international development partners, have lawyers provide pro bono services and allocate grants to non-State actors.

In order to develop and execute a national strategy on legal aid, the process described below can be followed.

1. *Review the existing national legal framework.* This will map the parameters within which legal aid is provided in the State. The State should devise a deliberate strategy to create voice and space for the poor and marginalized in the criminal justice system. A broader construction of legal aid services improves the quality of the demand side for criminal justice services and narrows the gap between the prosecution and defence arms of the law.
2. *Apply evidence-based programming for legal aid.* Effective programming is a consequence of sound identification of the gaps, challenges and solutions. A baseline will provide a snapshot of the justice system so that the process of identifying the issues can begin and a course of action can be prioritized. In collecting the baseline information, the programmer should collect information pertaining to the legal, policy and regulatory framework, the broader administration of justice framework and the practice of criminal justice as a whole. This information can then be utilized to design and programme a national legal aid strategy.
3. *Review the institutional framework.* The Lilongwe Plan of Action provides a useful benchmark for the review of the institutional framework. The Plan recommends that States establish a legal aid service that is independent of the Government and its departments. Deliberate and coordinated efforts should be taken to constitute the elements of the criminal justice system so that they are driven by institutional, system-wide, and not individual goals. It is helpful to identify existing coordination mechanisms and their levels. For example, some countries have adopted the sector-wide approach, in which coordination takes place within policy formulation, planning, budgeting and monitoring activities. This is the case in Ethiopia, Kenya, Malawi, Sierra Leone, Uganda, the United Republic of Tanzania and Zambia. Sector-wide approaches are at formative stages in Burundi, Rwanda and the United Republic of Tanzania.
4. *Map out and diversify legal aid service providers.* Since many States in Africa cannot provide their citizens with the requisite quality of legal aid, all available resources must be identified and mobilized. These include bar associations, law societies, law students, paralegals, pro bono services, NGOs and faith-based groups. These mechanisms ensure quality standards in the

provision of legal aid. Accreditation processes for civil society organizations that deliver these services is one way of harmonizing the quality of services provided to justice claimants. Civil society organizations have been recognized as paramount in keeping the issue of legal aid service delivery consistently on the agenda. They help to ensure that the design and execution of justice reforms pay attention to legal aid service delivery. By mapping these actors, a picture emerges of who is available, where they are and what they can offer. This will also show the geographical and jurisdictional gaps in service delivery and inform the prioritization of resources.

5. *Allocate financial resources.* Although it is generally acknowledged that States are responsible for funding legal aid services, Africa depends a lot on development partners and other non-State actors, since it is a continent with widespread poverty. It is important to identify and isolate resources allocated to the implementation of legal aid services. To this end, donor support must be coordinated. An alternative source of funding is through the multi-donor pool of resources, for example, the Legal Aid Basket Fund in Uganda. Another alternative example includes the United Republic of Tanzania, where development partners provide funding to civil society organizations to deliver legal aid services through the Tanganyika Law Society. In its initial stages, the fund need not be large, but should be structured in such a way that it paves the way for increased national investment into legal aid services. All these efforts should be coordinated consistently to ensure that the provision of legal aid services is financially sustainable.
6. *Understand the critical needs of users in the criminal justice system.* What categories of people go through the criminal justice system? This information should be disaggregated into gender, age, socio-economic variables and geographical location. A compilation of the voices of users of the criminal justice system will also reveal their current concerns about safety and security, and about what remedies are available before the onset of conflicts. For those who have experience with the criminal justice system, it is important to ascertain the first point of contact with legal aid services-providers, the frequency of contact, the topics of discussion and the rating of quality of service in comparison to privately funded legal services.
7. *Understand the critical needs and position of the criminal justice system in the national development agenda.* The State-led legal aid system agenda should be coordinated with other Government priorities. In post-conflict countries, while institutions are being rebuilt and human resources developed, people still need access to lawful and effective mechanisms to manage their disputes and keep the local peace.
8. *Forge political will and leadership.* This is crucial for the facilitation and success of any legal aid scheme because obstacles to cooperation among stakeholders need to be removed. By engaging locally, underneath the political radar, small changes can achieve measurable impact and create local momentum and consensus, which can push policy changes higher up.

9. *Share good and successful practices with other jurisdictions.* Exposure and experience from other countries can serve to open minds and inspire actors to what works, what does not and why. There is a rich experience available across the continent that has yet to be fully exploited (see box).

Summary of promising practices

Assisting users in navigating the criminal justice system (Malawi and Uganda)

Camp courts (Malawi)

Case management committees (Liberia)

Chain Link Initiative (Uganda)

Community legal services: Timap for Justice (Sierra Leone)

Developing police trained units (Sudan)

Diversion schemes at police stations (Malawi)

Family and Children Support Units (Northern Sudan)

Family Support Units (Sierra Leone)

From the international and regional into the national laws (Sierra Leone Legal Aid Bill)

Legal Aid in Joint National Justice Strategy - Justice, Law and Order Sector (Uganda)

Gender-based legal aid clinics (Guinea)

Lawyers and paralegals roster system (Angola, Malawi and Nigeria)

Legal Aid Basket Fund (Uganda)

Legal Aid Service Providers Network (Uganda)

Mobile courts (Sierra Leone and Democratic Republic of the Congo)

Paralegal services (Uganda and Malawi)

Simple appeal forms (Malawi)

University law clinics (Uganda and South Africa)

Victim Support Units (Zambia)

10. *Establish monitoring and evaluation mechanisms.* Impact is measured through such mechanisms against a baseline survey. When data are gathered systematically, performance standards and targets are set, concerns among the criminal justice actors are raised and promptly addressed, and statistical and qualitative information is gathered. Quality assurance mechanisms within the system must also be coordinated. For example, the Chain Link Initiative in Uganda demonstrates that justice agencies are all part of the same chain. It is this chain that constitutes the administration of justice process, and all parties stand to benefit from working more closely together and sharing information. The concept has been replicated, not only in case management, but also in organizing the legal aid service system.

Notes

¹ Universal Declaration of Human Rights (General Assembly resolution 217A(III)), art. 10; International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668), art. 14.

² For a good overview of the causes of prison overcrowding, see diagnostic diagram, produced for Penal Reform International by Federica Dell Amico (www.penalreform.org/files/2004-overcrowding-poster-en-fr_1.pdf).

³ The United Nations Office on Drugs and Crime is currently developing draft United Nations principles and guidelines on access to legal aid in criminal justice systems. According to the draft available in March 2011, legal aid should include legal advice, assistance and representation for defendants and victims in the criminal justice process, provided free of charge for those without means, as well as other services provided through alternative dispute resolution and a restorative justice process.

⁴ Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, para. 1 (www.penalreform.org/publications/lilongwe-declaration-accessing-legal-aid-criminal-justice-system-africa).

⁵ Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 7.

⁶ General Assembly resolution 217 A (III).

⁷ Mauro Cappelletti and James Gordley, “Legal aid: modern themes and variations”, *Stanford Law Review*, vol. 24, No. 2 (January 1972), p. 347.

⁸ Fifty per cent of crimes go unreported and a great majority attribute this to inability to pay bribes demanded by police (International Human Rights Network, Uganda Criminal Justice Baseline Survey 1996-2001, *Mid-term Evaluation Report of the Justice Law and Order Programme in Uganda* (October 2004), p. 81).

⁹ According to Amnesty International, 15 countries in Africa retain the death penalty, 14 have abolished the death penalty for all crimes and 23 have abolished the death penalty in practice (i.e. they have not executed anyone for over 10 years) (www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries). See also report of the Secretary General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (E/2005/3) (www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf).

¹⁰ World Bank, “Voices of the poor: can anyone hear us?”, participatory research initiative in preparation for the *World Development Report 2000-2001* (2000).

¹¹ Government of Sierra Leone, Justice Sector Reform Strategy, March 2008, chap. IV, pp. 52-53.

¹² The United Nations Mission in Liberia Corrections Advisory Unit estimates that the prison population will increase by 400 per cent in the short term. Prison population growth rates for Africa for the period 1999-2004 stood at 61 per cent; figures for other regions reveal that this trend is global, however: Americas, 71 per cent; Asia, 90 per cent; Europe, 66 per cent; Oceania, 69 per cent (*World Prison Brief*, International Centre for Prison Studies, figures for 2004 (www.kcl.ac.uk/icps)).

¹³ In South Africa, the Government has introduced the Legal Practice Bill, focusing on legal aid service providers, which is currently under consideration by parliament (www.lssa.org.za/upload/Legal_Practice_Bill_LSSA_Nov_2010.pdf).

¹⁴ Guinea Bissau and Sao Tome and Principe have signed but not ratified the International Covenant on Civil and Political Rights, respectively on 12 September 2000 and 6 September 2000. (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-5&chapter=4&lang=en).

¹⁵ United Nations, *Treaty Series*, vol. 1577, No. 27531. All States in Africa are parties to the Convention on the Rights of the Child.

¹⁶ United Nations, *Treaty Series*, vol. 1249, No. 20378. Somalia has not yet signed, while Nigeria and the Sudan have signed but not ratified the Convention on the Elimination of All forms of Discrimination against Women. (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en).

¹⁷ United Nations, *Treaty Series*, vol. 1465, No. 24841. Sao Tome and Principe and the Sudan have signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, respectively on 6 September 2000 and 4 June 1986, but have not ratified it. Angola, Eritrea, the United Republic of Tanzania and Zimbabwe have not yet signed the Convention (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en).

¹⁸ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 8 (www.achpr.org/english/women/protocolwomen.pdf).

¹⁹ African Charter on the Rights and Welfare of the Child, July 1990, art. 17, para. 2(c).

²⁰ General Assembly resolution 43/173, annex.

²¹ *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), annex I.A; amended by the Economic and Social Council in its resolution 2076 (LXII) (addition of section E, entitled “Persons arrested or imprisoned without charge”).

²² General Assembly resolution 40/33, annex.

²³ Sierra Leone ratified the International Covenant on Civil and Political Rights on 23 August 1996 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-5&chapter=4&lang=en) and the African Charter on Human and Peoples’ Rights on 21 September 1983 (www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf).

²⁴ African Commission on Human and Peoples’ Rights, document DOC/OS(XXX)247.

²⁵ David McQuoid-Mason, “The supply side: the role of private lawyers and salaried lawyers in the provision of legal aid: some lessons from South Africa”, in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (National Institute for Trial Advocacy, April, 2007).

²⁶ David McQuoid-Mason, “Reducing violence in South Africa through street law education of citizens”, in *International Debates of Victimology*, Gerd Ferdinand Kirchoff, Ester Kozovski and Hans Joachim Schneider, eds., papers and essays given at the VIIth International Symposium on Victimology, held in Rio de Janeiro in 1991 (1994), pp. 347-348.

²⁷ See the Justice, Law, Order Sector (www.jlos.go.ug/page.php?p=reform).

²⁸ *Report of the Conference on Access to Justice and Legal Aid in Africa, Kigali, Rwanda, 1-4 December 2008* (www.humanrights.dk/files/Importererede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/Kigali_Legal_Aid_Conf_Africa_2008_Report.pdf).

²⁹ In monitoring progress, indicators of good performance may include the integration of legal aid in the national planning frameworks, the proportionality of public defence/prosecution funding and the coverage of disadvantaged groups.

³⁰ *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, annex.

³¹ *Report of the Conference on Access to Justice*, op. cit.

³² David McQuoid-Mason, “Holistic approaches to the delivery of legal aid services: the South African experience”, in *Report on the Conference on Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe, held in Kyiv, 27-30 March, 2007*.

³³ David McQuoid-Mason and others, *Street Law: Practical Law for South African Students*, 2nd ed., 2004.

³⁴ *Ibid.* The South African Street law book is user-friendly and deals with a wide variety of subjects, including a general introduction to South African law and the legal system, criminal law and juvenile justice, consumer law, family law, socio-economic rights and labour law. The book uses student-centred teaching techniques and involves students in role-playing, opinion polls, critical thinking and mock trials. The programme, together with its offshoot, Democracy for All, runs at nine universities in South Africa. Democracy for All is run nationally and is linked to the book entitled *Democracy for All*. The latter is aimed at providing human rights and democracy education for schoolchildren and community organizations throughout South Africa. The Street law project has also produced a training manual on HIV/AIDS, the law and human rights.

³⁵ David McQuoid Mason, “A series of pointers clarifying the role of paralegals”, in *Access to Justice in Africa and Beyond*, op. cit., p. 291, and a *Survey of Paralegal Development in Southern Africa* (Legal Resources Foundation, Zimbabwe, 2009).

³⁶ International Development Law Organization, “Empowering the poor to access criminal justice: a grassroots perspective”, legal empowerment working paper No. 2 (www.idlo.int).

³⁷ Martin Pierce, “The Paralegal Advisory Service in Malawi: changing the landscape”, evaluation report (United Kingdom Department for International Development, March 2007).

³⁸ Open Society Justice Initiative, *Community-Based Paralegals: A Practitioner’s Guide* (Open Society Foundation, December 2010) (www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/paralegals-manual-20101208).

³⁹ Independent evaluations were conducted in Kenya (2005), Malawi (2002, 2004, 2007) and Uganda (2006), each attesting to the positive contribution made by paralegals.

⁴⁰ In 2010, 22 weekend trainings of paralegals were conducted (www.hudumazasheria.or.tz/images/documents/zlsc_2010_activities_calendar.pdf).

⁴¹ United Nations Development Programme, United Nations Children’s Fund and United Nations Development Fund for Women, *Informal Justice Systems Study*, carried out by the Danish Institute for Human Rights, 2010 (forthcoming).

⁴² In Burkina Faso, traditional courts at village level apply customary law in cases involving divorce and inheritance (United Nations Office on Drugs and Crime, pilot review programme of the United Nations Convention against Corruption) (www.unodc.org/unodc/en/treaties/CAC/pilot-review.html).

⁴³ As part of a joint United Nations programme in Mauritania, a United Nations Office on Drugs and Crime project on access to justice included training *Mouslihs* (traditional mediators). The training aimed at using Mauritania’s traditional dispute settlement mechanisms to make criminal justice available to the majority of citizens. The *Mouslihs* welcomed the programme, which included building skills for their role as social mediators. In 2011, some 300 women paralegals will also benefit from project training activities.

⁴⁴ Johann Kriegler, “The view from the bench: awkward decisions, difficult options in the provision of legal aid”, in *Access to Justice in Africa and Beyond*, op. cit.

⁴⁵ In September 2009, 20 per cent of the prisoners in Uganda had no formal education at all and 49.9 per cent of the entire prison population had only primary education.

⁴⁶ Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press, 2007) (www.transparency.org/publications/gcr/gcr_2007).

⁴⁷ In Liberia: *Resurrecting the Justice System* (International Crisis Group, 2006) Timap was discussed as a case study and it was recommended that Liberian civil society consider a similar intervention: “by solving the everyday justice needs of ordinary citizens, Timap is proving town by town, case by case, that justice need not be a far-off ideal, but can be an everyday reality” (www.crisisgroup.org/~media/Files/africa/west-africa/liberia/Liberia%20Resurrecting%20the%20Justice%20System.ashx). In 2007, the Carter Center initiated a paralegal programme in Liberia modelled on Timap.

⁴⁸ In 2009, the Government of Sierra Leone agreed to the development of a five-year national justice delivery system based on the Timap model.

⁴⁹ Since early 2008, the Paralegal Advisory Service Institute, the Danish Institute for Human Rights and the Kenya Dispute Resolution Centre have cooperated on the development and piloting of the village mediation programme in Malawi, based on the Madaripur Mediation Model (Bangladesh), with funding from Irish Aid.

⁵⁰ The Supreme Court in Nicaragua sought to improve access to justice in post-conflict zones where the local justice system had collapsed. Rural judicial facilitators were initially established in 1998 in 13 municipalities in the northern central area to act as intermediaries between the community and the local judge. They provide free legal advice, inform their communities on legal issues, perform mediations, assist the local judge and serve as the principal link between the community and the legal authorities. They later became instruments of the formal justice system (*The Rural Judicial Facilitators Programme in Nicaragua: An Exemplary Model of Restorative Justice?* (Sweden, Umea University, 2007)).

⁵¹ The Human Rights Committee has stated that “all persons arrested must have immediate access to counsel” (CCPR/C/79/Add.74, para. 28); the Inter-American Commission has stated that the right to defend oneself requires that an accused person be permitted to obtain legal assistance when first detained (*Annual Report of the Inter-American Commission, 1985-1986*, OEA/Ser.L/V/II.68, doc.8.Rev.1, p. 154); the European Court of Human Rights has consistently acknowledged that the right to a fair trial normally requires that an accused person be allowed legal counsel during the initial stages of police investigation. (*Murray v. United Kingdom* (1996) 22 EHRR. 29, para. 66).

⁵² General Assembly resolution 43/173 of 9 December 1988.

⁵³ Economic and Social Council resolution 2002/12, annex, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, art. 1, para. 2.

⁵⁴ Penal Reform International, *Index of Good Practices in Providing Legal Aid in the Criminal Justice System*, version 2 (February 2006) (www.penalreform.org/files/man-2006-index-legal-aid-v2-en_0.pdf).

⁵⁵ Anthony Nwapa, “Building and sustaining change: pretrial detention reform in Nigeria”, in *Pretrial Detention*, Spring 2008, pp. 95-100, and programme reports from the Open Society Justice Initiative, 2009.

⁵⁶ Open Society Justice Initiative, *Rights Enforcement and Public Law Centre (REPLACE) Final Narrative Report for July 2008-July 2009*.

⁵⁷ United Nations Children’s Fund (Sudan), technical briefing paper 3, Family and Child Protection Units (www.unicef.org/sudan/resources_5046.html).

⁵⁸ *Benham v. United Kingdom* (1996) 22 EHRR. 293, para. 61.

⁵⁹ African Commission on Human and Peoples’ Rights resolution on the Right to a Fair Trial and Legal Assistance in Africa (the Dakar Declaration and Recommendations).

⁶⁰ Penal Reform International, *Freedom Inside the Walls*, film directed by Pierre Kogan (2005) (www.penalreform.org/multimedia/freedom-inside-these-walls).

⁶¹ Less than 25 per cent of cases assigned to lawyers in Ghana are successfully completed every year. In 2006, it was estimated that 18 per cent of legal aid cases were completed (International Monetary Fund, *Ghana: Poverty Reduction Strategy Paper: Annual Progress Report: Joint Staff Advisory Note* (July 2009) (www.imf.org/external/pubs/ft/scri/2009/cr09238.pdf)).

⁶² Findings of the exercise carried out in 2007 to map legal aid providers in Zambia. The exercise was supported by the embassies of Denmark and Sweden and the German Agency for Technical Cooperation and implemented by the Paralegal Alliance Network, the University of Zambia School of Law and the Danish Institute for Human Rights. The aim of the mapping exercise was to explore opportunities for establishing a network of civil society-based legal aid service providers or paralegals.

⁶³ United States Agency for International Development, *Africa Rule of Law Status Review* (2009), annex 6, “Country report: Nigeria”, p. 111 (pdf.usaid.gov/pdf_docs/PNADO804.pdf).

⁶⁴ The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex) place emphasis on “dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law” (rule 2.5).

⁶⁵ National Institute for Trial Advocacy, *Access to Justice in Africa and Beyond*, op. cit.

⁶⁶ Penal Reform International, *Path to Justice*, film directed by Pierre Kogan (2004) (www.penalreform.org/multimedia/path-justice).

⁶⁷ General Assembly resolution 45/110, annex.

⁶⁸ International Covenant on Civil and Political Rights (art. 9, para. 3); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principle 38); African Commission on Human and Peoples’ Rights resolution on the Right to Recourse and Fair Trial (1992), para. 2(c); African Charter on Human and Peoples’ Rights (1981)(art. 7, para. 1); the African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state that “every person charged with a criminal offence has the right to a trial without undue delay” (N.5).

⁶⁹ Standard Minimum Rules for the Treatment of Prisoners, op. cit., rule 8.

⁷⁰ *Ibid.*, rule 93.

⁷¹ The paralegals are funded by Trócaire under the People’s Legal Aid Centre (PLACE).

⁷² Census of prisoners in 48 central government prisons, Sept 2007, Justice, Law and Order Sector, Uganda.

⁷³ United Nations Office on Drugs and Crime, *Handbook on Prisoner File Management* (United Nations publication, Sales No. E.08.IV.3) (www.unodc.org/documents/justice-and-prison-reform/Prison_management_handbook.pdf).

⁷⁴ International Development Law Organization, *Legal Empowerment: Practitioners’ Perspectives*, p. 41.

- ⁷⁵ Pierce, op. cit., and International Centre for Prison Studies, *World Prison Population List* (www.kcl.ac.uk/icps).
- ⁷⁶ Ngunyi and Namakula, *Evaluation Report* (Paralegal Advisory Service (Uganda), 2006).
- ⁷⁷ Rights Enforcement and Public Law Centre (REPLACE), *Final Narrative Report*, reporting period July 2008–July 2009 (Open Society Justice Initiative).
- ⁷⁸ Penal Reform International, “Ten-Point Plan to Reduce Overcrowding in Prisons”, in *Index of Good Practices in Reducing Pre-Trial Detention* (www.penalreform.org/files/man-2006-index-legal-aid-v2-en_0.pdf).
- ⁷⁹ International Covenant on Civil and Political Rights, art. 14, para. 5.
- ⁸⁰ Paralegal Advisory Service (Uganda), *Annual Report: Year 2, April 2008–March 2009*.
- ⁸¹ So too can the courts, by refusing to admit a confession at the police station as proof of guilt without corroborative evidence in support, as in Mozambique.
- ⁸² *Freedom Inside the Walls*, op. cit.
- ⁸³ Centre for Justice Studies and Innovations, *Status of Juvenile Justice in Uganda, 2006–2007, Volume 1: Summary Findings* (2008) (www.cjsiug.org).
- ⁸⁴ The Convention on the Rights of the Child provides that States Parties “shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts” (art. 39).
- ⁸⁵ See also United Nations Office on Drugs and Crime, *Establishment of a One-Stop Centre to Counteract Violence against Women: Terminal Evaluation Report* (www.unodc.org/documents/evaluation/ProjEvals-2005/ProjEval-2005-16.pdf).
- ⁸⁶ Child Justice Alliance (www.childjustice.org.za). United Nations Office on Drugs and Crime, *Handbook for Professionals and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime* (United Nations publication, Sales No. E.10.IV.1) (www.unodc.org/documents/justice-and-prison-reform/hb_justice_in_matters_professionals.pdf).
- ⁸⁷ Government of Sierra Leone, *The Domestic Violence Act, 2007* (www.sierra-leone.org/Laws/2007-20p.pdf).
- ⁸⁸ *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series (United Nations Publication, Sales No. E.06.V.15) (www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf).
- ⁸⁹ General Assembly resolution 40/33, annex, Rule 11(1) (www.unodc.org/pdf/compendium/compendium_2006_part_01_02.pdf).
- ⁹⁰ United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf).
- ⁹¹ Colette Rauch, ed., *Combating Serious Crimes in Post-Conflict Societies: A Handbook for Policymakers and Practitioners* (United States Institute of Peace Press, 2006), pp. 109–110.
- ⁹² See also *Comprehensive Strategy for Combating Sexual Violence in the Democratic Republic of the Congo* (18 March 2009) (www.monuc.unmissions.org).
- ⁹³ One such tool is *Gender in the Criminal Justice System Assessment Tool* (www.unodc.org/documents/justice-and-prison-reform/crimeprevention/E-book.pdf).
- ⁹⁴ For a full version of this framework, see United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit* (www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html).
- ⁹⁵ For instance, figures from the Ministry of Justice of the United Kingdom show that, in the past three years, average spending on all legal aid (including civil and criminal) for a population of approximately 65 million was in excess of 2 billion British pounds (approximately \$4 billion). This amounts to approximately \$60 per capita in any given year. While the legal aid survey shows that South Africa spends \$2 per capita each year, Ghana and Kenya spend 3 cents per capita, Malawi 1.5 cents and Nigeria 1 cent.
- ⁹⁶ Figures III–VI were kindly provided by the Governance and Justice Group (www.governancejustice.org).
- ⁹⁷ Kriegler, op. cit.
- ⁹⁸ Paralegal Advisory Service Institute, *Survey of Legal Aid in Africa*, produced in collaboration with the United Nations Office on Drugs and Crime (forthcoming).
- ⁹⁹ As of August 2010, the partners contributing to the Legal Aid Basket Fund are Austria, Denmark, Ireland, the Netherlands and Sweden.
- ¹⁰⁰ The Paralegal Advisory Service Institute of Malawi has published *The PLC Manual: A Manual for Paralegals Conducting Paralegal Aid Clinics (PLCs) in Prison*, 2nd ed., 2007 (www.penalreform.org/files/man-2007-paralegal-aid-clinics-second-edition-en_0.pdf). The Institute has also published *In Practice: A Manual for Non-Lawyers Working in the Criminal Justice System* (2005), in collaboration with the United Nations Office on Drugs and Crime. The Manual contains a full set of working tools, from memorandums of understanding to codes of conduct and data-gathering tools (www.governancejustice.org/images/stories/pdf/Paralegal.pdf).
- ¹⁰¹ Ngunyi and Namakula. op. cit.
- ¹⁰² Robert V. Wolf, “Community justice around the globe; an international overview”, *Crime and Justice International*, vol. 22, No. 93 (July/August 2006) (www.courtinnovation.org/_uploads/documents/C&J%20International.pdf).



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