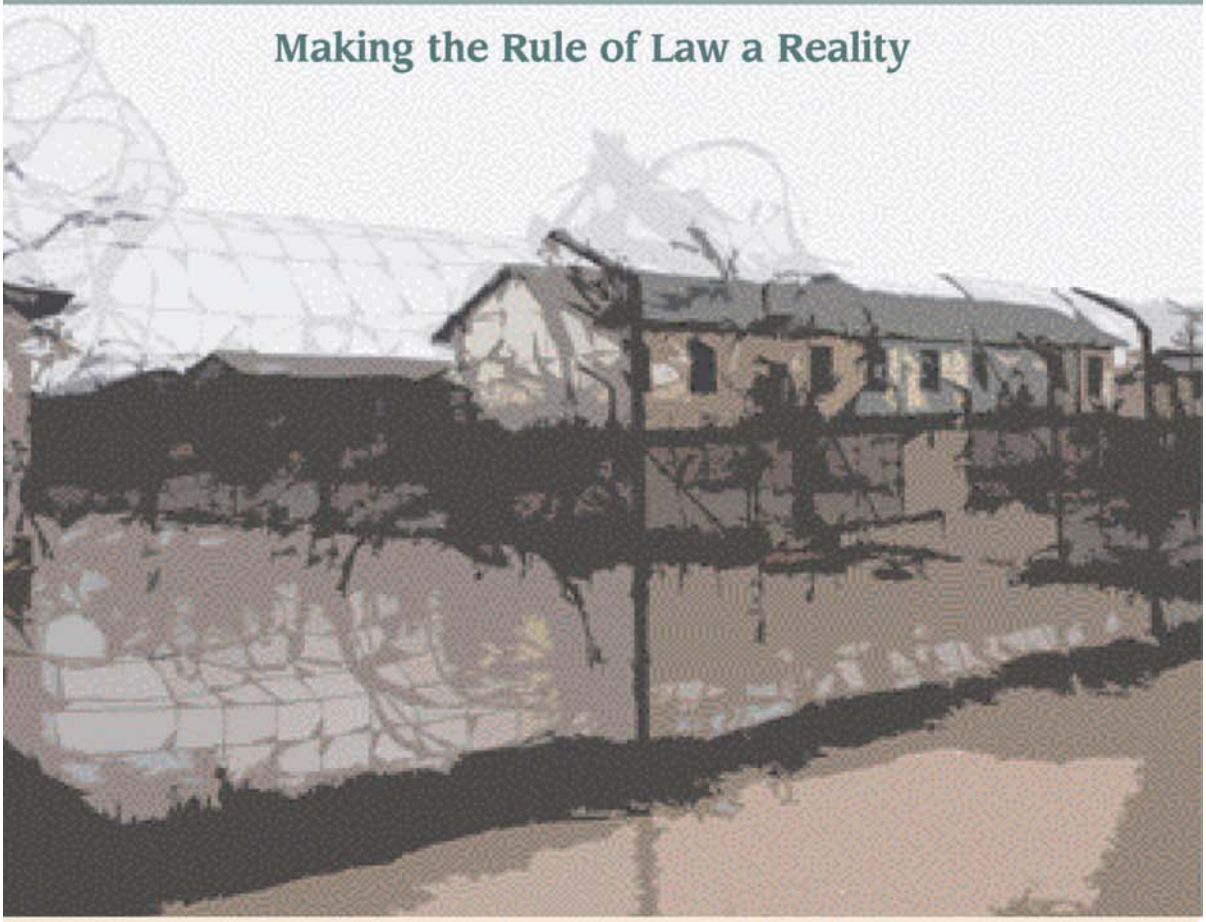
ACCESS TO JUSTICE IN AFRICA AND BEYOND

Making the Rule of Law a Reality



Penal Reform International
and Bluhm Legal Clinic of the
Northwestern University
School of Law

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Chicago, Illinois

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DEDICATION

To Ahmed Othmani

PREFACE:

THE IMPORTANCE OF LEGAL AID IN LEGAL REFORM

Stephen Golub[1]

Laws and rights do not exist for the poor in most developing countries. To put the point another way, they exist in theory but not in reality, on paper but not on the ground. Legal aid and related legal empowerment efforts constitute the most important part of legal reform—by which I mean the reform of not only laws, but also formal and informal legal systems—because they are necessary for making rights a reality in the lives of the poor. Well-intentioned governments and development agencies expend substantial resources on rewriting laws, training judges and prosecutors, improving case processing, strengthening bar associations, and engaging in a host of other initiatives that aim to build the rule of law. But these efforts often prove meaningless for the poor. Why? Because without legal aid, the poor will never even enter a courthouse or any other justice forum.

What, then, is legal aid, exactly? It certainly includes counsel for criminal defendants. But, as demonstrated by the pieces in this collection—all presented at the Legal Aid in Criminal Justice Conference, organized by Penal Reform International (PRI) and the Northwestern University School of Law—it also involves a host of other activities, not least the work of paralegals. And, though mainly beyond the scope of this collection, legal aid can also include "legal empowerment" initiatives, a range of civil justice and related activities that advance the rights, power, and legal capacities of the poor.

Despite the primacy of legal aid in bringing rights to life, all too often it constitutes a programmatic stepchild for rule-of-law development efforts, receiving relatively little funding or attention. The current emphases on judicial and law reform, burdened by an excessive faith in their capacities to benefit the poor, unintentionally undermine support for comprehensive legal aid.

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1. Stephen Golub teaches International Development and Law at Boalt Hall Law School of the University of California, Berkeley. He also consults and conducts research on the rule of law, legal empowerment, legal aid, civil society, social development, democracy, governance, gender, anti-corruption efforts and post-conflict situations. His work in recent years spans thirty countries and includes: directing a global review of Ford Foundation law programs; heading a seven-country study on legal empowerment for the Asian Development Bank; regional and country-specific advice, program design and evaluation in Africa, Asia and Eastern Europe for the U.K. Department for International Development and the United Nations Development Programme; consulting for the World Bank on the evaluation of legal services programs for the poor in Latin America and the Middle East; advising the Open Society Justice Initiative on its strategy and future direction; and preparing research papers for Transparency International, the Carnegie Endowment for International Peace, and the International Council on Human Rights Policy. Mr. Golub can be contacted at Sjg49er@aol.com.

Lawyers and development agencies often proceed on the implicit assumption that if laws are reformed they will be implemented. This simply is not the case in many or most societies. A complaint common to many countries is, "Our laws are good, but they're not enforced." It typically is necessary for lawyers, paralegals, nongovernmental agencies, the media, the poor themselves, or a combination of these and other forces, to pursue implementation. Crucial elements in this mix are legal aid and legal empowerment, which allow the poor to seek justice and assure the protection of their rights. Unless they or their allies work to get the laws implemented on a case-by-case, community-by-community, group-by-group basis, good laws, and even good judicial decisions do not even exist for the poor.

Many development organizations concentrate law-oriented support on programs that focus on reforming laws and government organizations, without directly aiding the poor. They operate on the assumption that trickle-down legal reform eventually alleviates poverty and otherwise benefits the disadvantaged. But the track record of such a focus is weak.

In fact, there is little or no evidence of these programs improving the situation of the poor, given their general inattention to legal aid. External reviews of such efforts over the years have been highly critical. The United States General Accounting Office found serious flaws in USAID's largely state-oriented law reform work in parts of Latin America.[2] In a book on various Latin American countries' progress in (often donor-supported) judicial reform, Prillaman offered a bleak assessment of all except Chile, which he viewed as having a mixed record.[3] Summing up the track record of United States government work with judiciaries across the globe, Carothers has asserted that "what stands out about U.S. rule-of-law assistance since the mid-1980s is how difficult and often disappointing such work is."[4] Blair and Hansen's USAID-commissioned study of rule-of-law assistance in six Latin American and Asian countries similarly advised against such an approach under most circumstances.[5]

2. United States General Accounting Office, Foreign Assistance: Promoting Judicial Reform to Strengthen Democracies, GAO/NSAID-93-140 (1993).

3. William C. Prillaman, The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law (2000).

4. Thomas Carothers, Aiding Democracy Abroad: The Learning Curve 170 (1999).

5. Harry Blair & Gary Hansen, Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs, USAID Development Program Operations and Assessment Report No. 7 (USAID Center for Development Information and Evaluation, Feb. 1994).

To criticize such reform efforts is in no way to oppose the reform of laws, judiciaries, or other state legal organizations. On the contrary, such steps can be very worthwhile. But in the absence of legal aid and legal empowerment, these reforms will not benefit the poor to any great degree.

The implicit rationale for downplaying legal aid has its roots in an emphasis on the roles of institutions in development. The general notion in development literature is that institutions are so fundamental that they must be addressed by international actors for development to unfold.[6]

But there is a difference between how the concept of institutions is considered in development literature and how it is applied in development practice, at least in the legal field. North defines institutions as "the rules of the game in a society, or . . . the humanly devised constraints that shape human interaction . . . both formal constraints—such as rules that human beings devise—and informal constraints—such as conventions and codes of behavior."[7] He further distinguishes between institutions as "the underlying rules of the game" and organizations (legislatures, regulatory bodies, firms, universities, unions, etc.) that both influence and are influenced by institutions.[8] In most rule-of-law development programs, however, the emphasis on institutions typically reflects how the term commonly is used: institutions *as* organizations, with a particular focus on state institutions/organizations such as judiciaries.

In contrast, a full-fledged scrutiny of how the "rules of the game" affect the poor would take into account the historical, cultural, social, and political factors that shape both the formal and informal manifestations of how the poor interact with the law, and in fact would take both formal and informal types of law into account. That analysis might in turn learn from and apply how the poor affect the rules of the game, and how they potentially can do so. Formal laws and state organizations would play important parts in this analysis. But the view of how they operate, and whether and how they can be reformed, would only be part of the picture. Underlying factors that shape their operations, and strategies that enable the poor to participate in and benefit from the justice "game," would also be taken into account.

6. While there is some movement by donors toward a sector-wide approach in the legal field, this often translates into work with specific state institutions.

7. Douglass C. North, Institutions, Institutional Change and Economic Performance 3–4 (1990).

8. *Id.* at 5.

In summary, there is nothing wrong with the areas of legal reform that do not include legal aid. But unless legal aid receives substantial donor, government, and civil society support, legal reform will all too often be a hollow shell. It will fail to achieve the ultimate goal of any development program—to improve the lives of the poor. The papers in this collection air many of the ways in which legal aid is crucial for development, human rights, and making the rule of law a reality.

◆ SECTION I ◆
Framing the Issues

INTRODUCTION AND OVERVIEW OF LEGAL AID IN AFRICA

Adam Stapleton[1]

> *[T]here is an inseparable link between the protection of individual and collective human rights and democracy. The field of battle in which democracy and human rights are tested is the administration of criminal justice.*[2]

BACKGROUND

From November 22–24, 2004, in cooperation with the Malawi Ministry of Justice and Constitutional Affairs, Penal Reform International (PRI) organized a regional conference in Malawi entitled "Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers and Other Service Providers."

Leading researchers and practitioners from twenty other African countries[3] convened in Lilongwe to consider and discuss how legal services can better provide access to criminal justice for poor people and, in particular, how legal services can serve to reduce the incidence of due process violations, lower the level of pretrial detention, and decrease the amount of time taken to resolve a case.

1. Criminal barrister and adviser to Penal Reform International.

2. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 325, 326 (1993).

3. Those countries were: Benin, Botswana, Burkina Faso, The Democratic Republic of Congo (DRC), Ghana, Kenya, Liberia, Mali, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

The three-day conference focused on the supply and demand sides of legal aid, the contributions made by non-lawyers and NGOs, and the significance of traditional/customary law, especially in rural areas.[4]

THE AFRICAN LEGAL SYSTEMS

In most African countries, the formal (state) justice system functions alongside traditional and informal (non-state) justice systems. The first is tied to the legal traditions and values inherited from the colonial past—the English common-law system in east and parts of central Africa, the Roman-Dutch system in southern Africa, or the codified civil law systems in the west. "Traditional" systems are tied to the traditions and values passed down from generation to generation as customary law regulating life in village communities. "Informal" systems are non-state justice systems, like alternative dispute resolution (ADR) fora, established by non-governmental organizations or faith-based groups. Finally, in the Sudan and northern Nigeria, Shari'a law operates as the primary law of the land; it seeks to regulate human intercourse within a moral and religious framework that is written in a poetic rather than legal style and open to varying interpretations.

In most places, the three systems operate side by side, blithely ignoring one another.[5] In all places, however, people (especially in the rural areas where most people live) have recourse to the traditional or customary law fora first to settle their disputes, grievances, and minor criminal matters.[6]

The lawyer only plays a role in the state justice system. He or she is positively excluded from customary law matters in most jurisdictions because of the nature of the forum and the informality and simplicity of the proceedings, which are aimed at "maximizing direct public participation which is essential given the lack of official enforcement mechanisms."[7] He or she is not needed in ADR proceedings, which most faith-based groups and NGOs offer as a free service.

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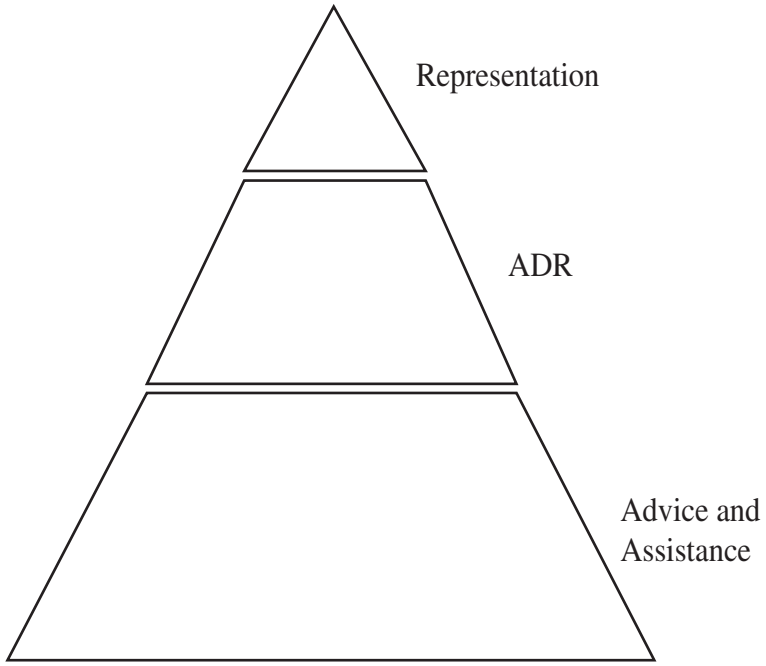
4. The conference was opened by Jacques Lepine, Head of Aid and Head of Office for the Office of the Canadian High Commission; Lellis Braganza, Charge d'Affaires, European Union Delegation in Malawi; Justice Paddington Garwe, Charge d'Affaires, European Union Delegation in Malawi; and Henry Phoya, MP, Minister of Justice and Constitutional Affairs.

5. This is not the case in Uganda or Zimbabwe, however, where all cases must start in the Local Council Courts (Uganda) or Local Courts (Zimbabwe) before they can proceed to the formal state justice system.

6. Research on customary law practices on the continent is remarkably thin. A useful review of the available literature (in Anglophone countries) is Penal Reform International, Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems (Wilfried Scharfe ed.) (2000) [hereinafter *Justice in Sub-Saharan Africa*].

7. *Justice in Sub-Saharan Africa*, *supra* note 6, at 32.

The graphic below illustrates the point. Defendants will always need lawyers to litigate and represent them in the courts and formal tribunals, but this paper submits that this role is specialized and represents the "tip" of the iceberg of necessary legal services. It is submitted that defendants only truly need lawyers at the "representation" stage; in the context of ADR and general legal advice and assistance, non-lawyers may be perfectly well-equipped to provide individuals with much-needed services.



To date, governments and the legal establishment have viewed "legal aid" restrictively, as a service provided by a lawyer to someone who could not otherwise afford his or her services. Officials often consider the notion of "access to justice" as the sole province of the state justice system. But in many rural and some urban communities, "'western-style justice' is distrusted and avoided by most."[8] Recognizing this, PRI has recommended that:

> [A]ccess to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice.[9]

8. *Id.* at 9, 10.
9. *Id.* at 10.

But this approach collides with the views of many law societies and judicial officers across the continent who, far from seeking to share their "magical knowledge"[10] and de-mythologize the law to enable greater access for the ordinary person, condemn any reform they perceive to be against their interest as "poor man's justice" and therefore unacceptable, or an erosion of judicial independence and unconstitutional.[11]

Many judges and lawyers fail to understand that their legal systems are collapsing around them. The level of overcrowding in the prisons is "inhuman,"[12] the courts of first instance are remote from, and mistrusted by, the people they are there to serve, and the police (who are poorly trained and under-resourced) are feared by the people they are meant to protect.

The legal establishment has a tendency to paint itself as the victim of this state of affairs. Judges and lawyers side-step their ethical obligation to make justice available to ordinary people. Instead, many in the legal establishment point to their wealthier brothers in the west in support of their demand that government should provide more courts and better terms and conditions of service for their members, ignoring the fact that many countries lack the resources to commit to such an undertaking. This lack of comprehension and disinterest contributes to the dysfunction of the legal systems on the African continent and, consequently, further undermines any notion of rule according to law.

SUMMARY

As the papers in this collection demonstrate, legal aid services in the criminal justice systems around the African continent have an essential role to play in affording poor people access to justice and protecting individual rights.

Often, too much emphasis is placed on lawyers and litigation. In many systems of justice, the lawyer-driven litigation model is simply not a viable mechanism for providing assistance to those in need, either because of cost or the availability of services. Perhaps, then, the time has come for greater recognition of traditional and informal non-state justice systems, especially in rural areas.

10. *See* Markus Weilenmann, *Legal Pluralism: A New Challenge for Development Agencies*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 87 (2007).

11. The DRC, Lesotho, Malawi, Kenya, and Tanzania fall into this category and appear wholly ignorant of the progressive approach being adopted to the south in Mozambique (led by the Supreme Court with DANIDA support), South Africa, and Namibia.

12. Preamble to the Kampala Declaration on Prison Conditions in Africa, UN Economic & Social Council Res. 15/1997/21 (July 21, 1997).

Several of the pieces in this collection forcefully advance this argument. Dr. Weilenmann demonstrates that traditional and informal justice systems are not "isolated entities" but rather a whole net of interactive legal orders linked to a multitude of legal services. He challenges the "missionary eagerness" to draw up "one value system, one legal order and one particular legal technique."[13] John Wuol Makec agrees; he submits that customary law is a dynamic presence in most African countries, handling most of the work that would otherwise inundate the courts. By recognizing its role, he argues, funds will be reserved for legal aid in the formal courts since lawyers are not needed in such conciliatory fora.[14]

Moreover, even within state justice systems, non-lawyers can successfully perform much of the work traditionally performed by lawyers alone. The conference considered, at length, the role of non-lawyers in the criminal justice system, both law students and "paralegals"—non-lawyers who are equipped with knowledge of criminal law and procedure and trained in practical skills.

Several highly innovative and cost-effective legal aid mechanisms currently being piloted around the continent do not require the expertise of a lawyer. These mechanisms demonstrate that properly trained non-lawyers can provide the appropriate advice and assistance to an enormous number of citizens on a range of issues, whether in the village or in the police station (at interview), in court (at first appearance), or on production in prison. Such advice and assistance often do not require the highly specialized knowledge and expertise of a lawyer. They are predicated on an understanding that there are multiple solutions to community conflict resolution; together, they will enable greater access to justice. [15]

The conference featured Clifford Msiska,[16] who introduced the work of Malawi's Paralegal Advisory Service, an innovative legal aid service involving a partnership between NGOs and criminal justice agencies that has operated in the country since 2000. His presentation at the conference featured a film, *Path to Justice*, which illustrates how a cadre of paralegals have succeeded in stabilizing the overall remand population in Malawi, ensuring that officials lawfully detain those in prison, and assisting those on remand to gain the skills and know-how to represent themselves in court on bail, plea, and conducting their own defense (since with barely 350 lawyers in a country of 12 million, the indigent offender is simply not going to be represented by a lawyer).[17] He outlined the paralegals'

13. Weilenmann, *supra* note 10.

14. John Wuol Makec, *Legal Aid and its Problems in the Sudan*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 129 (2007).

15. Daniel Nina & Pamela Jane Schwikkard, *The "Soft Vengeance" of the People: Popular Justice, Community Justice and Legal Pluralism in South Africa*, 36 J. Legal Pluralism 69 (1996).

16. National Coordinator, Paralegal Advisory Service.

17. *See infra* page 12.

work in police stations in screening young offenders for diversion programs, and showed how, through their work over eighteen months, they succeeded in gaining the trust and respect of the police. Eventually, their work led to an invitation from the police to extend their services throughout the country and attend adult police interviews. Msiska's presentation was supported by Rhoda Igweta[18] and Edouard Gogan.[19] Finally, Vivek Maru discussed what paralegals can achieve in post-conflict societies such as Sierra Leone; he stressed that the right to basic legal advice and assistance is on par with the right to basic health care.

TIME FOR LEGAL REFORM

Forty years after independence for many African states, these countries have undertaken far-reaching reforms in their economic and political systems. The continent has seen extensive and costly development programs launched in agriculture, education, health, and infrastructure. Paradoxically, governments have paid scant attention—until recently—to the legal systems (the "justice sector") upon which these economies and political systems so depend.

Today, many formal legal systems in Africa are in crisis. Allegations of institutionalized corruption within the judiciary are common in most countries and substantiated in some.[20] Poor people view the police as predators.[21] Poor laws remain on the statute books in many countries to deter the rural poor from entering the towns in search of work.[22] The prisons are filled with fine defaulters and people too poor to pay the surety for their next appearance in order to be allowed home on bail. The prisons are full—not of dangerous people (though there are some), but of poor people, the majority of whom have not committed the types of offenses that require their removal from society.[23]

If the situation in African prisons was "inhuman" in 1996, the situation in 2006 is, if anything, worse. Twenty prison services report that their prisons are over-

18. Program Manager, Kenya Prisons Paralegal Project (KPPP) operating since 2004 in Nairobi, Kenya.

19. Coordinator, Projet d'Assistance Judiciaire aux Détenus (PAJUDE), Benin.

20. *See, e.g.*, The Warioba Report, Tanzania (1996). For a discussion of the findings of the Warioba Report, *see* Joint Legal Sector/Partners Appraisal of the Legal Sector Reform Programme, Tanzania, Final Draft Report 74 (June 2003) (on file with author).

21. Deepa Narayan, Voices of the Poor: Can Anyone Hear Us? 249–64 (World Bank ed., 2000).

22. Such criminal laws include: being a rogue and vagabond, loitering, prostitution, police bonds to keep the peace/be of good behaviour, and transmitting a disease likely to endanger health.

23. Professor Adeyemi notes that "people who are sent to imprisonment in default of payment of fines can be as much as 16% of the total prison population." Adedokun A. Adeyemi, *Personal Reparations in Africa: Nigeria and Gambia, in* Alternatives to Imprisonment in Comparative Perspective 53, 66 (Zvekic ed., 1994).

crowded.[24] In March 2003, Nairobi Remand Prison, with a capacity of 600 persons, accommodated a daily average of 3,000 persons.[25] Mzuzu prison in Malawi, which has a capacity of 100 prisoners, averaged 500 prisoners in the last quarter of 2005.[26]

One direct cause of prison overcrowding is the excessive length and use of pretrial detention.

In Accra, Ghana, prison authorities estimated that the courts had granted bail to between 65–75% of the 650 prisoners in St. James Fort Prison, itself an old slaving station; 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 selected Kenyan prisons by the Kenya Prisons Service revealed that, of the total number of prisoners who had committed bailable offenses, 86% were granted bail but could not afford the financial terms set by the court, and only 6% had the means to hire lawyers.[27]

In Madagascar, 28% of the 12,400 remand prisoners had been in custody for more than five years; one had been waiting nineteen years for his trial. In Burundi, 58% of the prison population was awaiting trial; the number was 59% in Nigeria.[28]

The statistics are impressive, but they lack a human dimension; alone, they do not reveal the true enormity of the situation.

On a visit to Kobur prison in Khartoum with a judge of the Appeal Court, a PRI group was directed to the condemned cells holding those awaiting execution and

24. In advance of the second pan-African conference on prisons and penal reform in Africa, held in Ouagadougou, Burkina Faso, in September 2002, PRI sent questionnaires to all prison services in Africa; twenty-seven services responded. Benin had a population of just under 5,000 in September 2000 against a capacity of just under 2,000; Burundi's population was 8,647 in mid-2002 against a capacity of 3,750; Cameroon's population was 20,000 in mid-2002 against a capacity of 6,749; Rwanda's population was 112,000 in mid-2002 against a capacity of 46,700; Senegal's population was 6,489 in December 2000, against a capacity of 2,972; South Africa's population was 176,893 in June 2002, against a capacity of 109,106; Tanzania's population was 44,063 in June 2002, against a capacity of 22,699; Zambia's population was 13,173 in June 2002, against a capacity of 5,327. (Questionnaires on file with author).

25. Government of Kenya/PRI, Prisons Department Reports: Training of Enumerators; Case Review Findings on Selected Prisons; Recommendations on Decongesting Prisons (March 2003) (on file with author) (herein after Government of Kenya/PRI Report).

26. *The Prisons Are Bursting at the Seams*, Paralegal Advisory Service Newsletter (Feb. 2004) (on file with author).

27. Government of Kenya/PRI Reports, *supra* note 25.

28. These figures were collected by the author at each prison facility.

amputation. In one cell there was a young man who gave his age as twenty-two. He stood at the gate of his cell with manacles attached to both his hands and legs. A note on the side of the door gave the date, judgment, and sentence of the court. The judge acted as interpreter in the short conversation that ensued. After the preliminaries, members of the party asked whether the young man had been represented at trial. The judge replied that as a matter of law he had to be and so the question was redundant, but he nevertheless courteously asked the young man. The young man's answer was obviously in the negative, and a rapid series of questions and answers between judge and condemned person ensued. The result was that after a series of phone calls on his mobile phone, the judge confessed with some embarrassment: "There has been a mistake."

This sort of "mistake" is not confined to this young man, this prison, or the Sudan. In 1997, lawyers working to clear the homicide backlog in Malawi (involving over 800 persons, with some cases going back ten years) found fifty-eight prisoners without a police docket. Some of these individuals had been in custody for six years or more, essentially lost in the system.[29] The Director of Public Prosecutions (DPP) ordered their immediate release (without compensation). In 2003, a constitutional case was set in motion at the High Court of Malawi[30] requesting direction from the court on what was meant by a provision in the Constitution guaranteeing each accused person "trial within a reasonable time." Before the matter could be heard, the DPP ordered the release of the three applicants, all of whom had been in custody since 1994.[31] Once again it appeared that their files had been lost.

Researchers from PRI met an alleged witch in Benin who had been on remand for eighteen years. The Kenyan Prison Service also found two men who had been waiting seventeen and eighteen years for homicide trials.[32]

How has this happened, and how does it continue to happen? A number of forces collude in the maintenance of the status quo. Prison services consider themselves passive recipients of anything criminal justice systems send to them; the late Malawian president Banda's pronouncement on prisoners, "let them rot," strikes a chord with many politicians and ordinary people; and powerful interests are able to use the criminal justice process to oppress weaker members of society. In the

29. British Council, Final Report, DFID Project to Clear the Homicide Backlog in Malawi, Annex 1D (September 10, 1997).

30. In the Matter of the Constitution, Gerald Mtali, Layimoni Bizalieli, Samson Phiri v. The Republic.

31. In the High Court of Malawi, Lilongwe District Registry, Release Order of Gerald Mtali, Layimoni Bizaliele, and Samson Phiri, (August 1, 2003) (on file with author).

32. Government of Kenya/PRI Report, *supra* note 25.

main, however, it is because none of these people have access to legal aid services which enable them to challenge the situation in which they find themselves.

The national constitutions of many African countries purport to provide adequate safeguards. Some constitutions make provision for legal representation at public expense "where the interests of justice so require"[33] or where "substantial injustice"[34] would otherwise result; but many merely allow for legal representation and remain silent on the matter of costs, or disclaim any right to state-funded assistance.[35]

In Angola, the government does not provide a legal aid department. While the law provides for legal assistance,[36] an indigent accused must prove his or her economic status by making an *atestado do povreza* (statement of poverty) which the accused can obtain from the local administrator and present to the presiding judge. There are two problems with this procedure: first, it is so difficult to apply that no one does; second, lawyers are unwilling to take on cases because payments are slow and the rate is low. In sum, it does not work. A recent visit to the central prison in Luanda revealed that one of the 234 juvenile prisoners and two of the seventy-three women had legal representation.

As Table 1 shows, the low numbers of registered lawyers in practice is a problem in many countries.[37]

33. Constitution, Art 42, cl. 1, § c (1995) (Malawi).

34. S. Afr. Const. Art. 35, cl. 2, § c (1996).

35. Constitution, Art. 32 (1998) (The Sudan); Constitution, Art. 77 (1992) (Kenya) (save in capital murder cases), Constitution, Art. 12, cl. 13 (Lesotho); Constitution, Art. 36, cl. 6 (1999) (Nigeria). The European Court of Human Rights has ruled that the "interests of justice require consideration of the seriousness of the offence, the complexity of the case, and the ability of the defendant to provide his own representation. Free legal assistance should be granted even if there is little likelihood that the three year maximum potential sentence will be imposed." *Quaranta v. Switzerland* (judgment of May 24, 1991), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=quaranta&sessionid=6885720&skin=hudoc-en. And in *Benham v. United Kingdom*, (decision of May 24, 1996), the court ruled that where deprivation of liberty is at stake, the interests of justice mandate legal representation. A potential sentence of three months imprisonment, along with the legal complexity of the case, triggers the state's obligation to provide free legal assistance, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=6864835&skin=hudoc-en.

36. Lei da Assistencia Judiciaria 15/95 de 10 de Novembro.

37. The tables here were compiled from data supplied by conference country participants in response to a questionnaire distributed in advance. In the case of Ethiopia, the data was extracted from a recent baseline survey of the justice system. *See* Center for International Legal Cooperation, Federal Democratic Republic of Ethiopia, Comprehensive Justice System Reform Program Final Report (2004) (on file with author).

TABLE 1

Country	Population (millions)	Lawyers	Police/ Population	Prison Population	Prison cap
Botswana	1.6	190	1:266	5,801	3,870
Cameroon	17.0	1,248	1:200	19,800	10,000
DRC	60.0	3,000	**	40–50,000	**
Ethiopia	67.0	434	1:2,600*	65,000	**
Ghana	18.0	1,750	1:857	11,800	7,000
Kenya	33.0	4,000	1:900	50,000	14,000
Malawi	12.0	350	1:2,000	9,200	4,500
Niger	11.0	77	**	7,000	8,722
Rwanda	8.0	420	**	80,000	46,700
Senegal	10.0	300	**	16,993	7,000
South Africa	45.0	17,500	1:408	181,000	114,000
Sudan	33.0	2,000	**	12,000	5,000
Tanzania	34.0	723	1:10,000	43,902	22,699
Uganda	26.0	700	1:1,730	18,512	8,952
Zambia	10.0	550	1:715	13,500	5,357

* In Addis the ratio is 1:480
** Data not available.

On closer inquiry, the problem becomes less a matter of numbers than geographical concentration—and so accessibility, to most people—of lawyers. The nub of the matter is that the lawyers are to be found almost exclusively in the main urban centers, while the majority of the population lives in rural areas (see Table 2).

TABLE 2: LAWYERS IN LEGAL AID

Country	right to (y/n)		Public defender (employed by the state)		Private practice		Lawyers	Urban base
Botswana		N		N	**		190	Majority
Cameroon	Y		Y			N	1,248	100%
DRC	Y			N	Y		3,000	100%
Ghana	Y		Y		Y		1,750	Majority
Kenya	Y			N	**		4,000	80%
Malawi	Y		Y			N	350	100%
Niger	Y			N	**		77	100%
Rwanda	Y			N	**		420	100%
Senegal	Y			N	**		300	100%
South Africa	Y		Y		Y		17,500	Vast majority
Sudan	Y		Y			N	2,000	Majority
Tanzania		N		N	**		723	90%
Uganda	Y			N	**		700	100%
Zambia	Y		Y			N	550	Majority

** Data not available.

In Table 3, we see how even in those countries where the law allows for legal representation in the police station, such representation is rarely provided. Further, in capital cases the experience of the lawyer is generally not commensurate with the serious nature of the crime.

TABLE 3

Country	Access to lawyer on arrest	Always/ Sometimes/ Rarely	Access to legal aid on arrest	Rep in Capital cases	Rep in non-cap cases	Experience of lawyer commensurate with crime
Botswana	N	Never	N	Y	N	N
Cameroon	Y	Rarely	N	Y	N	N
DRC	Y	Rarely	Y	Y	Y	**
Ghana	Y	Sometimes	N	Y	N	Y
Kenya	Y	Rarely	N	Y	N	N
Malawi	Y	Rarely	N	Y	N	N
Niger	Y	Rarely	N	Y	Y	Y
Rwanda	Y	Rarely	Y	Y	Y	Y
Senegal	Y	Rarely	Y	Y	**	N
S Africa	Y	Rarely	Y	n/a	Y	n/a
Sudan	Y	Rarely	N	N	Y	N
Tanzania	Y	Rarely	N	Y	Y	N
Uganda	Y	Rarely	N	Y	Y	N
Zambia	Y	Sometimes	N	Y	N	**

** Data not available.

REFORMS SUPPORTED BY THE LEGAL ESTABLISHMENT: "PRO BONO" SCHEMES—A TRIED AND TESTED FAILURE

Many countries have acted to remedy the manifestly inadequate state of legal aid either by recruiting into legal aid departments younger lawyers (some of whom could not get taken on in the private sector) on poor terms and conditions or rehashing "pro bono" lawyer schemes, again employing the more junior end of the Law Society or Bar, or a mixture of both.

There are several problems with the "pro bono" scheme. As David McQuoid-Mason cautions, pro bono schemes, though they can encourage lawyers to engage in public service, may result in less than top-quality representation, as lawyers relegate their pro bono cases to subordinate status.[38]

In Kenya several pilot legal aid schemes have been put forward.[39] All place reliance on lawyers providing their services for free, i.e. on a pro bono basis.[40]

38. *See* Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L. L. J. 83 (2000).

39. Okech-Owiti & Carl Wesselink, Legal Aid Programme: A Pilot (Oct. 11, 2000) (on file with author).

40. In former times, such work was known as a "pauper brief." The literature reveals, however, that the pauper brief had extremely limited application as "advocates showed little interest in it." Towards a Legal Aid and Advice Scheme for Kenya, Report of a Workshop Held at the Whitesands Hotel, Mombasa, May 24–30, 1998, at 11 (on file with author).

The schemes were limited to court appearances, which provoked the criticism that they failed to address the need for legal assistance after arrest, but before formal charges are lodged, the point at which the accused are often most vulnerable.

One commentator characterized the pro bono approach as "inappropriate" for a country such as Kenya, as the urbanized concentration of the lawyers meant they would "not be able to provide adequate or equitable legal aid for the people of Kenya who live mainly in the rural areas."[41]

In Lesotho, timely appointment of "pro deo" counsel (as they are known there) is problematic. Lawyers argue that they are only paid for one appearance (e.g., bail) or complain that the Legal Aid Board has not paid them. There is a widely held view that "if you want your matter never to proceed, take it to Legal Aid."

In Nigeria, lawyers doing pro bono work have nonetheless required settlement of their costs ("petty disbursements") which can include travel, accommodation, food, etc. The estimates some put on these "petty disbursements" amount to considerable daily sums.

This is not to heap all the blame on the venality of lawyers, however. The crisis in the legal systems in these countries presents the most committed legal aid lawyer with real practical problems every working day. He or she must contend with: long waits due to overloaded case lists; the late arrival of witnesses, defendants, or magistrates; time wasted due to missing files, non-appearance of witnesses, lawyers, magistrates or non-production of remandees; "adjournment syndrome;"[42] poor court facilities, which often lack furniture, robing room, telephone, electric lighting, places to meet confidentially with clients, and so on.

Lawyers may be excused for asking the question: how long is a lawyer who offers in good faith his or her expertise free of charge prepared to wait in order to make a five minute application in an inheritance dispute at the Nairobi High Court or bail application in the magistrate's court—especially when he or she could be earning money in chambers? A lawyer might commit to providing free services in five cases a year if he or she knew that each case would involve no more than two or three court appearances with perhaps some advice on appeal. Yet, in few

41. *Id.* at 8–9 (commentary of Dr. Ooko-Ombaka). Gilbert Sendugwa notes that in Uganda "there is a heavy presence of legal aid provision in Kampala and other large urban centers. This has left the majority of the rural poor without access . . . legal representation and full time presence is only present in 16% (9) of Uganda's fifty-six (56) districts." Gilbert Sendugwa, A Demand-Side Perspective on Legal Aid: What Services do People Need? Uganda Supplementary Conference Paper 3.

42. "Adjournment syndrome" refers to the practice of adjourning cases, often without good cause.

countries in Africa can one make such a claim: a case could run for years and involve any number of court appearances before it is finalized.

Government has a responsibility to ensure "adequate legal assistance at all stages of the proceedings" in capital cases; and, in cases where "the interests of justice so require" to provide "a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance. . . ."[43]

Trial observations of ninety-one capital cases in Malawi revealed that "in almost every case," the lawyer met his or her client at court for the first time minutes before the trial began and that out of the seven lawyers in the department, three had just been recruited from university and their first trials were capital cases.[44]

In one case, a jury found a Mozambican national guilty of murder and sentenced him to death. He claimed to have an alibi. He met his lawyer at court minutes before the trial began. After a short discussion with his advocate, he decided to let the matter proceed. The advocate had indicated that even if the case were adjourned, the legal aid department had neither the manpower nor the means to send anyone to look for the witness, take a statement, and organize the fellow's travel to court to give testimony.[45]

Women face unique challenges in gaining access to justice. The difficulties that women experience in accessing the law are compounded by "cultural practices that undermine the status of women such as discouragement of women from owning property, widow inheritance, cultural beliefs and taboos" all of which "make women even more vulnerable."[46] Moreover, women's comparatively lower level of education often results in a deficit of knowledge of legal rights. Another problem is that domestic violence is emerging as a real issue both in urban and rural areas in families of all income levels.

There is an emerging consensus that many countries cannot afford or provide "lawyer-based" schemes. It is time to broaden the definition of legal aid and open it up to a range of services which, taken together, would provide the user with a

43. UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Economic & Social Council Res. 1984/50 (May 25, 1984); *see also* UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27–September 7, 1990.

44. Paralegal Advisory Service, Report: Trial Observations of Capital Cases Carried Out Between June 2000–February 2001 (Sept. 2001) (on file with author).

45. *Id.*

46. Sendugwa, *supra* note 41.

choice of "justice delivery" mechanisms and, for those in conflict with the criminal law, appropriate advice and assistance at all stages of the proceedings (i.e. at interview in the police station, to remand prisoners and to those on their first appearance at court). This, it was determined, would do much to reduce the numbers of cases needlessly clogging the criminal justice system and enable it to function more equitably and efficiently.

South Africa has done more than perhaps any other country to wrestle with the problem of developing an affordable legal aid system that is accessible to all of its citizens.

In 1998, the South African government convened a National Legal Aid Forum[47] to think the matter through. The participants in the meeting came up with four elements that legal aid should contain: (1) legal advice and information; (2) litigation; (3) representation in other forms of dispute resolution; and (4) education and training.

The Forum went on to enumerate its guiding principles: accessibility, representivity (i.e. reflecting the race, gender, and geographical diversity of the country), cost effectiveness and efficiency, quality service, accountability, and development. The Forum further recommended that delivery of legal aid should be by a variety of mechanisms and that a two-stage approach should be considered which favored a bottom-up model for delivery of legal aid services. Stage one entails the provision of information and advice at the community level, and stage two involves referral to legal services for representation.

THE ROLE OF NON-LAWYERS ELSEWHERE ON THE CONTINENT

In the poorer countries to the north, many of which have a less developed legal culture than that of South Africa, the position is different. The role of state-funded legal aid in such countries, as we have seen, is de minimis. And, as these governments would argue, given the constraints and competing priorities they face, those who have offended the laws necessarily occupy a position towards the bottom of the social justice ladder when it comes to the allocation of scarce resources.

In recognizing the role played by non-state justice fora in the community—and in Malawi, specifically—Henry Phoya asks what should be done about them:

47. See David McQuoid Mason, *National Legal Aid Forum, Kempton Park, January 15–17 1998: Working Commission Recommendations*, 12 S. Afr. Crim. J. 48 (1999).

- Do we view these structures as an opportunity or a threat?
- Do we seek to incorporate these fora in the formal justice system so that every case starts there?
- Do we look the other way and leave the traditional mechanisms unregulated, not knowing whether the constitutional guarantees that we accord to all Malawians are being flouted?
- Do we recognize their existence and look into ways of cross-referring cases between the two systems?[48]

Dr. Weilenmann argues persuasively that questions of "informality" are often a matter of perspective, and that for those living in the countryside it is the formal laws (those on the books) which "may have the smell of informality." Instead of advancing one set of laws over another, he argues for the inclusion and recognition of all.[49]

As Henry Phoya points out, the role played by traditional (non-state) justice fora assumes importance in the rural areas where most people live and lawyers are seldom to be found. These mechanisms, together with faith-based groups and NGOs, provide the first—if not only—port of call for many users because they are cheap, local, intelligible, and speedy.

The Table 4 shows that every country which responded to the survey has some form of traditional/non-state/customary/folk law court or forum; that most are formally recognized (i.e. in the law); that few have criminal jurisdiction but that most have some form of coercive power; and that most have a link (via appeal) to the formal justice system. Further, Table 4 demonstrates that in most countries, the majority of cases are heard in these traditional fora.

48. Henry Phoya, *The View from Government*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 31 (2007).

49. Weilenmann, *supra* note 10.

TABLE 4: TRADITIONAL COURTS/INFORMAL FORA

Country	Courts / fora	Recognized	Criminal jurisdiction	Coercive powers	Appeal to formal courts	% estimate of cases heard in traditional fora
Botswana	Y	Y	Y	Y	Y	**
Cameroon	Y	Y	N	Y	Y	20%
DRC	Y	Y	N	N	Y	65% +
Ghana	Y	Y	N	**	Y	most
Kenya	Y	N	N	Y	N	**
Malawi	Y	Y	N	N	N	most
Niger	Y	Y	Y	**	Y	majority
Rwanda	Y	Y	Y	Y	Y	**
Senegal	Y	**	N	**	Y	**
S. Africa	Y	Y	N	Y	Y	majority in rural areas
Sudan	Y	Y	Y	Y	Y	few
Tanzania	Y	N	N	Y	N	45%
Uganda	Y	Y	N	Y	Y	many
Zambia	Y	N	N	Y	Y	most

** Data not available.

A trial observation of a local Islamic court in Jigawa state, northern Nigeria, concerned a matrimonial dispute. The parties had no representation. The Sheikh asked questions of each side; the parties appeared to answer freely and without inhibition in their own language. The hearing concluded within fifteen minutes. Both parties appeared satisfied with the adjudication and went their ways. This compared favorably with a similar hearing in the nearest magistrate's court which would have involved numerous adjournments and associated transport costs.

However, there are serious problems with these traditional fora: they do not represent a panacea, and one should be cautious of romanticizing the picture and harking back to some pre-colonial "golden age" as has been attempted in some countries.[50] Non-state "traditional" justice mechanisms can, and do, order physical punishment.[51] They are susceptible to local politics, corrupt practices, and a tendency to maintain the *status quo* (particularly where women and young persons are concerned). In the absence of formal state justice agencies (e.g., the

50. *Justice in Sub-Saharan Africa*, *supra* note 6, at 126–128. This has been the case, most notably, in Rwanda. *See generally* JOHAN POTTIER, RE-IMAGINING RWANDA (2002).

51. Shari'a law as practiced in the northern states of Nigeria and the Sudan endorses corporal punishment, especially as concerns young offenders. Sentences of death by stoning passed by the lower courts (overturned on appeal) have also achieved notoriety in the international media.

police) they can, and do, become "judge, jury and executioner."[52] Many countries in sub-Saharan Africa commonly report incidents of mob or popular justice.[53]

In the Democratic Republic of the Congo (DRC), the combination of war and absence of any central government over the years has demolished the formal justice system. The few judges and court staff that remain charge for their services, as they have not been paid—in some instances for five or more years. There are very few functioning courts. Judgments are not enforced as there is no one to enforce them. Police and prison services are severely run down and have no operational budget. The country is vast and is made up of eleven provinces, many of which are the size of an average European state. In the eastern province of South Kivu, which continues to experience conflict, there are some forty lawyers, all of whom are based either in Bukavu or in Uvira. Just two functioning courts (in Bukavu and Uvira) serve an estimated population of one million persons. Due to the absence of courts, most people apply to their chiefs and elders for settlement of disputes and judgment even in serious criminal matters, and only apply to the state justice system when they need an official stamp (e.g. in civil matters concerning guardianship and adoption). However, due to the displacement of communities and corruption of traditional chiefs and elders, NGOs and faith groups have developed new mechanisms to assist people in resolving their disputes.

Héritiers de la Justice, a non-governmental organization, has set up *Comités de Médiation et Défense* (mediation and defense committees) throughout South Kivu. Twenty-one such committees have established over one hundred sub-committees, which in turn have established sixty-six cells. The members receive training in human rights and mediation skills and receive a basic introduction to the laws. They target local leaders such as nurses, pastors and teachers. They link up with other faith groups—Christian, Muslim and Baha'i—and operate a school program. They have registered 2,300 dossiers since January 2002 and have completed about 250 cases in the two years of operation. The committees provide their services free of charge and produce an amicable and prompt settlement of the dispute. This compares well with the average costs of a trial in the nearest court.[54]

52. Narayan, *supra* note 21, at 253.

53. The Kenya Human Rights Commission (KHRC), a national NGO, quotes reports of mob killings being up in 2003 by 20% on the previous year. From 1998–2003, KHRC documented 688 mob violence killings. KHRC, "Respect the Right to Life" campaign materials (on file with author).

54. To open a dossier in the tribunal costs $15. To type up the pleadings costs $5 and for service on the party $5. Once the tribunal is seised of the matter, the costs continue ($5–$20 to visit the village, etc). Costs are high and judgments drag out because each step and hearing has a cost since this is the only source of revenue for court personnel.

The Commission for Justice and Peace of the Catholic Church has developed similar mechanisms. Their *commissions d'arbitrage* (arbitration committees) average ten referrals per month to a lawyer in civil matters and fifteen referrals per month in criminal matters. On average, they resolve ten cases per month without the need to refer them to the lawyer. They have a cooperation agreement with the military, which calls them to assist in cases.

Both NGOs and church groups keep their costs down by recruiting and training local people. The "consideration" for the local person is the prestige he or she derives from providing the service in the community. Similar to the more established advice centers in South Africa, serious or complex cases are referred up the chain to a lawyer.

These programs demonstrate that many cases can be dealt with by non-lawyers who have been suitably trained to deal with the issues with which they are daily confronted.

"You cannot use a paralegal to deal with a criminal case."

Many professionals in the legal establishment in Africa smile or shudder at the prospect of a non-lawyer providing any service in the field of criminal legal aid. Yet a role for "paralegals" has long been recognized in the United Kingdom where "legal executives" (as they are termed in the U.K.) sit with suspected offenders during police interviews, take statements from them in prison, and follow up with witness statements. The legal executive—or paralegal by any other name—thereby frees up time for the lawyers to specialize in court work or the preparation of the defense.

Paralegal aid—a model for the future?

The role of community-based paralegals, or "animators," has a long history in many countries in Africa. All countries canvassed, save the Sudan, appear to have non-lawyers offering some kind of legal service (see Table 5).

Paralegals came into prominence in South Africa during the apartheid era, where they were the only recourse for most ordinary citizens. The Legal Resources Foundation in Zimbabwe has an extensive network of paralegal offices throughout the country, offering free advice from matrimonial and inheritance disputes through the gamut of legal services ordinary people need on a daily basis. These people receive training and provide a valuable service, usually without charge. The significance of the role they have to play is growing in terms of recogni-

tion, especially in post-conflict societies as attested to by Vivek Maru in Sierra Leone.[55]

TABLE 5: NON-LAWYERS IN LEGAL AID

Country	Legal services	Trained	Recognized	Regulated	Charge a fee
Botswana	Y	Y	Y	Y	Y
Cameroon	Y	Y	N	N	N
DRC	Y	Y	Y	N	N
Ghana	Y	Y	Y	N	N
Kenya	Y	Y	Y	Y	N
Malawi	Y	Y	N	N	N
Niger	Y	Y	Y	Y	N
Rwanda	Y	Y	Y	N	Y
Senegal	Y	Y	N	N	N
S. Africa	Y	Y	**	N	N
Sudan	**	**	**	**	**
Tanzania	Y	Y	N	Y	N
Uganda	Y	Y	N	N	Y
Zambia	Y	Y	N	N	Y

** Data not available.

The issue is as much about cost as anything else. An evaluation of Malawi's Paralegal Advisory Service noted how:

> [R]elatively few resources [can] achieve maximum benefit for users (and used) of the criminal justice system . . . [and] well focussed assistance . . . marshals goodwill and resources already present in the system to best effect, by promoting a holistic view and furthering communication between actors . . . [demonstrating] the usefulness of paralegals as actors in the justice system[.]" [56]

In the examples from Benin, Kenya, and Malawi, paralegals provide education, advice, and assistance within their levels of competence; they do not advise on individual cases, nor claim a representational role. What they do claim to offer, however, is appropriate legal aid to those in need on the edge of the criminal justice system. As a matter of principle, they do not seek to compete with or challenge the role of lawyers. Instead, they create work for lawyers by referring cases for advice or representation.

55. Vivek Maru, *Timap for Justice: A Paralegal Approach to Justice Services in Sierra Leone, in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 139 (2007).

56. Fergus Kerrigan, Danish Institute for Human Rights, Report: Energizing The Criminal Justice System In Malawi: The Paralegal Advisory Service 3 (Apr. 2002) (on file with author).

CONCLUSION

The "Legal Aid in Criminal Justice" conference produced the "Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa" together with a Plan of Action. The Declaration challenges the legal establishment to look deep into itself and ask whether it is serious about making "justice" accessible to the ordinary (that is to say, the poor) person. This means looking at all the justice delivery systems practiced in the country: traditional and customary law as well as informal (ADR) mechanisms. This means listening to the needs of ordinary people[57] and consulting them[58] rather than responding to their own more powerful interests.

Lawyers have—and always will have—an important role to play in the justice system,[59] but the Lilongwe Declaration points out that they are not the only actors. The South Africans learned through struggle that non-lawyers (paralegals) had an important role to play in offering basic legal advice and assistance. The Congolese and others have learned through necessity that non-lawyers can play a useful role in mediating settlements. The legal establishment needs to recognize the opportunity the traditional justice system offers people in rural communities and engage them.

The Declaration further challenges governments and foreign donor agencies to recognize the role of traditional chiefs and elders, NGOs, and faith-based groups in providing justice delivery mechanisms and supporting these groups and actors with training and legal literacy programs. It also challenges actors to put in place regulatory mechanisms to ensure adherence to constitutional guarantees and international human rights standards.

While the formal state courts can best provide the legal and procedural certainty required where serious penalties (e.g., imprisonment) are contemplated, the Lilongwe Declaration calls for greater communication, cooperation, and coordination between the various actors in the justice sector (state and non-state) as well as cross-referral mechanisms between state courts and traditional/informal fora. By drawing up mechanisms that enable the community to settle minor disputes in

57. Mozambique embarked on an ambitious program to research the administration of justice throughout the country. The research program, funded by DANIDA, lasted two years and was led by Dr. Joao Carlos Trindade, a judge of the Supreme Court, in conjunction with Coimbra University, Portugal.

58. *See generally* NARAYAN, *supra* note 21.

59. There has been little mention of the important strides made in the growth of public interest litigation and its effectiveness in informing public debate, raising awareness, strengthening constitutional guarantees, and holding public officials to account. The International Commission of Jurists (Kenya) supports litigation at the regional level. *See* www.icj-kenya.org.

line with restorative approaches to justice that promote social coherence, rather than refer all cases to the state justice system which inevitably ends in prison and serves to unravel and fragment local communities, funds will either be released or allowed to go further and so enable the over-stretched and under-resourced state justice system to investigate, try, and incarcerate the serious or professional offender and ensure public safety and security.

The costs to the government of bringing the state justice system to the people are prohibitive. The costs to ordinary people in accessing the state justice system are also prohibitive. There are no quick fixes. However, as has been remarked, "Justice is too important to leave in the hands of judges and lawyers." The participation of the community in the criminal justice system needs to be encouraged rather than ignored. The media, and in particular radio in Africa, has an important role to play in stimulating and informing debate on the kind of criminal justice system the society wants.

The Lilongwe Declaration and Plan of Action provide authoritative guidance for those serious about enhancing access to justice for ordinary people and entrenching the rule of law in our societies. The significance of the Declaration was recognized at the XIth UN Congress on Crime Prevention and Criminal Justice in Bangkok, April 18–25, 2005, where it was tabled by the Government of Malawi for adoption.[60] The Lilongwe Declaration was further cited as a key reference document in "Crime and Drugs as Impediments to Security and Development in Africa: A Programme of Action, 2006–2010."[61]

The Lilongwe Declaration was adopted by the African Commission on Human and Peoples' Rights at its 40th Ordinary Session, held in Banjul, The Gambia, November 15–29, 2006 (ref. ACHPR/Res.100(XXXX)06).

60. While the Congress did not formally adopt the Lilongwe Declaration due to time constraints, mention was made in the report of Committee I on Agenda Item 7. *Making Standards Work: Fifty Years of Standard Setting in Crime Prevention and Criminal Justice*, para 13, A/Conf.203/L.3/Add.2.

61. Endorsed at a roundtable for Africa, held in Abuja, under the aegis of the UN Office of Drugs and Crime (UNODC) (September 5–6, 2005).

THE VIEW FROM THE BENCH: AWKWARD DECISIONS, DIFFICULT OPTIONS IN THE PROVISION OF LEGAL AID

Johann Kriegler[1]

The African continent has made great strides politically, economically, and socially. Although there are those for whom it may be mere lip service—where there is disparity between the language of the lips and the conviction of the heart—the member states of the African Union are all but unanimous in their declared commitment to the rule of law. Electoral democracy has become generally accepted as the preferred form of government. The need for free and fair elections is widely recognized and commonly satisfied. The remaining few relics of despotism are increasingly isolated, and there is broad consensus that they ought to mend their ways.

I. LEGAL AID AS AN ELEMENT OF THE RULE OF LAW

There is also unanimity on the question of the importance of effective legal aid in promoting the rule of law. The interrelationship between good governance and socio-economic development is beyond debate. So too is the pivotal role of the rule of law in ensuring good governance. The crucial importance of fair trial rights to the advancement of the rule of law is likewise a given in Africa. Article 26 of the African Charter obliges state parties to promote institutional protection of human rights.[2] In this it echoes the Universal Declaration of Human Rights and other well-known international human rights instruments: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and Convention on the Rights of the Child (CRC).

More directly relevant to this discussion is that the African Union (AU) Guidelines proclaim the inalienability of the right to a fair trial. Furthermore, the Guidelines make plain that the essential elements of a fair trial include equality of access to the courts, equality of arms, the right to defend oneself, and the right to consult a lawyer of one's choice.[3] They further provide that the state must supply legal representation where the interests of justice so require by reason of the seriousness or complexity of the case or the severity of the likely penalty.[4]

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1. Retired Judge, Constitutional Court of South Africa.

2. African Charter on Human and Peoples' Rights, art. 26, entered into force October 21, 1986, OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982).

3. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, § A(2), Doc/OS (XXX) 247 (2001).

4. *Id.* § H.

In addition, the Dakar Declaration[5] emphasized that fully accountable institutions are necessary for a fair trial, especially an independent Bar which honors the cab-stand principle and is protected from harassment and intimidation.[6] The Declaration, moreover, recognizes that most of those who need legal representation cannot afford it, which creates a duty on governments, judiciaries, professional associations, and human rights NGOs to assist in providing such representation.[7]

The task for reformers is clear. Africa needs a radical and fearless appraisal of where we really stand in relation to the ideal of legal aid for those in need. Our continent is still stalked by the four apocalyptic horsemen: war, famine, pestilence, and death. The daily lot of tens of thousands remains misery; they are caught in a vicious cycle of poverty, passivity, powerlessness, and yet more poverty. Those committed to increasing access to justice must seize this moment to give substance, shape, and direction to the lofty ideals espoused in the papers in this collection.

II. MAJOR OBSTACLES

A. Governmental

Realistically, we must acknowledge major governmental obstacles to implementation of these promises. As was emphasized at Dakar, once states ratify international human rights instruments, they do not necessarily follow up with concrete measures for the domestic implementation of the provisions of such instruments. Understandably, yet no less regrettably, fair trial rights and even the rule of law figure relatively low on the political agendas of governments faced with ostensibly insurmountable security crises, public health threats, and socio-economic challenges. But even where there are no such challenges, political inertia is all too common. Legal aid is not popular or politically glamorous. In the eyes of many ordinary citizens, providing funding for the defense of "criminals" is a waste of scarce public resources.

In any event, security considerations unavoidably trump libertarian ideals. Civil war, cross-border violence, and, since 9/11, the specter of terrorism have prior claims to public attention and funding.

5. The Dakar Declaration: Resolution on the Right to a Fair Trial and Legal Assistance in Africa, adopted at the 26th Ordinary Session, African Commission on Human and Peoples' Rights, November 1–15, 1999, General DOC/OS(XXVI)INF.19.

6. *Id.* § 5.

7. *Id*. § 9.

B. Historical

Two major factors, with roots extending back centuries, are important. First, in most if not all of our societies, there is still tension between democracy, with its panoply of "modern" institutions, on the one side and, on the other, the hierarchies of traditional authority. "Newfangled" concepts such as the rule of law and fair trial rights have to co-exist in uncomfortable juxtaposition with these age-old relationships, customs, and perceptions. Combined with this factor, there is often a post-colonial malaise affecting public institutions, whereby the courts and their operations are regarded as beyond the control—or responsibility—of the ordinary man and woman. These functions, once performed by the colonial administrators (and since their departure taken over by equally remote representatives of a remote government) are perceived to be located outside the sphere of activities of ordinary men and women.

C. Cultural

Although the basic concepts of fairness and humanity are common to most societies, the rule of law, the right to a fair trial, and what that right entails are unknown concepts, unheard of and incomprehensible to many downtrodden millions. Notwithstanding dedicated efforts in many places over many years, there is a very long way to go. Governors and governed are often locked into this traditional post-colonial top-down relationship.

There is little evidence of a sense of self-reliance, or of awareness of individual rights and a willingness or ability to vindicate them. Consequently, the prospect of a general improvement of the quality of life through the enforcement of entitlements remains illusory for most. Here I have in mind especially women, refugees, internally displaced persons, recent arrivals, the homeless, street children, child-combatants, AIDS sufferers, orphans, child prostitutes, and all the other defenseless victims who have largely to fend for themselves on this harsh and unrelenting continent of ours.

III. AWKWARD CHOICES

It goes without saying that the existence and scope of these obstacles are no justification for flinching or hanging back. On the contrary, the very existence of these obstacles and their daunting dimensions must be a spur and an inspiration. We know that whatever may have to be done about the other obstacles to attaining just societies where all can live with dignity, establishing the rule of law is one important prerequisite. This particular decision is therefore simple: there is no turning back.

What is difficult, however, is how to manifest this resolve. First and foremost, knowing what we do about our governments and the socio-political and cultural realities of our societies, how hard can we push? How stridently must we proclaim our message? Without a certain level of governmental and community support, rule of law proponents will be easily dismissed as crackpots sounding off on the fringe. Therefore, we need a frank and balanced appraisal of the degree of pressure that can be exerted without becoming politically contentious, but at the same time not abandoning principle. Nor is this a decision that can be taken once and for all. We must be constantly alert to shifts in public opinion, to changes in governmental policy, to changes in the local marketplace of ideas, and, of course to the affordability of enhancing the system of legal aid.

In our relationship with government, there comes a time when one has to choose the best vehicle or vehicles for the delivery of legal aid. Must we accept that government is the appropriate agency, or ought there to be another or additional provider? If government is to be the sole vehicle, what role exists for the other agencies that were exhorted by the Dakar Declaration to play a role? How does the legal profession interact with government, how does the judiciary make its special contribution to the alleviation of the problem, and what is the role of civil society? Advocates of private initiative contend that, at best, government delivery of social services tends to be slow and red-tape bound, unresponsive or resistant to change, expensive and inefficient. Whether that is universally true is debatable, as is whether the alternative is much better. This much is true, though: absent the requisite political will, legal aid provided by government is likely to remain illusory.

Although there is always the risk of corruption where government dispenses services, some form of publicly funded or supported legal aid provided by the profession or civil society is also open to abuse. There are, inevitably, vested interests in jeopardy, jobs and reputations at risk, and possible political fall-out wherever persons or bodies outside the confines of the civil service substantially deliver a system of legal aid. Venality and nepotism are not confined to government servants, and conducting proper audits of non-governmental delivery of legal aid is notoriously difficult. Some form of cooperative delivery of legal aid or multi-disciplinary control seems necessary, but the blend will have to be made and, where necessary, adapted in the light of local conditions.

Striking and maintaining the balance is not easy and may prove time-consuming. Delivering a sustainable program of legal aid is not an event but a process. It is, moreover, a dynamic process where many factors play a part, where circumstances may change quite fundamentally, and where many setbacks must be anticipated and overcome. Thus, a system whereby the public purse pays private practition-

ers to defend indigent persons charged with serious offenses (commonly styled "judicare") has led to profiteering, double-dating,[8] and similar abuses.

At the same time, the full-time employment of public defenders also has major disadvantages, e.g., that these lawyers tend to be beginners who cannot find employment in the private sector and are generally inexperienced, ill-trained, unmotivated, and overworked. Therefore, choosing one or other system of delivery does not end the need for professional oversight and possible adaptation.

IV. A FUNDAMENTAL DECISION

Probably the most awkward decision that has to be taken is whether the program of legal aid to be provided in a particular community should go beyond the provision of purely forensic assistance. Clearly, the minimum required by the aspirational command of the AU Guidelines is the preservation of the right to a fair trial, but that will often be seen as wholly inadequate. In societies where there is no tradition of rugged individualism or self-reliance, no capacity for virile and effective self-vindication, little governmental accountability, and no culture of civic vigilance, promotion and protection of the rule of law demands more than merely providing legal representation where necessary for those who come into confrontation with the criminal justice system.

There is much to be said for the contention that in many African societies a campaign for the implementation of truly effective legal aid must acknowledge the need for a broadly based civic education program. This, however, is a major undertaking requiring a variety of strategies ranging from special sub-courses as part of the ordinary school curriculum to street-law projects and ongoing community-based programs. This is not only expensive but carries the risk of spilling over onto the political terrain.

V. CONCLUSION

Whatever choices might be made, even purely forensic legal aid such as will ensure a fair trial for all facing severe penal consequences will remain a remote aspiration not readily attainable within a generation. It will require long-term, dedicated, concerted, and sustained effort. The time and place for this process to start is here and now.

8. That is, a lawyer's listing of a (private) case at a time and place knowing that he or she has a prior commitment on another (legal aid) matter elsewhere.

THE VIEW FROM GOVERNMENT

Henry Phoya[1]

The Constitution of Malawi has institutionalized the rule of law and human rights. It is stipulated in our Constitution that an accused person has the right to access justice and legal remedies as well as the right to a fair arrest, detention, and trial.[2]

It has been stated that democracy comes with increased crime. Malawi has seen this happen in the last ten years.[3] One can see from the growing numbers of accused persons in our prisons[4] that the number of lawyers will not be able to cope with the demand for legal aid services.[5]

Unfortunately, the criminal justice systems in most African countries face the danger of collapse due to acute financial constraints. This in turn affects the right of ordinary people to access justice and has resulted in alarming and growing numbers of remandees in prisons. In Malawi, the problem has been compounded by the fact that our prisons were never built to hold the number of people that they currently house.[6] Furthermore, our courts are backlogged with cases due to inadequate resources, lack of personnel, remoteness in the districts, and lack of public confidence in them.

However, although there are insufficient numbers of lawyers in Malawi, government-sanctioned programs designed to fill the gap are proving to be very useful. The use of paralegals through the Paralegal Advisory Service over the past five to seven years has led to the reduction of a previously high prison remand population.[7] This has been achieved through government recognition of the reality that in order to achieve the protection of human rights, civil society groups have to be taken on board. Such groups provide social services which fill the gaps where the government is lacking.

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1. Lawyer, Member of Parliament, Minister of Justice and Constitutional Affairs, Malawi.

2. Constitution, Art. 18, 19, 41, 42 (1995) (Malawi).

3. In 1994, after thirty years of rule under the Life Presidency of Dr. Kumuzu Hastings Banda and the Malawi Congress Party, Malawi's first multi-party elections were held.

4. Since 1995, the prison population has more than doubled from 4,500 inmates. Malawi Prison Headquarters Statistics (on file with PRI).

5. Malawi has some 350 lawyers to service a population of 12 million. *See* Adam Stapleton, *Introduction and Overview of Legal Aid in Africa*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 3 (2007).

6. The four principal prisons in Malawi were constructed by the British and hold 64% of the total prison population. Zomba prison is the main prison which was built for 800 prisoners yet routinely holds 1,800 to 2,000 inmates. Malawi Prison Headquarters Statistics, (on file with PRI).

7. The average prison remand population prior to the paralegal schemes initiated by the Government of Malawi was between 40–55%. Since 2003, the average has dropped to below 30%. Thomas Trier Hansen et al., Paralegal Advisory Service: Evaluation of Activities 2002–2004 at 2 (Nov. 2004) (on file with PRI).

It is thus an honor for the Malawi Government that the Paralegal Advisory Service has been internationally recognized by a UN Habitat Best Practices Award. This recognition extends to our judiciary, police, and prison services; all are trying to make justice more accessible to ordinary people in Malawi.

While the papers in this collection highlight various themes, I note one that is of particular interest to Malawi—the idea of looking beyond the formal justice system to include the traditional, non-state justice mechanisms practiced by our people on a daily basis in the rural areas where more than 80% of the people of Malawi live.

This is a contentious theme for us here in Malawi because while our Constitution allows Parliament to legislate for access to traditional courts,[8] our history before the advent of democracy in 1994 shows how those holding political power can abuse these courts for political reasons.[9] The reality is that most cases are dealt with informally at the village level. It is a fact that, without the traditional mechanisms, our formal system would simply be swamped with petty cases that are easily resolved at a grass root level. This raises a number of questions:

- Do we view these structures as an opportunity or a threat?
- Do we seek to incorporate these fora in the formal justice system so that every case starts there?
- Do we look the other way and leave the traditional mechanisms unregulated, not knowing whether the constitutional guarantees that we accord to all Malawians are being flouted?
- Do we recognize their existence and look into ways of cross-referring cases between the two systems?

The contributions in this collection address these and other questions, with suggestions and recommendations for strategies particular to the African context. This publication, therefore, comes at an opportune time, when many countries in Africa are reviewing their legal systems. By including voices from our friends in Africa, Europe, and America on strategies that have worked in their own countries, this collection gathers creative and practical solutions for improving our criminal justice systems.

8. The Constitution of Malawi allows Parliament to "make provision for traditional local courts presided over by lay persons or chiefs: provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offenses as prescribed by an Act of Parliament." CONSTITUTION, Art. 110(3) (1995) (Malawi).

9. During his presidency, Kamuzu Banda "co-opted" the traditional courts to try political opponents without legal representation and with suspension of all rules of evidence and procedure. The most notorious case was that of Vera and Orton Chirwa, who were sentenced to death by a traditional court in 1982. *See* UNHCR, *Report of the Working Group on Arbitrary Detention*, *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/fd2e88c3d95ab7bf8025672e00343bb7?OpenDocument.

DEVELOPMENTS IN PENAL REFORM IN AFRICA

Paddington Garwe[1]

Penal Reform International (PRI) has been working on criminal justice issues in Africa for more than ten years. PRI has been able to do so through partnerships with various non-governmental as well as governmental agencies. In partnership with these agencies, various programs have been introduced; these programs are at different levels of implementation. We have learned a number of useful lessons along the way, while a number of good practices, some of which can serve as international models, have been developed. Over the years, PRI has worked with other organizations on criminal justice issues, and has co-hosted conferences and seminars in different parts of the continent. These meetings have served to break down barriers and have given policy makers an opportunity to reflect on current practices in their countries and on the need to introduce significant changes to systems that, in some cases, have not been reviewed since colonial times.

In 1996, PRI convened the first Pan-African Conference on Prison Conditions. That conference, in Kampala, Uganda, was significant in many ways and provided the base upon which PRI has continued to work over the years. The deliberations of the conference produced what has come to be referred to as the Kampala Declaration on Prison Conditions in Africa.[2] Various recommendations were made with respect to prisoners, prison staff, alternative sentencing options, and the role of the African Commission on Human and Peoples' Rights. The Kampala Declaration was adopted by the United Nations in 1997.[3]

In 1997, an international conference on community service orders was hosted at Kadoma, Zimbabwe. The declaration and plan of action that emanated from that conference were subsequently adopted by the United Nations as well.[4]

In 1999, PRI, together with the International Centre for Prison Studies, hosted an International Penal Reform Conference in Egham, England, to consider a new approach for penal reform in the new century. Among other things, delegates noted that in many countries the majority of the people in prison are awaiting trial, and most of them have little or no access to adequate legal representation.

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1. Judge of the High Court of Zimbabwe, Chairperson of the Zimbabwe National Committee on Community Service, Board member of PRI.
2. The Kampala Declaration on Prison Conditions in Africa, 1996, adopted at the Sixth Session of the United Nations Commission on Crime Prevention and Criminal Justice, 28 April–9 May 1997. E/CN.15/1997/21. *See* Appendix 6.
3. *Id.*
4. Kadoma Declaration on Community Service, E/CN.15/1998/L.2, 22 April 1998, ECOSOC.

The need for a new framework for penal reform that emphasizes access to justice for the poor and the marginalized was stressed. Though the Egham conference was not held with Africa in mind, the agenda that came out of that conference was very relevant for Africa.

In 2002, PRI hosted another Pan-African Conference on Prison and Penal Reform in Ouagadougou, Burkina Faso. One of the issues that took center stage during the conference was the need to reduce pre-trial detention. While noting that a number of countries have made provisions for bail and legal aid, conference participants generally conceded that in practice these systems do not operate effectively, owing to lack of resources on the part of accused persons to enlist the services of lawyers, as well as shortcomings within the judicial system itself. The result is that very rarely do accused persons take advantage of such provisions.

PRI has made every effort to facilitate the development and promotion of an African agenda for penal reform. Working closely with its partners, PRI has been able to identify and publicize good practices, not just in Africa, but internationally.[5] The sharing of knowledge and experiences has become an important component of the work of PRI.

It has been stated in some quarters that one cannot take a good practice that has worked in a particular country and transplant it as a model in another. While I certainly agree that one cannot take a good practice developed in one country and seek to transplant it wholesale to another, I am also convinced that there exists considerable scope among countries for the sharing of good practices and the development of flexible models that can be adapted for use in other countries.

In this regard I am proud to have been involved in one such model. In 1992, with little or no resources at our disposal, PRI introduced a community service scheme in Zimbabwe; that scheme has, to a large extent, become a model and has been replicated in various countries, including Malawi.

The reasons identified for the success of the program include the following:

(a) a simple organizational structure;

(b) the involvement of all stakeholders, in particular the involvement of the judiciary and the public; and

(c) the voluntary nature of the scheme and the fact that it can operate with little or no resources.

5. Penal Reform International, Index of Good Practices in Reducing Pre-Trial Detention, 2004, http://www.penalreform.org/english/frset_pre_en.htm.

Following the international conference held at Kadoma, Zimbabwe, in 1997, twelve countries in Africa introduced community service into their criminal justice systems, and the program is in different stages of development in these countries. Working with various organizations, I have visited a number of countries outside of Africa; working with criminal justice agencies in those countries, I have looked at the possibility of introducing penal reform in general and community service programs in particular. I have seen how penal reform can transform the lives of many people, and this has given me considerable satisfaction and the strength to continue.

PRI is particularly excited about the Paralegal Advisory Service that has been developed in Malawi. The need for partnerships between the government and civil society is now generally acknowledged. The paralegal scheme in Malawi amply demonstrates what can be achieved when such a partnership works well. Although introduced not long ago, the scheme is being replicated in Benin, Kenya, Uganda, and is to start soon in Tanzania, with interest expressed in countries such as the Sudan, Ghana, Liberia, Zambia, and Bangladesh. The fact that the scheme has served as a model in these countries is a source of pride not just for Malawi, but also for PRI.

Generally, there has been a great deal of activity in criminal justice reform on the African continent. In Malawi, Kenya, and Uganda, there are a number of justice reform programs under way. In the Sudan, the Democratic Republic of Congo, Sierra Leone, and Liberia, major reforms are also being undertaken. These examples give an idea of the major overhaul of legal systems currently being implemented in many African countries.

More than ever before, there is a need to share our research and findings as well as lessons that have been learned along the way. We need to remember that the fight against crime should never be left solely to the police, the courts, and prison authorities. Crime affects us all and therefore there is a need to involve all stakeholders, such as ordinary people, non-governmental organizations, and traditional authorities, as well as the agencies set up by the government in the criminal justice system. A well-functioning criminal justice system is all-inclusive, and each actor involved in criminal justice plays an important role. Unless all stakeholders participate in the process of reform, penal reform in its true sense will remain a distant goal.

◆ SECTION II ◆
Resolutions on the Way Ahead: Toward a Broader Understanding of Legal Aid

THE LILONGWE DECLARATION ON ACCESSING LEGAL AID IN THE CRIMINAL JUSTICE SYSTEM IN AFRICA

CONFERENCE ON LEGAL AID IN CRIMINAL JUSTICE: THE ROLE OF LAWYERS, NON-LAWYERS, AND OTHER SERVICE PROVIDERS IN AFRICA

LILONGWE, MALAWI—NOVEMBER 22–24, 2004

One hundred twenty-eight delegates from twenty-six countries (including twenty-one African countries) met from November 22–24, 2004, in Lilongwe, Malawi, to discuss legal aid services in the criminal justice systems in Africa. Ministers of state, judges, lawyers, prison commissioners, and academics, along with international, regional, and national non-governmental organizations attended the conference. Three days of deliberations produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (set forth below) that was adopted by consensus at the closure of the Conference, with the request that it be forwarded to national governments, the African Union Commission on Human and Peoples' Rights, the African Union Commission, the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, and publicized to national and regional legal aid networks.

PREAMBLE

Bearing in mind that access to justice depends on the enforcement of rights to due process, to a fair hearing, and to legal representation;

Recognizing that the vast majority of people affected by the criminal justice system are poor and have no resources with which to protect their rights;

Further recognizing that the vast majority of ordinary people in Africa, especially in post-conflict societies where there is no functioning criminal justice system, do not have access to legal aid or to the courts, and that the principle of equal legal representation and access to the resources and protections of the criminal justice system simply does not exist as it applies to the vast majority of persons affected by the criminal justice system;

Noting that legal advice and assistance in police stations and prisons are absent. Noting also that many thousands of suspects and prisoners are detained for lengthy periods of time in over-crowded police cells and in inhumane conditions in over-crowded prisons;

Further noting that prolonged incarceration of suspects and prisoners without providing access to legal aid or to the courts violates basic principles of international law and human rights, and that legal aid to suspects and prisoners has the potential to reduce the length of time suspects are held in police stations, congestion in the courts, and prison populations, thereby improving conditions of confinement and reducing the costs of criminal justice administration and incarceration;

Recalling the Resolution of the African Charter of Fundamental Rights of Prisoners adopted by the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice held at Addis Ababa, Ethiopia in March 2004 and its recommendations for its adoption by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April 2005;

Mindful that the challenge of providing legal aid and assistance to ordinary people will require the participation of a variety of legal services providers and partnerships with a range of stakeholders and require the creation of innovative legal aid mechanisms;

Noting the Kampala Declaration on Prison Conditions 1996, the Kadoma Declaration on Community Service Orders in Africa 1997, the Abuja Declaration on Alternatives to Imprisonment 2002, and the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa 2002; and mindful that similar measures are needed with respect to the provision of legal aid to prisoners;

Noting with satisfaction the resolutions passed by the African Commission on Human and Peoples' Rights (notably the Resolution on the Right of Recourse and Fair Trial 1992 and the Resolution on the Right to a Fair Trial and Legal Assistance in Africa 1999) and, in particular, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001;

Commending the practical steps that have been taken to implement these standards through the activities of the African Commission on Human and Peoples' Rights and its Special Rapporteur on Prisons and Conditions of Detention;

Commending also the recommendation of the African Regional Preparatory Meeting held at Addis Ababa in March 2004 that the African Region should prepare and present an African Common Position to the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April 2005, and that the African Union Commission has agreed to prepare and present that Common Position to the Congress;

Welcoming the practical measures that have been taken by the governments and legal aid establishments in African countries to apply these standards in their national jurisdictions; while emphasizing that notwithstanding these measures, there are still considerable shortcomings in the provision of legal aid to ordinary people, which are aggravated by shortages of personnel and resources;

Noting with satisfaction the growing openness of governments to forging partnerships with non-governmental organizations, civil society, and the international community in developing legal aid programs for ordinary people that will enable increasing numbers of people in Africa, especially in rural areas, to have access to justice;

Commending also the recommendations of the African Regional Preparatory Meeting for the Eleventh United Nations Conference for the introduction and strengthening of restorative justice in the criminal justice system;

The participants of the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa, held in Lilongwe, Malawi, between 22 and 24 2004, hereby declare the importance of:

1. Recognizing and supporting the right to legal aid in criminal justice

All governments have the primary responsibility to recognize and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

2. Sensitizing all criminal justice stakeholders

Government officials, including police and prison administrators, judges, lawyers, and prosecutors, should be made aware of the crucial role that legal aid plays in the development and maintenance of a just and fair criminal justice system. Since those in control of government criminal justice agencies control access to detainees and to prisoners, they should ensure that the right to legal aid is fully implemented. Government officials should allow legal aid to be provided at police stations, in pre-trial detention facilities, in courts, and in prisons. Governments should also sensitize criminal justice system administrators to the societal benefits of providing effective legal aid and the use of alternatives to imprisonment. These benefits include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.

3. Providing legal aid at all stages of the criminal justice process

A legal aid program 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 programs 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.

4. Recognizing the right to redress for violations of human rights

Human rights are enforced when government officials know that they will be held accountable for violations of the law and of basic human rights. Persons who are abused or injured by law enforcement officials, or who are not afforded proper recognition of their human rights, should have access to the courts and legal representation to redress their injuries and grievances. Governments should provide legal aid to persons who seek compensation for injuries suffered as the result of misconduct by officials and employees of criminal justice systems. This does not exclude other stakeholders from providing legal aid in such cases.

5. Recognizing the role of non-formal means of conflict resolution

Traditional and community-based alternatives to formal criminal processes have the potential to resolve disputes without acrimony and to restore social cohesion within the community. These mechanisms also have the potential to reduce reliance upon the police to enforce the law, to reduce congestion in the courts, and to reduce the reliance upon incarceration as a means of resolving conflict based upon alleged criminal activity. All stakeholders should recognize the significance of such diversionary measures to the administration of a community-based, victim-oriented criminal justice system and should provide support for such mechanisms provided that they conform to human rights norms.

6. Diversifying legal aid delivery 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 programs, justice centers, and 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.

7. Diversifying legal aid service providers

It has all too often been observed 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. It is also widely recognized that the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants. These paralegals and legal assistants can provide access to the justice system for persons subjected to it, assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.

8. Encouraging pro bono provision of legal aid by lawyers

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.

9. Guaranteeing sustainability of legal aid

Legal aid services in many African countries are donor-funded and may be terminated at any time. For this reason, there is need for sustainability. Sustainability includes: funding, the provision of professional services, the establishment of infrastructure, and the ability to satisfy the needs of the relevant community in the long term. Appropriate government, private sector, and other funding, and community ownership arrangements should be established in order to ensure sustainability of legal aid in every country.

10. Encouraging legal literacy

Ignorance about the law, human rights, and the criminal justice system is a major problem in many African countries. People who do not know their legal rights are unable to enforce them and are subject to abuse in the criminal justice system. Governments should ensure that human rights education and legal literacy programs are conducted in educational institutions and in non-formal sectors of society, particularly for vulnerable groups such as children, young people, women, and the urban and rural poor.

LILONGWE PLAN OF ACTION

The participants recommend the following measures as forming part of a Plan of Action to implement the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.

The document is addressed to governments, criminal justice practitioners, criminologists, academics, development partners, as well as non-governmental organizations, community-based organizations, and faith-based groups active in this area. It is meant to be a source of inspiration for concrete actions.

LEGAL AID FRAMEWORK

Institution building

Governments should introduce measures to:

- Establish a legal aid institution that is independent of government justice departments (e.g., a legal aid board/commission that is accountable to parliament).
- Diversify legal aid service providers, adopting an inclusive approach, and enter into agreements with law societies as well as with university law clinics, non-governmental organizations (NGOs), community-based organizations (CBOs), and faith-based groups to provide legal aid services.
- Encourage lawyers to provide pro bono legal aid services as an ethical duty.
- Establish a legal aid fund to administer public defender schemes, to support university law clinics, and to sponsor clusters of NGOs/CBOs and others to provide legal aid services throughout the country, especially in the rural areas.
- Agree to minimum quality standards for legal aid services and clarify the role of paralegals and other service providers by:

- Developing standardized training programs;
- 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;
- Establishing effective referral mechanisms to lawyers for all these service providers.

Public awareness

Governments should introduce measures to:

- Incorporate human rights and "Rule of Law" topics in national educational curricula in accordance with the requirements of the United Nations Decade of Human Rights Education.
- Develop a national media campaign focusing on legal literacy in consultation with civil society organizations and media groups.
- Sensitize the public and justice agencies on the broadened definition of legal aid and the role all service providers have to play (through television, radio, the printed media, seminars, and workshops).
- Institute one day a year as "Legal Aid Day."

Legislation

Governments should enact legislation to:

- Promote the right of everyone to basic legal advice, assistance, and education, especially for victims of crime and vulnerable groups.
- Establish an independent national legal aid institution accountable to Parliament and protected from executive interference.
- Ensure the provision of legal aid at all stages of the criminal justice process.
- Recognize the role of non-lawyers and paralegals and clarify their duties.
- Recognize customary law and the role non-state justice fora can play in appropriate cases (i.e., where cases are diverted from the formal criminal justice process).

Sustainability

Governments should introduce measures to:

- Diversify the funding base of legal aid institutions that are primarily funded by governments, to include endowment funds by donors, companies, and communities.
- Identify fiscal mechanisms for channeling funds to the legal aid fund, such as:
  - Recovering costs in civil legal aid cases where the legal aid litigant has been awarded costs in a matter and channeling such recovered costs into the legal aid fund;
  - Taxing any award made in civil legal aid cases and channeling the money paid into the legal aid fund;
  - Fixing a percentage of the state's criminal justice budget to be allocated to legal aid services.
- Identify incentives for lawyers to work in rural areas (e.g., tax exemptions and reductions).
- Require all law students to participate in a legal aid clinic or other legal aid community service scheme as part of their professional or national service requirement.
- Request the law societies to organize regular circuits of lawyers around the country to provide free legal advice and assistance.
- Promote partnerships with NGOs, CBOs, faith-based groups, and, where appropriate, local councils.

LEGAL AID IN ACTION

In the police station

Governments should introduce measures to:

- Provide legal and/or paralegal services in police stations in consultation with the police, the law societies, 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 accused persons;
  - Visiting police cells or lock-ups (cachots);

  - Monitoring custody time limits in the police station after which a person must be produced before the court;
  - Attending police interviews;
  - Screening juveniles for possible diversion programs;
  - Contacting/tracing parents/guardians/sureties;
  - Assisting with bail from the police station.
- Require the police to cooperate with service providers and advertise these services and how to access them in each police station.

At court

Governments should introduce measures to:

- Draw up rosters for lawyers to attend court on fixed days in consultation with the law societies and provide services free of charge.
- Encourage the judiciary to take a more proactive role in ensuring the defendant is provided with legal aid and able to put on his/her case where the person is unrepresented because of indigency.
- 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.
- Encourage non-lawyers, paralegals, and victim support agencies to provide basic advice and assistance and to conduct regular observations of trial proceedings.
- Conduct regular case reviews to clear case backlogs and petty cases, refer/divert appropriate cases for mediation, and convene regular meetings of all criminal justice agencies to find local solutions to local problems.

In prison

Governments should introduce measures to ensure that:

- Magistrates/judges screen the remand caseload on a regular basis to make sure that people are remanded lawfully, their cases are being expedited, and they are held appropriately.
- Prison officers, judicial officers, lawyers, paralegals and non-lawyers conduct a periodic census to determine who is in prison and whether they are there as a first rather than a last resort.

- Custody time limits are enacted.
- Paralegal services are established in prisons. Services should include:
  - Legal education of prisoners so as to allow them to understand the law 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, terminally and mentally ill, etc.
- Access to prisons for responsible NGOs, CBOs, and faith-based groups is not subject to unnecessary bureaucratic obstacles.

In the village

Governments should introduce measures to:

- Encourage NGOs, CBOs, and faith-based groups to train local leaders on the law and Constitution (in particular the rights of women and children), and in mediation and other alternative dispute resolution (ADR) procedures.
- Establish referral mechanisms between the court and village hearings. Such mechanisms might include:
  - Diversion from the court to the village for the offender to make an apology or engage in a victim-offender mediation;
  - Referral from the court to the village to make restitution and/or offer compensation;
  - Appeals from the village to the court.
- Establish a Chief's Council, or similar body of traditional leaders, in order to provide greater consistency in traditional approaches to justice.
- Record traditional proceedings and provide village hearings ("courts") with the tools for documenting proceedings.
- Provide a voice for women in traditional proceedings.
- Include customary law in the training of lawyers.

In post-conflict societies

Governments should introduce measures to:

- Recruit judges, prosecutors, defense lawyers, and police and prison officers in peace-keeping operations and programs of national reconstruction.
- Include the services of national NGOs, CBOs, and faith-based groups in the reestablishment of the criminal justice system, especially where the need for speed is paramount.
- Consult with traditional, religious, and community leaders and identify common values on which peace-keeping should be based.

◆ SECTION III ◆

Expanding Horizons: Guidance from Home and Abroad

ACCESS TO JUSTICE: CHALLENGES, MODELS, AND THE PARTICIPATION OF NON-LAWYERS IN JUSTICE DELIVERY

Thomas F. Geraghty[1]
Geoffrey Anderman[2]
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I. Introduction

This article is an expansion of a presentation made at the Lilongwe Conference on Legal Aid in Criminal Justice.[8] The purpose of that presentation was to provide conference participants with information that might prove useful in their efforts to strengthen their mechanisms for delivering legal aid in their criminal justice systems.

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2. J.D. 2005, University of Southern California School of Law.
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7. J.D. 2006, Northwestern University School of Law.
8. In November 2004, the Malawi Penal Reform International Team, led by Adam Stapleton, sponsored a conference in Lilongwe, Malawi, entitled, "Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers, and Other Service Providers in Africa." Representatives from twenty-one African countries attended this conference, along with students and faculty from Northwestern University School of Law, University of Illinois School of Law, and Loyola University of Chicago School of Law.

In this article, we continue to pursue our objective of providing information about service delivery models while at the same time identifying common impediments to providing effective legal aid to those charged with crime. We begin with a brief discussion of the common challenges faced by all providers of legal services to defendants in criminal cases. We then examine the national and international laws which govern the provision of legal aid to criminal defendants. Next, we provide examples of different service delivery models, including the results of evaluations of those models. Based upon these evaluations, we identify the strengths and weaknesses of each model. We then identify tasks that legal service providers typically undertake when representing criminal defendants. Finally, we offer suggestions about how those tasks could be allocated between lawyers and non-lawyers in order to enhance both the quality and the availability of legal aid in criminal justice systems. We do this recognizing that even with a single objective—improving access to justice—different political systems and cultural traditions will necessarily result in different approaches to criminal justice reform.[9]

II. The Common Challenges

The following excerpt comes from an article written by Tom McNamee. It appeared on June 20, 2005 in the *Chicago Sun-Times*:

50 minutes ÷ 113 people = 26.55 seconds per case; Court system forces attorneys through fast and furious pace, with hardly a hint of justice

> *The public defender has a tough job. When an alleged bad guy stands before the judge, the public defender must muster all his legal and oratorical skills. He must lift his chin from where he is slumped in a chair, stop staring out the window, and say, "Twenty-four, lives with mother."*
>
> *Or he must say, "Thirty-six, lives with girlfriend." Or perhaps, if this is the case, "Forty-two, lives with wife and kids." If the public defender is feeling especially weary, of course, he may choose to abbreviate his remarks. He may choose to do away with the heavy lifting of connecting words and simply say, "Twenty-six. Girlfriend. Kids."*

9. *See* Ronald J. Allen, *Complexities in the Relationship Between the Delivery of Criminal Justice and Human Rights: The American Experience*, presented to the International Society for Criminal Law Reform Symposium on the Delivery of Criminal Justice in Sub-Saharan Africa, Arusha, Tanzania (May 10, 2005). Professor Allen observes: "The American approach to the right to counsel, as well as what sometimes is misleadingly referred to as the 'right to silence,' are often held up as potential models for other countries, but it is critically important to realize that the American approach to the right to counsel does not entail a discrete 'criminal procedure' with an independent existence that can be appraised as though it were a thing apart from other aspects of the system. Quite the contrary, the American approach to the right to counsel is derivative of a more general approach to government, and to the relationship between government and citizens." *Id*. at 4.

The judge will understand. The alleged bad guy will figure it out. And, really, how much does it matter?

As I sit in Bond Court on Friday in the Cook County Criminal Courthouse, this is the scary minimalist drama that I watch play out. Judge Matthew Coghlan is on the bench, and he's setting bonds in a furiously fast 50 minutes for 113 men and women who have been swept off the streets for various stupid crimes, mostly involving drugs. This works out to 26.55 seconds per alleged bad guy. The judge reads the charges against the defendant, listens to any other relevant facts offered by an assistant state's attorney or the public defender, and decides how much cash the defendant must come up with, if any, to go free until his trial comes up. All in 26.55 seconds.

Can't find a Johnnie Cochran

As I watch in Coghlan's courtroom, I'm holding a new book I've been reading. It's called 'Objection!' and it's by Nancy Grace, a hyperventilating host on CNN. "High-priced defense attorneys, celebrity defendants and a 24/7 media," Grace writes, "have hijacked our criminal justice system." But I don't know about that. When I look around Bond Court, I don't see any Michael Jacksons or Scott Petersons. I see 113 defendants so faceless and powerless they don't even get to look Coghlan in the eye. They appear only on video monitors from a holding pen in the basement. And I sure don't see any Johnnie Cochrans.

I see a couple of private defense attorneys who are anything but famous. And I see that public defender draped in his chair. "Thirty-seven, lives with his sister," he burps.

This just disgusts another reporter watching this spectacle in Bond Court with me, Steve Bogira.

"To get just their age and who they live with," he growls. "Why not get some high school interns to do that and save the state some money?" Bogira is the author of 'Courtroom 302,' easily the best book ever written about the Cook County Criminal Courts and, for that matter, one of the best books out there about the American justice system.

Justice for the rich may purr like a BMW, he says, but justice for the poor wheezes like a '69 Volkswagen in Mexico—and the vast majority of criminal defendants are dirt poor.

At least make an argument

As we watch, a man steps before the camera, charged with possession of three grams of cocaine, a shotgun and an unregistered revolver. He has hired a private attorney who does his best, in a rush of words, to argue for a low bond.

The defendant, the lawyer says, is 49, lives with his wife and child and held a steady job for a long time. He's on disability and waiting for a lung transplant. He's lived in the same community for years, and he's a longtime church deacon.

The judge sets bond at $50,000, meaning the defendant will have to come up with $5,000 to get sprung. "At least his attorney made an argument," Bogira says. Minutes later, another defendant steps before the video camera, and an assistant state's attorney reviews the whole crime for the judge. The defendant and an accomplice, says the prosecutor, robbed two other men who were loading a U-Haul truck, then held one man hostage while they took the second to an ATM to get more money. Somehow, both victims escaped. The defendant has seven prior felony convictions. He has failed to show up in court nine times. The assistant state's attorney, by Bond Court standards, has given a lengthy summary. Now it's the public defender's turn.

"Lowest bond," he calls in a flat voice from his chair. And that's it. Not a word more.

Coghlan sets bond at a middling $40,000. "Lowest bond," Bogira says, shaking his head. "That's just something to say. It means the public defender knew nothing about the guy at all. All you hear is the long, damning police version of what happened."

How about less injustice? What should a public defender in Bond Court do?

In a perfect world, a public defender would interview each defendant thoroughly and gather any information that might influence the judge's decision—the weight of evidence against the defendant, the likelihood of conviction, whether there is motivation to flee, the defendant's family ties in the community, how long he's lived there, his job history, financial resources, mental condition, whether he's agreed to drug testing, and more.

Obviously, that's law book fantasy. No public defender assigned to represent more than 100 defendants in a single day—even the

most dedicated of lawyers—could do all that. So instead of justice, what if we shoot for this: A little less injustice.

"A public defender should tell the judge something, and not just a guy's age and where he lives," Bogira says. "I can't believe none of these guys have employment. I can't believe nobody has a GED."[10]

In Grace's silly book, prosecutors are noble and principled and defense attorneys are scum. That's cartoon analysis fit for talk radio. In Bogira's fine book, prosecutors and defense attorneys are all decent folks, by and large, trying to do right. It's the very system of criminal justice —especially a tidal wave of cheap drug cases overwhelming the courts —that denies so many defendants a fair shake.

Sitting in Bond Court, I try to image the late and great Johnnie Cochran as a public defender. I wonder if this building would have beaten him down. I wonder if he would have been reduced to droning, "Thirty-two, lives with sister."[11]

The challenge of providing effective legal aid for poor people charged with crimes is a daunting one. The problem can be simply stated: there are too few service providers and too many persons in need of services. Even in countries with an adequate number of service providers, it is difficult to maintain morale and adherence to the highest standards of professional conduct.

The reasons for this are readily apparent. The population in need of legal services is overwhelmingly poor and under-educated, and the public lacks information about the availability and importance of legal aid. Despite the fact that leading scholars, lawyers, and journalists have stressed that a country's human rights reputation should be judged based upon its protection of the rights of the accused and its treatment of its prisoners,[12] many governments do not view the provision of legal aid as a productive use of scarce resources.

The lack of political and public support for legal aid for criminal defendants is a reality that all advocates of legal aid must confront. Without political or public support for increased access to legal services for criminal defendants, the establishment and maintenance of effective defender systems is challenging at best.

10. A GED is a high school equivalency certificate in the United States.

11. Tom McNamee, *50 Minutes ÷ 113 People = 26.55 seconds per case; Court System Forces Attorneys Through Fast and Furious Pace, With Hardly A Hint Of Justice*, Chicago Sun-Times, June 20, 2005, at 22.

12. *See infra* note 17 and accompanying text.

Convincing governments and citizens of the value of providing quality legal services to persons charged with crimes, especially in countries or localities where resources for food, shelter, medical care, and education are desperately needed, is exceedingly difficult.

Changing societal perceptions of defendants in the criminal justice systems is a long-term project, but one that must be addressed. The challenge for all supporters of more and better defender services is to raise political and public awareness of the value of defender services while developing quality, cost-efficient defender systems.

The need for legal aid is particularly acute for the growing population of prisoners worldwide. It is estimated that over nine million people are in prison worldwide.[13] In many countries, the delay between arrest and trial is staggering. In the United States, the majority of defendants wait between six months and a year to be tried.[14] In contrast, in 2005, the criminal registry in Malawi revealed prisoners who had been awaiting trial for almost ten years.[15] While there are marked differences between prison conditions in Western nations and in the developing world, the challenge of providing speedy trials and humane prison conditions is common to all countries.

Justice and penal reform advocates face a common challenge: the government officials and judges in charge of prison systems often view them as "outsiders." Even in the United States, it is not local or national government officials who challenge justice system and correctional administrators to reform defective systems, but rather non-governmental advocacy groups that bring an outsider's perspective to the problem of access to justice.[16] Scholars, lawyers, and journalists have continued to stress the importance of a country's treatment of its indi-

13. International Center for Prison Studies, *World Prison Population List*, http://www.kcl.ac.uk/depsta/rel/icps/world-prison-population-list-2005.pdf (last visited Apr. 30, 2006).

14. Sourcebook of Criminal Justice Statistics Online, *Time Between Arrest and Sentencing for Felons Convicted in State Courts*, Table 5.50, http://www.albany.edu/sourcebook/pdf/t5502002.pdf (last visited Apr. 30, 2006).

15. Homicide Backlog Project, Report No. 1 at 2 (October 2005) (observing, *inter alia*, that of 502 people arrested for homicide in Malawi prior to 2005, 174 (35%) are recorded as having been in custody for at least three years; and that Stephen Dikitala, arrested in November 1996, had still not been tried, and that Patrick John, fifteen-years-old at the time of his arrest in January 1997, was also still awaiting trial). *Id.* at 10, 13.

16. Initiatives to improve prison conditions include those sparked by such organizations as the John Howard Association (http://www.johnhowardnl.ca/org/jh_hstry.HTM), the ACLU Prison Project (http://www.aclu.org/Prisons/Prisons.cfm?ID=5011&c=26&Type=s), and the National Legal Aid & Defender Association (http://www.nlada.org/About/About_HistoryCivil).

gent accused in any human rights metric,[17] but such pronouncements have fallen on deaf ears, both in the "developed" and "developing" worlds. In part, this is because the totality of the objectives of criminal justice reform are not adequately emphasized. The potential of criminal justice reform, more actively led by those who represent clients, must be better explained. Sweeping criminal justice reform will result in more efficient and effective fact finding, as well as the ultimate restoration of criminal defendants to useful citizenship.[18]

Any model for improving defender services must include commitments to both access to justice and reform of penal institutions. The latter commitment is integral to criminal justice reform because a criminal defendant's human rights and ability to return to society are by no means protected by even the most perfect trial process. The damage done to prisoners by pre-trial and post-trial incarceration is often irreversible. Thus, advocates for change must view criminal justice reform as a comprehensive undertaking which aims to provide defendants speedy and fair trials, and subsequently restore criminal defendants to useful citizenship.

The strategy for approaching these difficult issues must vary from country to country and from locality to locality, taking into account political realities, available resources, history, tradition, and custom. The challenge of this article is to provide information that might be useful to those engaged in reform initiatives.

III. Organizational Approaches to Providing Legal Aid

A. *Introduction*

Countries, and even particular regions within countries, have taken differing approaches to providing legal aid to their citizens. This section will examine the three most common models: (1) the public defender model; (2) the judicare model; and (3) the contract system. This section will also briefly describe each model and

17. *See* Jenny S. Martinez, *International Decision: Availability of U.S. Courts to Review Decision to Hold U.S. Citizens as Enemy Combatants—Executive Power in War on Terror,* 98 Am. J. Int'l L. 782 (2004); Joshua S. Clover, Comment, "Remember, We're The Good Guys:" The Classification and Trial of the Guantanamo Bay Detainees, 45 S. Tex. L. Rev. 351, 368 (2004) (*"Many of [the Geneva Convention's] provisions mirror American constitutional notions of due process."*); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Intl L. 127 (2003); Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 Am. J. Crim. L. 225 (2003); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891 (2002); Warren Richey, *Terror on Trial: Citizen Detentions in the Spotlight*, Christian Science Monitor, Sept. 26, 2002, at 2; Charles Lane, *Debate Crystallizes on War, Rights: Courts Struggle Over Fighting Terror vs. Defending Liberties*, Wash. Post, Sept. 2, 2002, at A1; *Tom Jackman & Dan Eggen, 'Combatants' Lack Rights, U.S. Argues: Brief Defends Detainees' Treatment*, Wash. Post, June 20, 2002, at A1.

18. *See e.g.,* website for the Public Defender Service for the District of Columbia. In particular, see the description of the P.D.S.'s Offender Rehabilitation Division at http://www.pdsdc.org/OffenderRehabilitation/index.asp (last visited Apr. 30, 2006).

then assess each model's strengths and weaknesses, based on the assessments of those models in practice.

B. *The Public Defender Model*

The public defender model provides legal representation through the establishment of a government agency staffed by full-time lawyers.[19] Like any approach to delivery of defense services, the public defender model has strengths and weaknesses, depending upon a number of factors, including size of caseload per attorney, efficacy of management, maintenance of high morale, training, adherence to ethical and professional standards, and independence.[20]

The efficacy of the public defender model is premised on the theory that "a staff of full-time public defenders working exclusively on criminal matters should be able to provide higher quality defense services for the poor than would private, court-appointed attorneys who do not necessarily specialize in criminal law."[21] But public defender systems face numerous challenges that call into question the validity of this theory, most prominently the problems posed by overwhelming caseloads and a lack of independence from federal, state, and local governments.

The most significant problem plaguing countries that rely on the public defender model is that caseloads are often so large that the quality of representation suffers. In the United States's one hundred largest counties, the average caseload for public defenders exceeds 530 cases annually.[22] As a result, clients often suffer from a lack of adequate representation.[23]

Because public defender offices are government funded, they are dependent on the state both structurally and financially. Structural dependence can mean the perception or the reality of lack of independence. Clients may fear that because the state funds public defenders, they will not provide a vigorous defense even when ethical and professional guidelines require zealous representation. One can-

19. Public Interest Law Initiative, *Access to Justice: Legal Aid for the Underrepresented* 232, http://www.conectasur.org/files/pili6.pdf (last visited Apr. 30, 2006).

20. *Organizing the Legal Aid System: Comparative Experiences*, *available at* http://www.pili.org/publications/ForumReport/Part4.html (last visited Aug. 8, 2005).

21. Jo Anna Chancellor Parker, *What a Poor Defense! Exploring the Ineffectiveness of Counsel for the Poor and Searching for a Solution*, T.E. Jones L. Rev. 63, 78 (2003).

22. Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. Rev. 245, 250 (2004).

23. In Venango County, Pennsylvania, for example, public defenders often met with their clients "for the first time in court just minutes before their preliminary hearings." The Venango County Public Defender program was deemed to be "so understaffed and under funded that it cannot provide clients with the type of legal representation required by the Sixth Amendment to the United States Constitution." Kate Jones, *Indigent Defense*, 25 Champion 35, 35 (2001).

not help but recognize the conflicts inherent in states where the "governor[s] who sign[s] death warrants also appoint[s] the public defender."[24] Beyond these actual (or perceived) conflicts, defender offices face a host of other challenges: the lack of funding often deprives agencies of adequate access to training, legal research, investigators, expert witnesses, scientific testing, and other resources necessary to provide adequate and complete client representation.[25] When public defenders do not have structural and financial independence from the government, one can legitimately argue that counsel provided to the poor merely "create an appearance of legitimacy to a system that lacks fairness."[26]

Despite these obstacles, many public defender offices provide outstanding service to their clients as the result of the dedication and high professional standards of office leadership and staff. Some public defender offices have established standards for attorney caseloads. Additionally, some have sought out alternative sources of funding for training programs for attorneys and have created oversight mechanisms independent of state and local governments.

Organizations such as the National Legal Aid and Defender Association (NLADA) and the American Bar Association (ABA) have promulgated national standards for public defender caseloads and proposals for the training and education of public defenders. Consequently, public defender offices that have adopted some of these standards or created their own have succeeded in attracting top talent to their ranks, thus providing higher quality representation to their clients.

The Public Defender Service in the District of Columbia (PDS), through a highly selective hiring process, extensive training program, limits on caseloads, and use of an independent board of trustees, has succeeded in providing excellent service to its clients and attracting talented young attorneys as new employees.[27] The King County Public Defender's office, through the implementation of measures similar to those of the PDS, has been praised as "one of the best in the nation."[28] The Legal Aid Society of New York (LAS) is another example of an outstanding defender office.[29] The LAS is one of the largest public defender organizations in the nation; it is the primary provider of defense services to the indigent in New

24. Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 Ann. Surv. Am. L. 783, 821.

25. National Legal Aid and Defender Association, Defender Resources, Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems (last visited Apr. 20, 2006). *See also* Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. Rev. L. & Soc. Change 203 (2004).

26. Bright, *supra* note 24, at 821.

27. *See* The Public Defender Service for the District of Columbia website, http://www.pdsdc.org/.

28. Ken Armstrong & Justin Mayo, *Public-defense alternatives*, Seattle Times, Apr. 6, 2004, at A7.

29. *See* http://www.legal-aid.org.

York City,[30] but is also sufficiently staffed, employing over 800 lawyers.[31] LAS provides a wide range of services to its indigent clients, including work on "trials, appeals and parole revocation defense."[32]

What separates successful public defender systems from those that do not provide effective and comprehensive service? One answer is resources. Another answer, perhaps equally important, is competent, independent leadership that instills high morale among attorneys and staff and encourages adherence to professional and ethical standards.

C. *The Judicare Model*

Under the judicare model, private lawyers agree to participate in a plan that provides government-funded services to indigent clients. Clients choose a participating lawyer. Instead of being employed full- or part-time by a state or locally funded agency, participating lawyers are compensated "directly, with public funds, for their work" on a case by case basis.[33]

Like the public defender model, the judicare system has its strengths and weaknesses. The strengths include providing clients with access to a skilled and experienced private advocate, greater freedom of choice for clients regarding who represents them, and involvement of members of the bar in providing services to poor clients. Drawbacks include the expense of operating a judicare system, the difficulty in assessing and ensuring quality services, and the lack of support from the legal community if attorneys choose not to participate in the program or to accept particular cases.[34]

Judicare's most significant weakness is its expense, particularly compared to other legal aid delivery models. A study by the British Department for Constitutional Affairs found that "[w]hen costs data are available, they usually show that

30. *Id.*

31. *Id.*

32. The Legal Aid Society, Summary of Services, http://www.legal-aid.org/DocumentIndex.htm?docid=98# (last visited Apr. 30, 2006).

33. Gary Bellow, *Legal Services in Comparative Perspective*, 5 Md. J. Contemp. Legal Issues 371, 373 (1994). *See also* Roger Smith, Legal Aid: Models of Organization 8, http://www.justice.org.uk/images/pdfs/legalaid.pdf, (2002).

34. Public Interest Law Initiative, Organizing the Legal Aid System: Comparative Experiences; Forum Report—Access to Justice in Central and Eastern Europe, http://www.pili.org/publications/ForumReport/Part4.html (last visited Aug. 8, 2005). *See also* A. Currie, *Legal Aid Delivery Models in Canada: Past Experience and Future Developments*, *at* http://faculty.law.ubc.ca/ilac/Papers/04%20currie.html.

salaried services are cheaper on a cost-per-case basis," than judicare services, particularly in criminal defense cases.[35]

The high costs of judicare may be attributed, at least in part, to the fact that where judicare programs have been created, they have included within their reach a larger proportion of the population than is generally eligible for public defender services. For example, when judicare was first introduced in England, 80% of the population was eligible for the program. Although this percentage was eventually reduced to 50% in 2002, England was spending $38 per capita on legal aid in 2002, as compared with $2 in the United States, $9 in Ontario, Canada, and $12 in the Netherlands.[36]

A number of studies have shown that the higher costs associated with the judicare system do not necessarily result in better quality of services. Studies conducted in British Columbia, Manitoba, and Saskatchewan, found that "the traditional perspective . . . that staff lawyer delivery [in a public defender organization] is inferior is 'simply wrong.'"[37] The studies also concluded that "Canadian evaluations have generally found that cases referred to the private bar cost more than staff lawyer cases, even when . . . there is no difference between the complexity and gravity of cases handled by private lawyers and staff lawyers."[38] While "staff lawyers spend less time per case than private lawyers," "similar proportions of staff and private bar clients are convicted" and "staff lawyer clients draw fewer jail terms than private lawyer clients."[39] This does not mean, however, that the judicare model should be abandoned. A study conducted by the Ontario Attorney General found that the judicare model "might be more cost effective in small rural or remote communities, in which the demand for legal aid is insufficient to justify a full-time staff of attorneys."[40]

35. Tamara Goriely, Department for Constitutional Affairs, Legal Aid Delivery Systems: Which Offer The Best Value For Money in Mass Casework? A Summary of International Experience, http://www.dca.gov.uk/research/1997/1097esfr.htm (based on analysis of studies by Brantingham, 1981 and Sloan, 1987) (last visited Apr. 20, 2006); *see also* Citizens Advice, The Future of Publicly Funded Legal Services, http://www.citizensadvice.org.uk/index/campaigns/social_policy/consultation_responses/cr_legalaffairs/cr_future_public_services (2003).

36. *Bellow-Sacks Seminar: U.S. Legal Services in Comparative Perspective*, November 18–19, 2002, at 7, http://www.law.harvard.edu/academics/clinical/bellow-sacks/papers/ComparativePerspectiveProceedingswithRevision2.doc (last visited Apr. 30, 2006).

37. Currie*, supra* note 34.

38. *Id*.

39. *Id*.

40. *Legal Information and Advice Services in Scotland: A Review of Evidence*, *available at* http://www.scotland.gov.uk/cru/resfinds/lais-07.asp (last visited Apr. 30, 2006).

D. *The Contracting Model*

In a contracting system, the government "enters into a contract with a law firm, a local bar association, an NGO, or sometimes an individual attorney to provide legal assistance in a certain number of cases for a fixed fee per case."[41] This model can be distinguished from the judicare system in that under the judicare model, plan participants are given a "benefit" that they can take to any lawyer who participates in the plan, whereas under the contract model, lawyers agree to provide defined services for a set price. The advantages of a contracting system include a greater degree of central control over appointments, the ability to monitor quality of legal services provided, predictable budgets for legal services, and an increased accountability of lawyers. The disadvantages of such a system include higher costs compared to the public defender system and the risk of lack of zealous representation due to a provider's dependence on government contracts.

A problem peculiar to the contracting model is the "lowest bidder" phenomenon. When the government simply awards the contract to provide legal aid to the lowest bidder, rather than taking into account factors such as the quality of services, clients may receive substandard representation. For example, in 1993, officials of McDuffie County, Georgia, decided to solicit new bids for the contract to provide indigent legal services.[42] The officials awarded the contract to an attorney who bid $25,000, nearly $20,000 lower than the other two bids of $44,000 and $42,000.[43] The attorney who was awarded the contract gave the county low-quality service for a low price. He "often [met] people accused of crimes for the first time in open court and [entered] guilty pleas on their behalf after only a few minutes of whispered discussions."[44] In the first four years of the contract, the attorney "tried only three cases to a jury, while entering 313 guilty pleas."[45]

Although the contracting model may cut costs through price competition, a system that simply awards contracts to the lowest bidder may lead to inferior services. If standards such as minimum attorney qualifications, provisions for support staff, caseload caps, and a mechanism for oversight are implemented, the contracting system provides effective legal services.[46]

41. *Access to Justice, supra* note 19, at 231.
42. Bright, *supra* note 24, at 788.
43. *Id*.
44. *Id*. at 788–89.
45. *Id*. at 789.
46. The Spangenberg Group for the Bureau of Justice Assistance, Contracting for Indigent Defense Services—A Special Report 16 (2000), http://www.ncjrs.org/pdffiles1/bja/181160.pdf.

E. *Mixed Delivery Model*

Many countries employ a mix of the various service delivery models discussed above. Two examples are South Africa and Israel.

Traditionally, South Africa, like many African nations, relied on the judicare model for provision of legal aid. However, because of increased demand for legal aid following the installation of the new constitution and a democratic system of government, South Africa's judicare model no longer proved economically viable.[47]

Like South Africa, Israel once relied primarily on the judicare model. In 1995, Israel established the Public Defenders Office (PDO).[48] The Israeli mixed model uses "internal defenders," who are full-time public defenders, and "external defenders," who are part-time private attorneys "who work from their private offices under the supervision of internal defenders and are obligated to maintain close and constant contact with the PDO."[49] These "external defenders handle approximately 90% of criminal cases."[50] Both the "internal defenders" and "external defenders" receive training "to ensure high quality representation."[51]

IV. Supplements and Alternatives to Lawyer-Dominated Legal Aid

A. *Introduction*

In many developing countries, lawyer-based systems are unavailable and too expensive, particularly for most rural and indigent clients. Consequently, a variety of means of augmenting resources provided by lawyers and alternatives to the use of lawyers—among them the use of paralegals, law school clinics, and pro bono models—have become of increasing importance to the provision of legal services in the criminal justice system.

B. *Paralegal Model*

The paralegal model challenges the assumption that lawyers are necessary to assist indigent clients at every stage of the criminal justice process. The model may also offer an alternative (and less expensive) method of assisting the indigent. While used in a somewhat limited fashion in the United States, paralegals can and do serve a much larger role elsewhere, especially in developing countries.[52]

47. This point is fully discussed in 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 97 (2007).

48. Ogletree & Sapir, *supra* note 25, at 221.

49. *Id*.

50. *Id*.

51. *Id*. at 226.

52. *See* Penal Reform International, *The Paralegal Advisory Service: A Role for Paralegals in the Criminal Justice System*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 145 (2007).

Paralegals serve many functions, including advising people of their basic rights, assisting lawyers, and providing vital education and training. In addition, community-based paralegals are able to deliver legal services to people outside of the traditional legal system, and to those living in rural or remote areas.[53]

The Paralegal Advisory Service in Malawi is described elsewhere in this volume. This initiative, which has spread to Benin, Kenya, Uganda, and Tanzania, and has received expressions of interest from Nepal and Bangladesh, utilizes trained paralegals to identify prisoners who are good candidates for release from pre-trial detention or from prison.

These paralegals also train prisoners to file applications for release and to present their cases in court. The Malawi initiative is striking for its success in securing the release of prisoners and for its ability to work in cooperation with court, police and prison authorities. Through its diplomatic efforts, the Malawi Paralegal Advisory Service has successfully convinced prison and court officials that release of prisoners who should not be in prison reduces overcrowding and expense, and improves living conditions within prisons.

South Africa also relies heavily on the use of paralegals in its criminal justice system, especially in rural and impoverished areas. Prior to the fall of apartheid, the government's role in enforcing racial segregation caused many South Africans to doubt the legitimacy of the judicial system.[54] Many South Africans "identify laws and the government in negative images of police brutality, impatient and corrupt civil servants, fines, punishment, powerful courts, and demigod judges."[55] However, "paralegals, in sharp contrast to . . . attorneys . . . [are] representative of South African society in terms of race and gender."[56] Integrating paralegals from the community has been critical to increasing the legitimacy of legal aid to those in South Africa and elsewhere in the developing world.

The importance of the paralegal movement to South Africa's justice system is evidenced by the fact there has even been a proposal to re-define the term "legal practitioner" in the South African Constitution to include paralegals, thereby allowing them to represent clients in court.[57]

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53. *See* Vivek Maru, *Timap for Justice: A Paralegal Approach to Justice Services in Sierra Leone*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 139 (2007).

54. Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. Rev. 1, 11 (1995).

55. Carole A. Baekey & Andrea A. Gabriel, *Community Law Centre: Empowering Rural South African Communities*, 5 Md. J. Contemp. Legal Issues 399, 401 (1994).

56. Lisa R. Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 Mich. J. Int'l L. 545, 561 n. 52 (2002).

57. *Durban Symposium on Public Interest Law, Access to Justice/Legal Services*, http://pili.org/publications/durban/access.html (last visited Aug. 9, 2005).

Defender offices in the United States limit their use of paralegals to primarily providing technical support for lawyers. However, a more expansive role for paralegals could involve paralegals assisting lawyers in providing a range of services to clients, especially in defender offices in which lawyers are faced with heavy caseloads.

In order to demonstrate how the use of non-lawyers could augment the service provided pursuant to any of the models outlined above, it is useful to describe and analyze the tasks normally undertaken by lawyers who represent defendants in criminal cases. This should help providers of legal aid to decide which functions lawyers must undertake alone, which tasks lawyers and non-lawyers could undertake together, and which tasks non-lawyers could perform alone or with minimal supervision by lawyers. So far, no jurisdiction has adopted a "functional approach" in deciding what should and what should not constitute the practice of law for purposes of licensing and for regulating the unauthorized practice of law. However, where legal resources are in short supply, and where defendants lack access to legal aid, officials should ease restrictions on practice in favor of protecting the rights of indigent defendants. Some would suggest that the organized bar's monopoly on the provision of services to the indigent criminal defendants should be abolished. The Lilongwe Declaration[58] endorses such a view.

Necessary services and skills will vary from jurisdiction to jurisdiction depending on how the various stages of the criminal process—investigation, arrest, detention, preliminary court appearances, trial, appeals, and post-conviction proceedings—are structured and how they affect suspects and defendants. But there are some tasks that all will agree are common to providing legal aid in the criminal justice system.

1. Advocacy during arrest and police/prosecutor investigation: non-lawyers

Officials often make decisions to arrest and charge suspects without the benefit of knowledge of all of the facts regarding the incident or about the background of the accused. Although the police and prosecutors are empowered to conduct their investigations without input from a representative of the accused, many cases could be screened out of the criminal justice system based upon facts unknown to prosecutors and police. Trained advocates based in communities could work cooperatively with police to broaden the scope of investigations and to develop responses to non-serious allegations of criminal activity that do not involve the

58. *See Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 39 (2007).

need for pre-trial incarceration or formal adjudication. Non-lawyers could play a significant role in this process.

2. Advocacy for alternatives to pre-trial incarceration: non-lawyers

Pre-trial incarceration significantly damages defendants, both physically and emotionally. Pre-trial incarceration also adversely affects a defendant's ability to prepare for trial and to consult with counsel. In many countries, defendants spend more time in prison awaiting trial than the maximum potential sentence for the crime charged. Advocacy for avoidance of pre-trial incarceration or for release pending trial involves investigation, fact-gathering, and presentation of the results of the investigation to the court. A non-lawyer could perform these tasks—including appearing in court on behalf of a defendant to provide the court with information relevant to pre-trial custody determinations—as well as a lawyer. The standards governing pre-trial detention are usually straightforward. The judge's determination regarding release does not rest on a body of jurisprudence or complex analysis of statutory or case law. Experience has shown that lawyers have traditionally neglected this critical area of advocacy in part because of their focus on the adjudicative stages of the proceedings. Non-lawyers may therefore be uniquely well-suited to pursue this important avenue to justice. Should the court abuse its discretion in denying a suspect's request for pre-trial release, paralegals can then call upon lawyers to ask for re-hearing or appellate review.

3. Investigation of the case: lawyers and non-lawyers

Investigation is perhaps the most important aspect of case preparation. Without thorough investigation, defense attorneys cannot make proper decisions about whether to try a case or enter a guilty plea. Without thorough investigation, exculpatory evidence, perhaps unknown to the client or his family, will remain undiscovered, potentially resulting in a wrongful conviction.[59] Non-lawyers as well as lawyers can visit the scene of an alleged crime, seek out and interview potential witnesses and, equipped with as much information as possible, consult with a defendant about how to proceed.

4. Counseling the client and the client's family: lawyers and non-lawyers

Maintaining contact with and counseling the client and the client's family are critical tasks. It is rare that defense lawyers discover all relevant information known

59. In Bangladesh, for example, the laying of false charges against innocent persons is a common practice. NGOs such as the Bangladesh Society for the Enforcement of Human Rights regularly conduct parallel investigations to prove the innocence of the accused and obtain his/her release from custody. *See generally* UNDP, Human Security in Bangladesh: In Search of Justice and Dignity (September 2002), available at http://www.un-bd.org/undp/info/hsr/index.html.

to the defendant or to the defendant's family during an initial contact. It is also rare that initial contacts are of sufficient length or thoroughness. In many jurisdictions, contact with the client and his family occurs at the initial court appearance and infrequently thereafter. It is critical that there be an ongoing dialogue and regular exchange of information between the client and the defense team. Clients and families remember and discover new information as time passes. Moreover, if the client is not in custody, the defense team should provide him with assistance in finding employment and in avoiding criminal activity. If held in custody, the defense team should address the client's concerns about the conditions of confinement. Non-lawyers can perform nearly all of these services as well as lawyers can.

5. Preparation for plea, pre-trial hearing, and trial: lawyers and non-lawyers

Preparation for plea or trial includes investigation, the filing of pre-trial motions, research regarding the legal issues that are likely to arise before and during trial, preparation of the examination of witnesses, and preparation of opening and closing statements. Trial preparation is the responsibility of the lawyer, but the participation of non-lawyers can make the process more efficient and thorough. Paralegals are trained to conduct legal research and to prepare and file legal documents. They can also play a helpful role in assembling and organizing documents and physical evidence to present at trial. The interaction between lawyer and non-lawyer at this stage should focus on allocating tasks to the non-lawyer that will allow the lawyer to focus her attention on the preparation of courtroom presentations.

6. Trial: lawyers (and non-lawyers?)

Trial, of course, should be the lawyer's responsibility, especially in serious cases. As noted above, however, many countries make lawyers available only when a court decides that "the interests of justice so require."[60] The decision as to whether the interests of justice demand a lawyer usually hinges upon the seriousness of the offense, meaning the seriousness of the punishment that the court may impose. Application of this standard leaves many defendants who face serious consequences, including imprisonment and the acquisition of a disabling criminal record, unrepresented. If resources are not available to provide defendants with lawyers in such cases, especially in cases in which the court may impose jail sentences, the legal system should permit non-lawyers trained in trial presentation and advocacy skills to act as legal representatives. Objections to this suggestion

60. *See* Adam Stapleton, *Introduction and Overview of Legal Aid in Africa, in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 3 (2007).

based upon the legal profession's claim to exclusive dominion over representation of clients in court should be overruled until such time as the legal profession itself provides such representation or until the legal profession can demonstrate harm to defendants as the result of being represented by well-trained paralegals.

7. Preparation for sentencing: lawyers and non-lawyers

Lawyers typically fail to devote sufficient time and resources to preparation for sentencing, despite the fact that sentencing decisions often prove determinative of the client's continuing quality of life. Indeed, the Supreme Court of the United States has recently recognized the importance of pre-sentence investigations in death penalty cases.[61] Yet all too often, lawyers inappropriately rely on information contained in pre-sentence investigations conducted by court-appointed or court-employed probation officers. Proper representation at sentencing requires *independent* investigation of the defendant's background, including his family, educational, economic, and mental health history. Non-lawyers may very effectively conduct pre-sentence investigations with the oversight of defense counsel. In the United States and elsewhere, some criminal justice systems have turned to non-lawyer "mitigation experts" to assist in the gathering of information relevant to sentencing. Organizations such as the National Alliance of Sentencing Advocates and Mitigation Specialists (formerly known as the National Association of Sentencing Advocates) meet regularly to share information about investigation techniques and new developments in the law regarding sentencing.[62] The increased use of non-lawyers, with the oversight of lawyers, will represent an important step forward in devoting much-needed attention to this crucial stage of criminal justice proceedings.

8. The sentencing hearing: lawyers (with non-lawyers as investigators/witnesses)

Lawyers should conduct sentencing hearings in serious cases, bearing in mind that the stakes at sentencing hearings are often as high as those at trial. In cases in which the court does not appoint lawyers, judges should permit non-lawyers, trained in mitigation investigation, to present evidence. Lawyers and judges should permit non-lawyer mitigation experts to submit reports and to testify concerning defendants' social, psychological, educational, economic, and medical histories. Non-lawyer sentencing advocates should assist lawyers in identifying other witnesses who should testify at sentencing, including family, friends, teachers, doctors, pastors, and character witnesses.

61. *See* Wiggins v. Smith, 539 U.S. 510 (2003); Rompillo v. Beard, 125 S. Ct. 2456 (2005).

62. *See* http://www.sentencingproject.org/nasa/ (last visited May 1, 2006).

9. Representation on appeal and in post-conviction proceedings: lawyers (with assistance from non-lawyers)

In the United States, indigent criminal defendants have a right to the appointment of counsel, funded by the government, on direct appeal in state and federal court proceedings. Lawyers and paralegals work together to prepare records for the appeal and to prepare briefs.[63] Defendants do not have a federal constitutional right to the appointment of counsel in state court or federal collateral proceedings.[64] In collateral proceedings, in which cases are re-investigated to determine if a defendant's constitutional rights were violated at trial or on direct appeal, paralegals, investigators, and mitigation specialists perform many of the same functions as they perform when preparing for trial.

In most developing countries, the right to appeal a criminal conviction, while written into law, cannot be implemented because of lack of resources, including lack of means to prepare a record of what occurred in the trial court. Without a record of what occurred in the trial court, an appellate court cannot conduct a meaningful review. Allowing non-lawyers in the courtroom to document the proceedings could provide an invaluable resource, creating the possibility of appeal for those whose rights have been violated. Their involvement in cases which require investigation after conviction and sentencing would also prove invaluable. Non-lawyers, including law students, journalists, and journalism students, have played, and continue to play, a significant role in the identification of wrongful convictions in the United States.[65]

C. *Law School Clinics as Service Providers*

Law students, if properly trained and organized, can be a substantial source of services for indigent clients. After receiving some basic training in law, their skill levels should exceed that of paralegals, enabling them to perform important tasks on behalf of criminal defendants. Depending on the availability of legal resources, law students, just as paralegals, should step in to provide assistance where resources are lacking. Court- and government-promulgated student practice rules should regulate student representation of clients.

Law school clinics, in which students work on behalf of clients under the supervision of practicing attorneys and clinical professors, provide practical, hands-on training for law students, and simultaneously offer services to disadvantaged

63. *See* Douglas v. California, 372 U.S. 353 (1963).

64. *See* Ross v. Moffitt, 417 U.S. 600 (1977). However, most state post-conviction statutes require appointment of counsel in non-frivolous post-conviction proceedings.

65. *See* Center on Wrongful Convictions, Illinois Death Penalty Exonerations, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/deathpenalty.htm (last visited May 1, 2006).

clients.[66] In the United States, because law school clinics have law students' education as their primary goal, clinics are not high volume service providers.[67] As will be noted below, in many developing countries, law school clinics have service delivery as a distinct goal.[68]

1. The United States

The growth of law school clinical programs in the United States accelerated in the 1960s "when private foundations began to promote law clinics as a solution to the twin problems of providing needed legal services to low-income clients and enhancing students' lawyering skills."[69] Since then, nearly every law school in the United States has created a clinical program that involves students in the representation of indigent clients in civil and criminal cases.[70] The American Bar Association, which accredits law schools in the United States, requires that law schools offer opportunities for "live client or other real-life practice experiences . . ."[71]

The American Bar Association reports that 53 of the 147 law school clinical programs in the United States provide legal services in the area of criminal defense.[72] One example is the Center on Wrongful Convictions at Northwestern University School of Law, where students and faculty involvement played an instrumental role in twelve of eighteen death penalty exonerations in Illinois.[73] The Innocence Clinic at Cardozo Law School has also been instrumental in freeing many

66. Legal Vice Presidency, The World Bank, *Legal Services for the Poor Best Practices Handbook*, at 7 (on file with author).

67. *See Access to Justice*, *supra* note 19, at 231.

68. See Association of University Legal Aid Institutions of South Africa et al., Combining Learning and Legal Aid: Clinics in Africa (2003), available at http://www.justiceinitiative.org/activities/lcd/cle/durban2003/Durban_report.pdf.

69. Edwin Rekosh, *The Possibilities for Clinical Legal Education in Central Asia and Eastern Europe,* http://www.pili.org/resources/cle/possibilities_for_clinical_legal_education_in_central_and_eastern_europe.htm (last visited May 1, 2006).

70. Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 Penn. St. Int'l L. Rev. 421, 421 (2004).

71. *See* American Bar Association, Law School Accreditation Standards, Program on Legal Education, Standard 302 (5) (b) (1), *available at* http://www.abanet.org/legaled/standards/chapter3.html.

72. American Bar Association, Directory of Law School Public Interest and Pro Bono Programs: Public Interest Program Public Interest Clinics, *available at* http://www.abanet.org/legalservices/probono/lawschools/pi_pi_clinics.html (last visited Aug. 9, 2005).

73. Center on Wrongful Convictions, *supra* note 65.

wrongfully convicted defendants, focusing on the use of forensic evidence, such as DNA, to free innocent prisoners.[74]

Student practice rules were enacted by state courts in the United States during the late 1960s and early 1970s. These rules were the product of a confluence of interests: advocates for the expansion of legal services to the poor joined with law schools that sought to make clinical experiences for their students meaningful. One of the first such rules was Illinois Supreme Court Rule 711;[75] that rule permitted law students working with law school legal clinics, legal aid providers, and government agencies to represent clients so long as they were supervised by lawyers. The Illinois student practice rule allowed (and still allows) students to appear in court in civil cases even without the presence of a supervising lawyer, so long as the students' work is supervised. In criminal cases, students may appear in court on behalf of clients by themselves if there is no possibility of a jail sentence. In cases in which there is the potential for incarceration, the supervising lawyer must be present.

Virtually every state in the United States has a student practice rule with essentially the same requirements for supervision of students as the Illinois rule, although there are variations from state to state regarding the degree of supervision required in different kinds of cases.[76] When these rules were enacted, there was some resistance from the practicing bar, especially with respect to students working in law school clinics. The bar's concern was that law school legal clinics, since they were not bound by federal and local indigency eligibility requirements, would divert business away from private practitioners. Indeed, law school clinics that charged a fee for legal services came under special scrutiny. However, this concern of the practicing bar dissipated as far as law school clinics are concerned because it was demonstrated that law school clinics posed no threat to the economic interests of the practicing bar. It was recognized that the bar had an interest only in regulating the quality of legal services provided by law school legal clinics, and the quality of services provided by law school legal clinics more than met professional standards.

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74. Other innocence projects include the Innocence Project Northwest at the University of Washington School of Law (http://www.law.washington.edu/ipnw/), the Wisconsin Innocence Project at the University of Wisconsin Law School (http://www.law.wisc.edu/fjr/innocence/index.htm), the Northern California Innocence Project at the Santa Clara University School of Law (http://www.scu.edu/law/socialjustice/ncip_home.html), and the New England Innocence Project (http://www.newenglandinnocence.org/).

75. Ill. Sup. Ct. R. 711; *see also* Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux): A History of Clinical Education at Northwestern*, 100 Nw. U. L. Rev. 231, 245 (2006).

76. *See* Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinic Teacher Training by Using Lessons Learned from New Clinicians*, 11 Clinical L. Rev. 49, 51 n. 3 (2004).

2. Africa

Law school clinics in Africa hold a great deal of potential, for both students and clients. The law, and by extension legal education, is central to development and democratization projects, as well as to societal change;[77] the establishment of clinics within law schools can thus be an important step in creating institutions that have "an important, indeed pivotal role to play in the success of the democratization process."[78] It must be borne in mind, however, that "a successful Clinical Legal Education model cannot be based on a wholesale transfer of the American model, since the American model may not be adaptable to the African experience culturally, politically, economically, or socially."[79]

Law school clinics are already well established in South Africa, where they are relied on extensively as a means of providing low cost or free legal services.[80] Law schools in South Africa currently operate more than twenty clinics. These legal clinics are becoming a part of the "wider national system of legal aid delivery."[81] Legal clinics in South Africa were established at the University of Cape Town in 1972 and at the Universities of Witwatersrand and Natal in 1973.[82] South African law school legal clinics have focused on service delivery, attempting to make legal aid available to as many clients as possible.[83] As a means of addressing the "scarcity of lawyers relative to the number of unrepresented defendants,"[84] South Africa allows law students to assist in the representation of defendants.

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77. Grady Jessup, *Symbiotic Relations: Clinical Methodology—Fostering New Paradigms in African Legal Education*, 8 Clin. L. Rev. 377, 389 (2002).

78. *Id*. at 393 (quoting Dr. Eng. Hailu Ayele, Vice President, Addis Ababa University). Of course, this observation—that improved legal education and the creation of legal clinics could potentially aid in building democracy and establishing the rule of law—is not limited to the African context. In a recent article, Professor Haider Ala Hamoudi proposes the creation of legal clinics in law schools in Iraq. Although he concedes that any such project would face significant obstacles, he argues that the pedagogical and broader societal benefits to be gained are sufficiently great that those interested in rebuilding Iraqi society should endeavor to create legal clinics. *See* Haider Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 Berkeley J. Int'l L. 112 (2006).

79. Dunlap & Joy, *supra* note 76, at 380.

80. Symposium, An Overview of Civil Legal Services Delivery Models, April 7, 2000, 24 Fordham Int'l L.J. 225, 238 (2000); see also David McQuoid-Mason, *The Supply Side: The Role of 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 97 (2007).

81. Open Society Justice Initiative, Combining Learning and Legal Aid: CLE in Africa, http://www.justiceinitiative.org/activities/lcd/cle/durban2003 (last visited May 1, 2006).

82. Open Society Justice Initiative, *Clinical Legal Education in Africa*, http://www.justiceinitiative.org/activities/lcd/cle/cle_africa (last visited May 1, 2006).

83. *See id*.

84. Albertine Renee van Buuren, *Insufficient Legal Representation for the Indigent Defendant in the Criminal Courts of South Africa*, 17 Brook. J. Int'l L. 381, 414 (1991).

Students in these clinics assist with legal research and in counseling clients. They may also aid in the defense of indigent defendants.[85] Some law schools in South Africa have established satellite clinics in communities located away from the school itself, in order to help those who cannot afford to or are not able to travel to the universities.[86] Moreover, many of the law school clinics were set up at "historically black universities, servicing areas (often rural) where there are currently no justice centers or in places where justice centers may never be established."[87]

Law school legal clinics also function as service providers in other African countries.[88] Many African nations have established, or are currently establishing, legal aid clinics associated with law schools.[89] At present, there are clinics in Kenya, Lesotho, Tanzania, Zimbabwe, Botswana,[90] and Sierra Leone.[91] In Ghana, a legal clinic in Accra's Nima district provides opportunities for law students to work in a clinical setting. Law school associated clinics also exist or will soon open in Ethiopia, Uganda, Malawi, and Nigeria.

In Nigeria, "clinical legal education is becoming very popular as one of the most effective ways of teaching students lawyering skills, values/etiquettes and responsibilities of the profession, access to justice and government agencies."[92] However, clinical education in Nigeria involves primarily observation, rather than engagement in actual legal work because "[a]part from the learning by observation, [law students] are disabled by the professional rules from rendering any service to the client."[93]

In most African countries, the work that law students can do on behalf of clients is restricted because of their inability to practice before courts and administrative bodies. A student practice rule has been proposed in Uganda. In other countries,

85. *See* David McQuoid-Mason, *The Supply Side: The Role of 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 97 (2007).

86. *Durban Symposium on Public Interest Law. Access to Justice/Legal Services*, *available at* http://pili.org/publications/durban/access.html (last visited Aug. 9, 2005).

87. Indicator South Africa, *Promoting Access to Justice* (2002), http://www.ukzn.ac.za/indicator/Vol19No3/19.3_feature.htm.

88. *See* Association of University Legal Aid Institutions of South Africa et al., *supra* note 68, at 4.

89. *See supra*. For an excellent discussion of some of the challenges inherent in transposing the American clinical education model to the African context—culminating with a proposal to establish "Development Law" clinics in African law schools—see Jessup, *supra* note 77.

90. *Id*.

91. *Id*. The clinic in Sierra Leone, located at Fourah Bay College, was founded in December 2000 by a group of students and human rights activists in cooperation with students from Yale Law School.

92. Uche Jack-Osimiri, *Building Links with Practitioners, Government Agencies and Universities Through Clinical Aspects of Legal Education in Nigeria*, *available at* http://www.ukcle.ac.uk/vtf/papers/osimiri.html (last visited May 1, 2006).

93. *Id*.

student practice rules are being drafted for consideration by governments and bar associations.

3. Latin America

Latin America has relied on law clinics to provide needed services since the late 1960s and early 1970s. They "began operation at virtually the same time clinical education expanded significantly in the United States."[94] In Mexico City, the Panamericana University School of Law maintains a legal clinic that provides civil and criminal legal services. The University of Buenos Aires and the Diego Portales and University of Chile law schools provide law students with opportunities to serve indigent clients.[95] In Trinidad and Tobago, "second-year law students are required to take at least one case in the law school's legal aid program."[96]

In Chile, "experts on legal education suggest that a majority of law schools, including new private schools in remote cities, have some clinical component in their curricula, although some clinical programs, like many of the law schools themselves, are just getting underway."[97] These clinical programs provide opportunities for law students to "perform virtually all the functions of an attorney during the trial level phase of litigation"[98] because Chilean law provides that "any student in the third year of law school or beyond, as well as law graduates, for up to three years after graduation, may appear in court to perform the functions of a counsel of record in Chile's trial courts."[99]

4. Asia

In India and the Philippines "there are a number of long-established law school clinics that might [eventually] serve as models for their neighbors."[100] China, which is reconstructing its legal profession "from scratch,"[101] is following suit; the first legal clinics were opened in the country in 1999. The drive to establish these programs was "motivated by a strong desire to change how students learn and think about the law, aiming to expose them to legal aid work and to give them the tools with which to apply theories learned in the classroom to traditional

94. Wilson, *Training for Justice, supra* note 70, at 421–22.

95. *Id*. at 427–28.

96. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 Va. J. Int'l L. 167, 209 n. 184 (1995).

97. Richard J. Wilson, *Three Law School Clinics in Chile, 1970–2000: Innovation, Resistance and Conformity in the Global South*, 8 Clinical L. Rev. 515, 567–68 (2002).

98. *Id*. at 568.

99. *Id*. at 535.

100. Wilson, *Training for Justice, supra* note 70, at 428.

101. *Id*. at 422.

everyday realities."[102] Clinics are now perceived in China as "an integral component of new and reformed structures of legal education"[103] and over thirty Chinese institutions of higher learning have instituted legal aid programs.[104]

D. *Required Post-Graduate Legal Education*

Many countries require law school graduates to complete apprenticeships before they are admitted to the bar.

Chile, for example, requires students to "complete [their practical training after law school] in legal aid offices."[105] This requires that "all law graduates must engage in mandatory six-month service to the poor . . . to qualify for admission to the bar."[106]

In most countries in Europe, a law school graduate must perform a "post-graduate apprenticeship" in order to gain admission to the bar.[107] China and South Africa also employ this requirement.[108] A law graduate in China must complete a one-year apprenticeship, while the South African "articles clerkship" lasts for two years.[109] Japan and other East Asian countries also require an apprenticeship, usually for two years, to gain access to the bar.[110]

Law graduates in South Africa view the "articles clerkship" as an opportunity to prepare them to effectively practice law.[111] Although some white law firms have become more accessible to black law graduates, "the number of available positions is small compared to the number of lawyers seeking to qualify."[112] These recent graduates fare no better with black lawyers because there are not enough black attorneys to provide articles training for these graduates.[113] Although change is occurring, "the number of black attorneys and advocates still hovers around the 10 percent level."[114]

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102. Pamela N. Phan, *Note from the Field—Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 Yale Hum. Rts. & Dev. L. J. 117, 119 (2005).
103. *Id.*
104. World News Connection, *China Improves Legal Aid System: White Paper* (Apr. 13, 2005).
105. Dakolias, *supra* note 96, at 209; *see also* Wilson, *supra* note 94, at 528–29.
106. Wilson, *supra* note 97, at 568.
107. Rekosh, *supra* note 69.
108. Charles J. Ogletree, Jr., *The Challenge of Providing "Legal Representation" in the United States, South Africa, and China*, 7 Wash. U. J.L. & Pol'y 47, 70 (2001).
109. *Id.*
110. *See* Wilson, *supra* note 97, at 568–69.
111. Peggy Maisel, *An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys*, 20 Ga. St. U. L. Rev. 977, 983 (2004).
112. Kenneth S. Broun, Black Lawyers, White Courts 249 (2000).
113. *Id.*
114. *Id.* at 248.

After the fall of apartheid, significant changes in the "articles clerkship" program were implemented in South Africa. One of these changes allows recent law graduates to qualify for admission to the bar by performing community service.[115] The community service option has provided an opportunity for more black South Africans to participate in the legal profession.[116] This new program, in addition to increasing the number of practitioners in South Africa, has helped extend legal services to the indigent of South Africa.[117] The community service option has "increased the number of attorneys who are exposed to poverty law and development needs and who are educated to provide representation on these issues."[118]

E. *Pro Bono Legal Representation*

Pro bono activities by private lawyers are also a significant resource for representation of defendants in criminal cases. The American Bar Association (ABA), in its Model Rules of Professional Conduct, has emphasized the importance of the legal profession's obligation to provide pro bono representation. Many other bar associations in the United States "have strongly encouraged attorneys to offer pro bono services, which has also resulted in more legal services being provided on a voluntary basis."[119]

The preamble to the ABA's Model Rules of Professional Conduct states that "a lawyer should strive . . . to exemplify the legal profession's ideals of public service."[120] Rule 6.1 of the ABA Model Rules states that "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono public legal services per year."[121] Some states have implemented versions of Rule 6.1 by requiring or encouraging annual reporting of pro bono activities.[122]

Only one-third of the United States's largest law firms have committed themselves to meet the ABA's Pro Bono Challenge, "which requires contributions equivalent to 3–5% of gross revenues."[123] Furthermore, only 18 of the United States's largest

115. *Id*. at 284.

116. Maisel, *supra* note 111, at 984. The practice options before the introduction of the community service usually favored white South Africans and prevented black South Africans from gaining admission to the bar.

117. *Id*. at 990.

118. *Id*. at 999.

119. Access to Justice, *supra* note 19.

120. Model Rules of Prof'l Conduct Preamble (2003).

121. *Id*. Rule 6.1 (2003).

122. Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 Colum. J. Tranat'l L. 863, 901–02 (2004).

123. Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society*, 69 Fordham L. Rev. 1785, 1810 (2001); see also *Pro Bono Institute, Law Firm Pro Bono Challenge*, http://www.probonoinst.org/challenge.text.php (last visited Apr. 20, 2006).

100 law firms meet the ABA standard of hours per year in pro bono service.[124] Of the approximately 50,000 lawyers at the 100 largest law firms, the average amount of time spent on pro bono work per day is eight minutes.[125]

Among the many notable programs are those of Mayer Brown Rowe and Maw, LLP, Baker & MacKenzie, and DLA Piper Brown Cary, LLP (DLA Piper). The DLA Piper pro bono initiative has an international component, "the New Perimeter Project," that supports human rights initiatives in Eastern Europe and in Southern Africa.[126] DLA Piper has also developed national pro bono initiatives in the United States. Its most recent initiative involves representation of children in juvenile court and a juvenile justice policy reform initiative. In this project, DLA Piper has a cooperative relationship with the Bluhm Legal Clinic of the Northwestern University School of Law.

Traditionally, pro bono projects were run by bar associations and by not-for-profit volunteer legal service programs. Recently, however, large law firms have moved center stage. The "big firm's organizational structure provides very practical advantages over smaller practice sites in delivering pro bono services."[127] This is due to the large number of attorneys available and the ability of the firm to "absorb the costs" associated with pro bono work.[128] Additionally, large law firms can, more easily than solo practitioners or small firms, sacrifice billable work to perform pro bono work.[129]

Georgetown Law School's "Law Firm Pro Bono Challenge" encourages large law firms to contribute pro bono hours to the community.[130] The Georgetown Pro Bono Institute houses the "Law Firm Pro Bono Project," a global effort designed to support and enhance the pro bono culture and performance of major law firms in the United States and around the world."[131] Currently firms from London,

124. *Id.* at 1810.

125. *Id*.

126. See the following websites for the descriptions of these law firm pro bono initiatives: http://www.mayerbrownrowe.com/probono/commitment/index.asp, http://www.bakernet.com/BakerNet/Firm+Profile/Pro+Bono/default.htm, http://www.dlapiper.com/us/firm/probono.aspx, http://www.dlapiper.com/global/newsdetail.aspx?id=58, and http://www.shearman.com/probono/probonoindex.html.

127. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1, 33 (2004).

128. *Id*.

129. *Id*.

130. Pro Bono Institute at Georgetown University Law Center, Law Firm Pro Bono Project, *available at* http://www.probonoinst.org/project.php (last visited Aug. 11, 2005).

131. *Id.*

Toronto, Sydney, São Paulo, and Johannesburg contribute time and resources to the Institute.[132]

Although recent years have seen a substantial increase in pro bono activity at the international level, most of the activity has been undertaken by relatively large, elite firms.[133] For countries that do not have large law firms to provide legal services, the clearinghouse model of providing pro bono may prove useful. Under this model, a central agency assigns cases to pro bono attorney members.[134] These organizations, in addition to matching clients with pro bono attorneys, also monitor the quality of the attorneys' work and provide training and support to participating attorneys.[135]

A system of mandatory or volunteer pro bono activities could provide a necessary safety net to the current legal aid system, both in developing and developed countries. The "direct benefit of the mandatory pro bono method is that thousands of the indigent accused who cannot realistically be represented by the public defender program, will receive representation from the private bar."[136]

The pro bono model is not without its problems. Although some attorneys in the United States do devote substantial resources to pro bono work, most attorneys "do not highly prioritize the representation of indigent defendants."[137] Attorneys who provide pro bono services often are "not familiar with the issues faced by poor people."[138] On the other hand, the level of representation afforded the clients of well-organized pro bono programs is exceedingly high. The spill-over effects of such representation are also significant. Law firm pro bono programs often set the standard for representation of indigent clients by public sector providers. Law firm pro bono programs are also able to take on precedent-shaping cases which improve the quality of justice generally.

In an attempt to address some of the shortcomings of the pro bono model, non-governmental organizations (NGOs) "have been established for the explicit purpose of

132. *Id*. For a comprehensive description and analysis of the various pro bono programs that exist in the United States and around the world, see Cummings, *supra* note 127.

133. *Id*. at 98.

134. David Goldstein et al., *Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World*, at 15 (Spring 2000), *available at* http://www.pili.org/2005r/dmdocuments/improving.doc.

135. *Id*.

136. Ogletree, Jr., *supra* note 108, at 69.

137. *Id*.

138. Legal Vice Presidency, *supra* note 66, at 20.

mobilizing private attorney volunteer efforts."[139] These organizations, in addition to matching clients with lawyers, often "offer training and support, and sometimes provide supplemental resources to enable the lawyer to handle the case properly."[140]

One such organization, "Ditshwanelo," provides legal assistance for Botswanan indigent clients. The Botswanan government only provides legal counsel in death penalty cases.[141] Ditshwanelo lobbies for "free legal services for those who are in need of legal representation but are unable to afford it."[142]

The Legal Resources Foundation (LRF), an organization dedicated to bringing legal aid and advice to Zambia, provides a similar service in that country. LRF provides assistance in civil rights cases and in death penalty and criminal cases.[143] LRF also provides paralegal training as "a means of bridging the gap between the people and the lawyer."[144]

V. Lessons Learned

As we have shown, there are a variety of approaches to providing legal aid in criminal justice systems. The choice of approach depends upon tradition, priorities, and, perhaps most importantly, available economic resources. In most countries, the provision of legal aid to criminal defendants is a low priority, yet there is consensus at all levels that the provision of legal services to indigent defendants is a measure of a country's adherence to basic principles of human rights. The question posed by this article and by the Lilongwe Conference materials is how to expand upon what all would agree is a much needed service in the face of political and economic inertia.

All of the existing and proposed models for service delivery depend on re-allocation of existing resources. Most agree that it is unlikely that governments will devote significant new resources to the provision of legal aid. This cold fact suggests that in many jurisdictions we must move away from lawyer-dominated legal aid to systems in which the roles of lawyers and non-lawyers combine to provide high quality and cost-effective services. These new methods of providing service

139. *Id*.

140. *Id*.

141. Ditshwanelo—The Botswana Centre for Human Rights, Legal Aid System and Poverty, http://www.ditshwanelo.org.bw/index/Current_Issues/Legal_Aid.htm (last visited May 3, 2006).

142. *Id*.; *see also* Lauren Bartlett, *NGO Update*, 12 NO. 2 Hum. Rts. Brief 40 (2005).

143. The Legal Resources Foundation, Noteworthy Cases—Annual Report 2001, http://www.lrf.org.zm/noteworthy.html (describing, among other cases, a murder trial defended by LRF).

144. The Legal Resources Foundation, Objectives and Activities, http://www.lrf.org.zm/object.html (last visited May 3, 2006).

must demonstrate to governments, to courts, and to communities that the effective provision of legal aid in the criminal justice system is cost efficient and provides significant benefits to society.

The paralegal initiatives in Malawi, Benin, Kenya, Uganda, Tanzania, and South Africa hold much promise. The model provides inexpensive and capable service and promotes cooperation between advocacy groups and justice officials, including government officials, prosecutors, judges, police, and prison administrators. In addition, citizens subject to criminal proceedings receive education to help them assert their claims for pre-trial release and to assert their rights when they go to trial. Paralegals also advise prisoners of their right to plead guilty, if they are guilty, and advise prisoners to inform courts and prosecutors that they have already served appropriate sentences.

Although the paralegal model holds the most significant promise for effective delivery of legal aid in developing countries, it does not, as presently envisioned, address the problem of providing effective representation at trial and at sentencing. While the paralegal model assists prisoners in asserting their rights, there will inevitably be rights that paralegals alone cannot effectively assert, and defenses that paralegals alone cannot raise, without the cooperation of a team consisting of both lawyers and paralegals squaring off against the opposition in court.

In the effort to expand the involvement of non-lawyers in criminal justice systems in order to augment available services, it might be useful to take a functional approach to determining which services lawyers alone can best provide, which services non-lawyers alone can best provide, and which services lawyers and non-lawyers working together can best provide.[145] Identification of the nature of the services needed by persons charged with crime should enable us to make judgments about who might be best equipped to perform those services and how lawyers and non-lawyers should work together.

145. *See* David McQuoid-Mason, *A Series of Pointers Clarifying the Role of Paralegals, in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 291 (2007).

CHART

Country	# of prisoners	%Pre-trial detainees/ remand prisoners	# of lawyers
United States	2,135,901[146]	20.2[147]	950,000[148]
Russia	828,900[149]	16.9[150]	
Bangladesh	71,200[151]	67.7[152]	29,581[153]
Brazil	336,358[154]	23.8[155]	500,000[156]
South Africa	156,175[157]	29.4[158]	17,500[159]
United Kingdom	77,035[160]	17.3[161]	116,110[162]
Tanzania	46,416[163]	43.9[164]	723[165]
Canada	34,096[166]	30.1[167]	37,000[168]
Kenya	55,000[169]	39.4[170]	4,000[171]
Chile	38,135[172]	40.4[173]	12,300[174]
Israel	13,603[175]	26.1[176]	29,509[177]
Ghana	12,531[178]	28.8[179]	1,750[180]
Malawi	9,656[181]	23.2[182]	350[183]

146. International Centre for Prison Studies, World Prison Brief (Dec. 23, 2004), *available at* www.prisonstudies.org.

147. International Centre for Prison Studies, World Prison Brief (June 30, 2004), *available at* www.prisonstudies.org.

148. Conference Survey Responses; United States State Department, Outline of the U.S. Legal System (Dec. 2004), *available at* http://usinfo.state.gov/products/pubs/legalotln/lawyers.htm [hereinafter "Conference Survey Responses"].

149. International Centre for Prison Studies, World Prison Brief (Feb. 1, 2006), *available at* www.prisonstudies.org.

150. International Centre for Prison Studies, World Prison Brief (Dec. 1, 2003), *available at* www.prisonstudies.org.

151. International Centre for Prison Studies, World Prison Brief (March 2006), *available at* www.prisonstudies.org.

152. *Id*.

153. Bangladesh Prison Headquarters (May 2004); Bar Council List (Sept. 2005) (on file with author).

154. International Centre for Prison Studies, World Prison Brief (Dec. 2004), *available at* www.prisonstudies.org.

155. International Centre for Prison Studies, World Prison Brief (June 2004), *available at* www.prisonstudies.org.

156. Articles and Essays Presented at the Martin P. Miller Centennial Lecture Series, Denv. U. L. Rev. (1993) (older data).

157. International Centre for Prison Studies, World Prison Brief (Aug. 10, 2005), *available at* www.prisonstudies.org.

158. *Id*.

159. Articles and Essays Presented at the Martin P. Miller Centennial Lecture Series, 1993 (older data).

160. International Centre for Prison Studies, World Prison Brief (March 31, 2006) (data for England and Wales), *available at* www.prisonstudies.org.

161. *Id*.

162. The Law Society, Trends in the Solicitors' Profession: Annual Statistical Report 2003, http://www.lawsociety.org.uk/documents/downloads/ASRreport03_v1.pdf (reporting 116,110 solicitors as of July 31, 2003).

163. International Centre for Prison Studies, World Prison Brief (Dec. 1, 2005), *available at* www.prisonstudies.org.

164. *Id*.

165. Conference Survey Responses.

166. International Centre for Prison Studies, World Prison Brief (Aug. 31, 2004), *available at* www.prisonstudies.org.

167. *Id*.

168. Bar Associations: The Canadian Bar Association, *available at* http://www.martindale.com/xp/Martindale/Professional_Resources/Bar_Associations/International/profiles/Canada.xml (last visited Apr. 20, 2006).

169. International Centre for Prison Studies, World Prison Brief (Sept. 2004), *available at* www.prisonstudies.org.

170. International Centre for Prison Studies, World Prison Brief (mid-2000), *available at* www.prisonstudies.org.

171. Conference Survey Responses.

172. International Centre for Prison Studies, World Prison Brief (Sept. 2003), *available at* www.prisonstudies.org.

173. International Centre for Prison Studies, World Prison Brief (June 30, 2002), *available at* www.prisonstudies.org.

174. Articles and Essays Presented at the Martin P. Miller Centennial Lecture Series, DENV. U. L. REV. (1993) (older data).

175. International Centre for Prison Studies, World Prison Brief (Sept. 9, 2004), *available at* www.prisonstudies.org.

176. *Id*.

177. Judges in Rabbinical Courts, Lawyers, Policemen and Prison Staff, http://www1.cbs.gov.il/shnaton55/st11_02.pdf (last visited Apr. 20, 2006).

178. International Centre for Prison Studies, World Prison Brief (Nov. 11, 2005), *available at* www.prisonstudies.org.

179. *Id*.

180. Conference Survey Responses.

181. International Centre for Prison Studies, World Prison Brief (Sept. 13, 2005), *available at* www.prisonstudies.org.

182. *Id*.

183. Conference Survey Responses.

Country	Delivery Model for Legal Aid
United States	Primarily public defender—each state has its own model because legal aid is delivered by local and state governments (Wisconsin, Pennsylvania, and some southern states operate a judicare system)
England	Primarily judicare—there are pilot public defender programs (these public defenders offices compete with private practitioners)
Netherlands	Mixed model—private lawyers and salaried lawyers employed by the Legal Aid and Advice Centers provide legal aid
South Africa	Mixed model—the country uses judicare, public defenders, candidate attorneys, university law clinics, justice centers ("one-stop legal aid shops")
China	Public defender—nationwide system
Canada	Mixed model—each province/territory has its own model (six mainly staff, five mainly judicare, the rest a mix of the two)
Nigeria	Public defender
Chile	Public defender
Scotland	Primarily judicare—some experimentation with public defenders
Russia	Public defender
Israel	Mixed model—public defenders and private attorneys
Brazil	Public defender
Japan	Public defender

LEGAL PLURALISM: A NEW CHALLENGE FOR DEVELOPMENT AGENCIES

Markus Weilenmann[1]

Official state legal systems do not usually recognize folk law, or do so only with a passing nod, such as an exclusion clause. However, experiences with the modernization of state law in Africa have shown that a confrontational approach toward local legal concepts does not usually end in success.

While local folk institutions of dispute settlement have been either destroyed or incorporated into the official legal body in a way that diminishes their traditional force, official state law is beginning to suffer growing social, political, and cultural de-legitimization. One of the core problems is that Africa's bureaucracies are normally the offspring of former colonial powers. The pre-colonial orders left behind by various feudalistic societies do not fit well into the administrative logic of modern bureaucracies that aim to govern the indigenous culture by application of western law.

In agrarian societies, where daily living conditions are marked by traditional production systems (such as shifting cultivation, rain field cultivation, horticulture, pastoralism, and running irrigation systems), the rural population orients itself toward traditional kinship-based systems of relationships as well as traditional political structures and their corresponding normative orders. In the face of missing development progress, political leaders have to refer not only to the international standards of human rights, but also to domestic strategies of political legitimacy, recalling (and even improving) old traditional identities.[2] One of the consequences of this is a growing fragmentation of society, marked by competing legal powers and conflicting normative orders, expressed today in a framework of legal pluralism.

However, it is only recently that development agencies have become aware of the critical impact of legal pluralism on questions of social and legal cohesion in endangered nation states. With my contribution, I would like to discuss some typical difficulties that development agencies encounter when they try to bridge

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2. *See* Markus Weilenmann, *Reactive Ethnicity: Some Thoughts on Political Psychology Based on the Developments in Burundi, Rwanda and South-Kivu*, 10 J. PSYCH. IN AFRICA 1 (2000); *see also* Markus Weilenmann, *Orthodox Living Law? Virtual Project World? Conceptual Ideas for Gender-Sensitive Input into GTZ-supported Law Projects in Sub-Saharan Africa, in Gender and Macro Policy* 141–152 (GTZ ed., 1997).

the gap between state and folk law. Then I will outline the general contours of the German development agency GTZ's approach to legal pluralism and discuss two illustrative gender cases.

I. The Notion of Law

Development agencies often refer to an authority-related notion of law that suggests that all legal concepts that do not belong to modern state administration (in most cases the Euro-American model) are either "no law" or just "informal law." When they do so, they evince a commitment to a preconceived hierarchical structure that does not question the authoritative notion of law.

This notion of law connects the existence of law to a western-like state-controlled organization of power. This implies certain characteristics, such as the existence of official forces empowered to impose sanctions, a hierarchy of courts and administrative units, the separation of powers, and a codified state constitution. Accordingly, outside of the centralized power of states there is only informality and, in the strict sense of the word, no law.

This conventional and limited notion of law struggles with the same problems as the failed colonial powers. First, the degree of consistency of formal order systems remains particularly variable in Africa, depending on the degree of codification of state law, the institutional level to which one refers within the complex structure of the modern nation state, and the variable tasks of the public sector. Legal pluralism is therefore also a common feature *within* the structures of official state law.[3]

Second, questions of informality are often merely questions of perspective. In societies in which the overwhelming majority of the population is illiterate, the laws on the books remain—like magical knowledge—the special domain of a small urban elite, usually fluent in the language of the former colonizers. Furthermore, oral traditions do not always imply informality. On the contrary, oral cultures may even achieve a very sophisticated level of formality. Therefore, for those living in the countryside who are often victims of weak communication structures, it is actually the laws on the books that may have the smell of informality.

Third, the official non-recognition of folk laws does not necessarily lead to their abolition, but only to institutional and social encapsulation of those groups that

3. *See* Franz von Benda-Beckmann, Legal Pluralism in Malawi (1970) (unpublished dissertation, Kiel University).

are identified with the values of modern state law. Furthermore, folk law is not only used and interpreted by some relatively remote villages in the countryside, but also by state courts and legal experts. The concern is to resist the transformation of folk law into "lawyers' law," where state courts and legal experts seize a monopoly over the interpretation of folk law.

Thus, there is much confusion on this issue. To bring order, donor agencies should enhance socially and culturally integrative institutions and strengthen the negotiation capacities of *all* relevant political and legal stakeholders instead of advocating for one particular normative order or technique.

II. Anaytical Consequences of the Multiple Histories of Folk Law

In some developing countries, such as Burundi, Ethiopia, and Ghana, post-colonial state law also competes with pre-colonial state law. This has different analytical implications than if one refers to a nation-state such as in the Democratic Republic of Congo, whose legal roots are principally linked to the history of the colonial takeover of power. While in the first case the development of the rule of law is marked by competing powers and the access to qualifications of legitimate authority at *all levels* of society, in the latter case it has mainly to deal with problems of cultural heterogeneity, such as the integration or disintegration of more or less isolated cultural units.

III. Toward the Disregard of Entrance Rules and Critical Interfaces

When entering into the field of alternative justice systems, development agencies often stress their mediation capacities as they know them from alternative dispute resolution (ADR) techniques. They tend to dichotomize state law and alternative justice systems by emphasizing the lower regulation density, lower degree of institutionalization, and capacity to compromise of alternative justice systems as compared to state law systems.

Official state laws, folk laws, religious laws, ADR-norms, and new patterns of local patchwork laws are not isolated entities that can be positioned against one another. Rather, together they constitute a complete net of interactive legal orders linked to a multitude of legal services, sometimes competing with each other, but still heavily influenced by the entrance rules of official state courts. And since the modern state administrations claim a monopoly through their control over criminal justice cases, alternative justice systems operate under the shadow of official state law and are more widely applied in civil law matters. It is also for this reason that alternative justice systems have a lower regulation density and well-developed capacities to compromise. However, to dichotomize alternative

justice systems and state law—and to privilege the former above the latter—is to risk delegitimizing an already weakened nation state.

IV. GTZ:[4] A Threefold Approach

Although many projects engage with alternative justice systems and promote the rule of law, development agencies are seldom aware of the problems of competing legal powers, quasi-state status, and legal pluralism that may deepen the growing fragmentation of nation states. The German government development agency GTZ has engaged in matters of legal pluralism since the early 1990s, and opted for a threefold approach.

First, one has to educate the relevant executive officials, such as country directors, program officers, and the like. Since the questions of legal pluralism outlined above are strongly linked to good governance issues, GTZ finances a training program for its own staff that includes substantial debate on the cultural and legal preconditions of the formation of a modern nation state. The courses, carried out in developing countries, refer explicitly to the political and legal history of the respective country of intervention. The trainers are also equipped to supervise ongoing processes of delegitimization within development projects or programs.

Second, the planning officers at the headquarters initialize pilot projects or programs on legal pluralism. One such project, initiated in Ghana, focused on the critical role of women; the project was titled "Promotion of Women in Pluralistic Legal Systems."

Third, GTZ looks for interesting and innovative local initiatives that fit well with these new problems of understanding fragmented societies and competing legal powers. One such initiative is run by HUNDEE, an NGO situated in Oromya, Ethiopia. HUNDEE organized a project focusing on the reduction of all forms of violence against women, such as female genital mutilation (FGM), forced marriages, and domestic violence. Under HUNDEE,

> . . . the choice of working from within the culture arose from 1) an appreciation of the inadequacies of the modern legal system in protecting women from various forms of violence and abuse and 2) an acknowledgement of the fact that culture and tradition embrace mechanisms for the protection of women and girls from gender-based violence.[5]

4. Gesellschaft Technische Zusammenarbeit (GTZ) (German Technical Corporation).

5. J. Osterhaus, Ansätze zur Stärkung von Frauen in pluralen Rechtssystemen 4 (2001).

Both approaches—the sector pilot project in Ghana as well as the HUNDEE project in Ethiopia—are striking because both unmask the bias-loaded relationship between persons identified with the ideology of the legal decision-makers and persons identified with grass-root ideologies. Both also facilitated coordinated networking between the different political and legal actors at all levels of society.

In Ghana, for instance, it became apparent that neither the state agents nor the representatives of the various legal NGOs were familiar with the ways of thinking in rural areas and corresponding attitudes towards official channels of legal decision-making. Therefore, GTZ decided to conduct a participatory rural assessment (PRA) study with all political and legal decision-makers with an interest in the program.

The knowledge collated then served as a common matrix of experiences for developing a joint project. During the planning workshops, however, it became clear that two different sorts of problems arising from plural legal conditions were often confused: the empirical question of the current state of legal pluralism, and the political question of how far non-state law should officially be "recognized."[6] Only after the PRA study brought this confusion to light was it possible to come up with a consistent understanding of the problem, referring in particular to the critical role of women, who

> . . . are frequently more closely bound to the family and/or kinsfolk than are men, a fact which is particularly important in terms of modernisation plans, because the extended family is generally deemed one of the most conservative groups in society.
>
> Poor women and those from rural areas do not belong to the high-status groups in society who go to court when a conflict arises. This does not, however, mean that they live in a legal vacuum. To regulate conflicts, they would be more likely to turn to customary law and/or religious authorities (land owner, village chief, king, mufti, missionary, magic man, healer, etc.), to whom they have always had access. Those who live in the countryside, in particular, tend to see the modern state through feudal glasses —or they act as if they did.
>
> So, at all levels of society, innumerable contradictions in thought and action arise, which cannot be resolved merely by adopting a new legal order and improving access to the formal system. Any attempt to

6. *See* K. von Benda-Beckmann et al., *Disputing Water Rights: Scarcity of Water in Nepal Hill Irrigation, in* The Scarcity of Water: Emerging Legal and Policy Implications 224 (Edward H. P. Brans et al. eds., 1997).

> introduce societal transformation by adopting a new legal order will also come up against a whole series of structural problems: social, cultural and geographical distance; costs of taking legal action prohibitive for the majority; problems of enforcement and problems of the post-court decision-making phase (say the difficulty of upholding a decision of the court in a rural area when the traditional hierarchy is against the decision).[7]

The project is therefore searching for new opportunities to bridge the gap between rural "local living law" and the formal state legal system. "Modern legal systems can be made more effective if the local legal reality is accorded greater recognition in modern law and in the application of that law. The challenge . . . is to test new project approaches in this vein and to publicize these within the scope of the legal policy debate."[8] The project has been running for two years.

HUNDEE has developed a particular approach to "civic education," which includes the following two steps:

1. Together with state officials such as representatives of the justice agencies and the public administration at the Kebele level,[9] the NGO selected 100 male and 100 female opinion leaders, including traditional authorities, lawyers of the Shari'a-courts, policemen, local representatives of the women's office, representatives of the official state courts, and so on. With these parties, HUNDEE organized a series of two-day workshops to discuss gender relations and corresponding norms, values, and practices.

   Juliane Osterhaus[10] sees the role of the NGO as one of a facilitator offering opportunities to critically reflect on the relationship between state law and folk law. In her view, the discussion should focus on the various sources of legitimacy that justify the social discrimination of women, and then clarify which parts refer to original customary law(s) of Oromo culture, which parts are linked to the practice of official state law, and which parts are newer phenomena and refer more to all sorts of local patchwork laws. Through such discussions, it has become clear that many local practices today labeled as "tradition" are in fact relatively recent developments. Examples of these include bride robbery and exorbitant bride price payments.

7. Markus Weilenmann et al, Vorprüfung zur Durchführung von Pilotprojek-ten in Ghana und der Elfenbeinküste. Pilot-programm: Förderung von Frauen in pluralistischen Rechtssystemen, Gutachten zuhanden der Deutschen (GTZ ed., 2000).

8. *Id.* at 8.

9. Kebele is the lowest administrative unit of Ethiopia and includes about 30 villages.

10. Juliane Osterhaus is a GTZ-planning officer for gender and law at the GTZ-headquarter in Eschborn, Germany. For many years she has closely monitored the HUNDEE processes; thanks to her engaged work I can present this interesting case here.

2. In a second step in this project, men and women were brought together to discuss their different perspectives in a common workshop. The goals were to find consensus on those norms and practices that were worth protecting within Oromo culture and to decide on those elements that should be abolished or revised. Finally, these workshops elaborated new propositions for a reform of local legal practices. And since the opportunity was institutionalized in Oromo culture, and suited local legal norms to the new living conditions by several rites and other formalized techniques, it was possible "to make" new folk law (*seera tumaa*). To date, the local communities have decided jointly:

    1. To forbid forced marriages of young girls and women,

    2. To forbid bride robbery,

    3. To forbid FGM,

    4. To lay down a minimum age of 16 years for marriages of young girls, and

    5. To lay down a maximum bride price sum.

V. Conclusions

Of course, a local NGO such as HUNDEE cannot initiate wide-reaching social change, even if GTZ is now starting to scale up the project. It is more important to observe at this stage that the HUNDEE case offers new windows of opportunity for those who are interested in learning how to work on legal reform with traditional authorities and other local opinion leaders. If, however, the aim is to roll out such an approach at the national level (as I proposed for Ghana), there is a need in the countryside to initiate a multitude of local "laboratories" and to establish a well-coordinated project structure that is able to respond to the various local needs as well as feed the new insights into a state structure such as a Law Reform Commission. Such a structure is complex, time consuming, and cost intensive. But NGOs as facilitators may be able to assist in reform on such a wide scale. The time has come for them to try.

◆ SECTION IV ◆
Legal Aid in Practice in Africa

THE SUPPLY SIDE: THE ROLE OF LAWYERS IN THE PROVISION OF LEGAL AID—SOME LESSONS FROM SOUTH AFRICA

David McQuoid-Mason[1]

INTRODUCTION

There are a wide variety of models for the delivery of legal aid services in developing countries. Most countries use the judicare system, whereby cases that qualify for state assistance are sent to private practitioners. Some countries use a clinic model, and a few use the services of salaried lawyers. South Africa has experimented with a number of models of legal aid delivery, some of which have been or are being considered for adoption in African countries such as Nigeria and Sierra Leone,[2] as well as countries in Eastern Europe[3] and Central Asia.[4] After examining the development of the legal aid system in South Africa, this paper will consider the South African experience with a view to ascertaining whether any of the models developed there are relevant to other African countries.

The Legal Aid Board and the Development of a State-Funded Legal Aid System: Historical Evolution

The Legal Aid Board was established by the Legal Aid Act in 1969 and began operating a national legal aid scheme in 1971. Modeled on the United Kingdom scheme, the purpose of the Board is "to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated

1. Professor of Clinical Law at the University of KwaZulu Natal, Durban, South Africa.

2. Sierra Leone has instituted a paralegal program similar to that run by the Community Law and Rural Development Centre in South Africa.

3. Lithuania has been influenced by the South African and Israeli public defender models. Moldova is contemplating replicating the use of paralegals, as is done in South Africa.

4. Mongolia has introduced two pilot public defender offices, in part influenced by the South African public defender model. The Kyrghyzstan Parliamentary Working Group on Legal Aid is presently considering which aspects of the South African program may be of use to it.

in the Constitution."[5] How the Board implements this is left to its discretion, and it has drawn up guidelines for the implementation of a national legal aid scheme in its *Legal Aid Guide*.[6] During its early years, under apartheid, the Board spent most of its very limited budget on civil matters involving mainly the minority white sector of the population. It used a judicare system of referrals to private lawyers as the method of delivery.

During the apartheid years, the Board's budget was gradually increased and the emphasis shifted from civil to criminal cases. Towards the end of the apartheid era, the Board largely spent its budget on criminal cases, primarily benefiting black South Africans. Despite these changes, the method of delivery remained the judicare model.

The introduction of a democratic constitution in South Africa in 1994, however, led to unprecedented demands on the services of the Board. The Board was flooded with criminal cases, and the judicare system started to break down. The Board became responsible for providing legal aid in criminal cases where accused persons could not afford lawyers and "a substantial injustice would . . . result" if they were not represented.[7] At the same time, expenditures under the judicare system began to escalate out of control. The Board was compelled to consider other models of delivery. It established pilot projects to consider different ways of using salaried public defenders, and eventually decided to move towards a public defender model that included both qualified lawyers in public defender offices and law interns in Board-funded law clinics. Since 1997, the Board has been moving towards using salaried public defenders as the main mode of delivery of legal aid services.

In 2001, the Board created justice centers, which incorporated public defenders with paralegals and legal aid officers. The number of justice centers increased from twenty-six in 2001 to thirty-six in 2003. In 2004, there were fifty-eight justice centers, twenty-seven satellite offices (operating on a circuit basis), and thirteen high court units. In addition to the justice centers, the Board entered into cooperation agreements with legal service providers such as public interest law firms and university law clinics, and ran its own impact litigation division. The university law clinics also provide support to clusters of paralegal advice offices located in communities outside the cities. Where there are no justice centers or other forms of legal aid available, certain employees of the Department of Justice have been designated to serve as legal aid officers at the relevant magistrate

5. Legal Aid Amendment Act (1996).
6. Legal Aid Board, Legal Aid Guide (2002).
7. S. Afr. Const. 1996, Art. 35, § 2, cl. C.

courts. Their duties include referring legal aid applicants who qualify for assistance to private lawyers.

Recent statistics show a major shift in legal aid work, from judicare to justice centers. For instance, in 2002–2003, the justice centers dealt with 53% of all new cases, while judicare accounted for 41%. The average cost of a justice center case was R803 (about $115) while the same for judicare was R1,867 (about $267). By 2003–2004, the number of justice center cases had increased to 78% of all new cases and those delivered through judicare had fallen to 16%. Average costs also rose, to R1,090 (about $168) for justice center cases and R2,152 (about $331) for judicare. Cooperative partnership agreements with NGOs covered the remaining 6% of cases in both years.

Today the Board has a head office in Johannesburg and four regional offices that manage clusters of justice centers in the different provinces. The total number of cases handled by the Board has risen from 214,480 in 2002–2003 to 300,139 in 2003–2004.

Independence

The South African experience reveals that it is crucial that the Legal Aid Board be seen as independent from the government. When the Legal Aid Board was first established during the apartheid era, it was said to be independent of the state, but the majority of its members were representatives of government departments. For many years, this created a credibility problem for the Board, as people viewed it as an arm of the government. At the end of the apartheid era, when it was necessary to legitimize the administration of justice in preparation for a democratic system of government, the membership of the Board was expanded to include other legal aid experts, including academics.

Membership

The Board has a unitary board of directors with eighteen non-executive, independent members. The chairperson and the chief executive have separate roles, and the chairperson is a non-executive, independent director. The Board presently consists of: (a) a judge of the high court appointed by the Minister of Justice; (b) five lawyers nominated by the bar council and respected law societies and appointed by the Minister; (c) the Director-General of Justice, the State Attorney, who is the government official who deals with civil cases for the state; (d) an expert in legal aid or some other relevant area appointed by the Minister; (e) three members nominated by all of the above and appointed by the Minister to assist in

furthering the aims of the Board; and (f) no more than six members appointed by the President in consultation with the Cabinet.[8]

Powers

The Board has wide powers, including the ability to: (a) obtain the services of legal practitioners; (b) purchase, hold, or otherwise acquire or alienate any movable property, or, in consultation with the Minister of Finance, any immovable property; (c) let any movable or immovable property; (d) fix conditions subject to which legal aid is rendered; and (e) to do all things necessary for or incidental to the attainment of its objectives. The Board sets out its conditions governing the provision of legal aid in the *Legal Aid Guide* which must be submitted to the Minister of Justice for tabling in Parliament for ratification. The Board has four to six regular meetings a year and confirms decisions made between meetings by way of directors' resolutions.

Accountability

Parliament votes on the Board's funds, but it may also obtain funds from elsewhere. The Board must provide the Minister of Justice with information about its activities and financial position as he may require from time to time. The Board must also submit an annual report, including a balance sheet and a statement of income and expenditures certified by the Auditor-General, to the Minister of Justice, which he must table in Parliament within fourteen days.

Expenditure

For the year 2002–2003, Parliament gave the Board R341 million (about $43 million), or $1.00 for each member of South Africa's 43 million people. The Justice Budget for the year was R4.6 billion, or 1.5% of the total Budget for the country of R303.2 billion. Thus legal aid accounted for 7.9% of the Justice Budget or 0.12% of the total Budget in 2002–2003. In 2003–2004, Parliament appropriated R367 million (about $52 million) or about $1.20 per head of population.

Primary Legal Aid

Detained or arrested persons are entitled to primary legal aid at state expense from the moment of their arrest or detention if a substantial injustice would otherwise result. Legal aid officers at the courts provide primary legal aid in criminal matters, then refer the applicants to Legal Aid Board lawyers. Police officers are

8. At present none of these are government officials.

supposed to advise arrested or detained persons of their rights and allow them to contact a lawyer—including a legal aid lawyer.

Thus, South Africa has used the following methods of legal aid delivery: (i) pro bono legal aid work; (ii) state-funded judicare or referral to private lawyers; (iii) state-funded public defenders; (iv) state-funded interns in rural law firms; (v) state-funded law clinics; (vi) state-funded justice centers; (vii) public interest law firms; (viii) university and law school legal aid clinics; and (ix) clusters of paralegal advice offices. The next section will discuss the application of these methods in South Africa as well as the lessons that can be drawn from the South African experience for other African countries.

Pro Bono Legal Aid Work

South Africa, as in the United Kingdom and other countries,[9] has a tradition of lawyers doing some *pro bono* or *pro amico* work.[10] However, this is not always mandatory, although the law societies in some African countries are making it compulsory for their members.[11] Pro bono legal aid work may be used as a supplement to state-funded legal aid services, but should not be regarded as a substitute. It is axiomatic that legal aid lawyers should receive payment for their services, and in democratic countries the duty to pay for such services rests with the state.[12]

In 1962, the South African government attempted to set up a national legal aid scheme based on pro bono work by attorneys and advocates. The Department of Justice negotiated with advocates and attorneys to provide free legal services to persons referred to them by local legal aid committees set up at every lower court.[13] However, the system never worked because it was not properly adver-

9. For instance, at the recent Association of the Bar of the City of New York Global Forum on Access to Justice Conference, New York, April 6–8, 2000, the London office of the British law firm Allen and Overy claimed to have completed 10,080 pro bono hours of work during 1999, amounting to over two million pounds worth of work. In the United States, the Legal Services Corporation (LSC) agencies had pro bono cases accepted by more than 44,000 attorneys during 1998, and provided the education and structure for 150,000 volunteer private attorneys to serve clients effectively. *See* Justice Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L. J. 83 (2000). In France, more than four hundred Paris-based lawyers and civil servants known as the Droits d'Urgence provide legal aid and advice at fifty-six monthly sessions operating in twenty centers. Jean-Luc Bedos, *Droits d'Urgence: Access of Citizens to Legal Information in France*, 24 Fordham Int'l L. J. 1 (2000).

10. G.W. Cook, *History of Legal Aid in South Africa*, *in* Legal Aid in South Africa 28, 28 (Univ. Natal ed., 1974).

11. For instance, the Cape Law Society in South Africa.

12. However, the American Convention on Human Rights, Art. 8, § 2(e), seems to contemplate legal aid services being provided pro bono where it refers to "counsel provided by the State, paid or not."

13. Cook, *supra* note 10, at 31–32.

tised, there was too much red tape, and probably also because members of the legal profession were not paid for their services.[14]

Lessons Learned

Pro bono schemes are cheap and, if supported by the legal profession, can encourage public service by legal practitioners. However, pro bono clients may not receive the same level of service as paying clients, and many lawyers are reluctant to take on pro bono cases. Even if pro bono work is mandatory for the profession, some lawyers may "buy out" the time they would be required to devote to it, as sometimes happens in the United States.[15] Experience has shown that the chances of mounting a successful comprehensive legal aid scheme are minimal unless lawyers are properly paid to deliver legal services.

State-Funded Judicare or Referral to Private Lawyers

Referrals to private lawyers probably provide the most common form of legal aid in African countries. This method has been used since the inception of the United Kingdom legal aid scheme and was used for many years in South Africa. In this method, the state pays private lawyers for their services at fixed tariffs. They are paid fixed rates for certain aspects of criminal appeals and a fixed daily rate for criminal trials. In special circumstances, the amount can be increased up to a set ceiling. The state also pays a fixed fee for bail hearings, adjournments, and where the hearing lasts less than four hours. Fixed fees are paid with respect to certain procedures in civil cases as well.

In South Africa, the introduction of the new Constitution[16] had a devastating effect on the ability of the Legal Aid Board to continue using the judicare model. The huge increase in the number of criminal defense attorneys required meant that the Board had to revise its strategies concerning the delivery of legal aid services.

Between 1971 and 1998, a total of 997,707 legal aid cases were referred to attorneys, the vast majority involving criminal matters. Of these, 559,238 were referred after 1994 and the advent of the new Constitution. This means that the number of legal aid applications granted between 1994 and 1998 constituted 56% of all legal aid applications handled by the Board.[17] The overall increase from 1989 to 1999 was 709%.[18]

14. P. H. Gross, Legal Aid and its Management 176–77 (1976).

15. *See* Johnson, *supra* note 9.

16. S. Afr. Const. 1996, Art. 35.

17. Legal Aid Board, Legotla: Overview of the Board and its Activities 8 (unpublished report, on file with author) (November 1998).

18. *Id*.

The exponential growth in the number of judicare cases with respect to criminal matters eventually led to the abandonment of the judicare model as the Legal Aid Board's main method of legal aid service delivery.[19] Studies have shown that the judicare model is considerably more expensive than the salaried lawyer scheme. Accordingly, the South African Legal Aid Board introduced a pilot public defender program in 1990[20] and a pilot Board-funded law clinic scheme in 1994.

Today, private lawyers are used for legal aid in South Africa only if the salaried Legal Aid Board public defenders cannot take a case, there is a conflict of interest regarding the legal aid lawyers, or there is no other legal aid service in the area. However, the Legal Aid Board's monitoring of the quality of service is still in its infancy and, in most cases, relies upon the disciplinary procedures of the bar council and law societies regarding incompetent service by private lawyers.

Lessons Learned

In South Africa, the judicare system worked when the number of cases was comparatively few and the Legal Aid Board had the resources to handle them administratively. However, there must be adequate staffing and administrative structures to support the system, proper accounting systems to deal with claims for fees and disbursements expeditiously, and budget constraints that keep pace with demand. Once a centralized staffing establishment can no longer keep pace with the demands of practitioners for payment within a reasonable period of time, the referral system breaks down.[21] As a result of pilot projects testing the cost of public defenders and law clinic public defender interns, the Board decided to opt for a predominantly salaried lawyer model involving justice centers, with the use

19. During the period from 1997–98, private attorneys were paid for completing 105,732 cases, of which 87,469 (83%) involved criminal cases and 17% civil matters. The latter involved 14,156 divorce cases (13%), 3,617 (3.5%) other civil cases and 490 (0.5%) labor cases. The average cost per case finalized by the Legal Aid Board during the same period was R864 (about $108) a case for ordinary criminal matters, R1,707 (about $213) for Constitutional criminal matters, and R1,498 (about $187) a case for civil matters under the judicare system. The average cost of all judicare cases was R1,423 (about $178) *Id.* at 8.

20. Legal Aid Board, Annual Report 1991/92 32–3 (1993).

21. David McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa,* 24 Fordham Int'l L .J. 111, 121 (2000) [hereinafter McQuoid-Mason, *Civil Legal Aid*]. New computer systems were installed at the Legal Aid Board head office, but on a daily basis the incoming new accounts exceeded the number of old accounts that the staff was physically able to process. This resulted in long delays in payment, sometimes stretching into years, and loss of confidence in the system by practitioners who were no longer prepared to accept legal aid work. In some instances lawyers sued the Board for outstanding fees. The need to build up a huge contingency fund to cover amounts owed by the Board for matters that had not been completed compounded the problem and was criticized by the Auditor-General. In order to effect savings, the Board capped fees for criminal cases and this alienated the legal profession. *Id.* at 121–22.

of judicare as a subsidiary method of delivery in areas where there are no justice centers or where they cannot handle cases for logistical or ethical reasons.[22]

The United Kingdom and South African experience shows that in order to retain judicare as part of the legal aid system, it is best to use a fixed contract approach capping the annual fees to be paid to participating partners. This has been done with the recent agreements that the South African Legal Aid Board entered into with public interest law firms and university law clinics. In most African countries, judicare will likely remain the preferred method of delivering legal aid services, particularly in the small towns and villages, but there may be room to try a salaried lawyer approach in the larger towns.[23]

State-Funded Public Defenders

Public defenders are full-time salaried lawyers employed by the Legal Aid Board and on its conditions of service, not those of the Public Service Commission. Although public defenders are full-time salaried lawyers, they are not public servants. They consist of legal interns in the district courts and qualified lawyers in the regional and high courts, and are attached to the justice centers throughout the country.

The public defenders deal primarily with criminal cases where accused persons have a constitutional right to legal representation in trials and appeals. Such instances occur where, irrespective of the crime, "a substantial injustice would . . . result" if the accused person was not provided with a lawyer. Almost 88% of the work of the public defenders consists of criminal work.

The fact that public defenders are employed by the Legal Aid Board, an independent statutory body with its own board of independent, non-executive members, assures the independence of public defenders. However, public defenders remain members of their bar council or law society, and the Legal Aid Board has only recently taken steps to ensure proper quality control of public defenders instead of simply referring unscrupulous lawyers to the appropriate bar council or law society for discipline.

Outside of South Africa and Nigeria, there are probably very few public defender or state-funded salaried lawyer programs in African countries. In 1990, after widespread discussions with a variety of lawyer associations, the South African Legal Aid Board persuaded the Minister of Justice to authorize a state-funded

22. *Id.*

23. This is done, for instance, in Lithuania and Mongolia, where public defender offices operate in the main cities.

public defender system and to appropriate R2.5 million (about $625,000) for this purpose. This enabled the Board to employ legally qualified persons to represent the indigent accused. Initially, a pilot state-funded public defender office in Johannesburg was approved for two years.[24] Estimates that each public defender would be able to deal with approximately 200 district court criminal cases a year proved to be correct.[25]

During an extension of the public defender pilot project in 1995, the estimated average cost of a judicare criminal case was R822 (about $103), the average cost of a public defender criminal case R555 (about $69),[26] and the average cost of a state-funded law clinic case even less. The Legal Aid Board considered the pilot public defender project a success and established a permanent public defender office.[27] Since then, the Board's justice centers have included public defenders, together with law intern public defenders, as an integral component of its work.

Lessons Learned

Public defender models are considerably cheaper than the judicare system.[28] Countries that rely almost *exclusively* on the judicare model and are limited by budget constraints should seriously consider introducing partial public defender schemes in areas where the courts process substantial numbers of criminal cases. A full-fledged network of public defender offices is likely to be too expensive for small and developing countries, but the South African experience has shown that justice centers that combine public defenders with intern public defenders can be established for a modest *per capita* expenditure on legal aid by the state.[29] Some African countries could probably establish justice centers incorporating public defenders or intern public defenders in the larger cities and towns, supplementing them with judicare in other areas.

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24. *Legal Aid Board*, *supra* note 20.

25. David McQuoid-Mason, *Public Defenders and Alternative Service*, 4 S. Afr. Crim. J. 267, 270 (1991). By November 1992, more than 2,200 cases had been dealt with by the ten public defenders in Johannesburg, with a 57% success rate on not-guilty pleas, and a 90% success rate for bail applications. The average cost per case during 1992 compared very favorably with the costs allowed to private practitioners by the Legal Aid Board. During 1993–94, the office provided legal representation for 2,808 accused persons, while during 1995–96 it represented 3,794. Legal Aid Board, Annual Report 1995/96 at 27 (1997).

26. Legal Aid Board, *supra,* at 28.

27. In 1996–97, the public defender offices in Johannesburg and Soweto employed thirty-one staff members, who approved 3,515 applications for legal aid and finalized 3,386 court cases. The offices handled twenty-three appeals and withdrew from 1,069 cases. Legal Aid Board, Annual Report 1996/97 at 23 (1999).

28. It has been suggested that this may not be the case in the United Kingdom and Canada, but this seems to be against the trend in other countries.

29. Assuming that expenditure *per capita* of just over $1 per annum can be regarded as modest.

State-Funded Legal Aid Interns in Rural Law Firms

Partnerships between the national legal aid scheme and private law firms are a useful way of extending legal aid to rural areas. South Africa piloted this model, which may be of interest to other African countries with large rural populations. In 1995, the South African Legal Aid Board partnered with Lawyers for Human Rights to establish a pilot project in which the Board gave private attorneys in selected rural towns funding to employ candidate attorney interns to do legal aid work. The participating law firms received assistance for the payment of the salary of the candidate attorneys. Lawyers for Human Rights identified suitable attorneys and monitored the progress of the project. Each of the candidate attorneys handled at least ten new legal aid matters a month for the Board and performed community service one day a week.[30] The project proved to be highly successful. Not only did it expand legal aid services in rural areas, but it also enabled formerly disadvantaged persons to be employed in the legal profession in the areas where they lived.[31]

Lessons Learned

The legal aid internship scheme involving partnerships between the state-funded legal aid body and private practitioners to employ young lawyers is very cost-effective. It is much cheaper to supplement the salaries of candidate attorneys in rural law firms than to establish branch offices of the national legal aid scheme in areas where there is a limited demand for legal aid services.[32] Recent law graduates who are required to serve an apprenticeship with qualified lawyers can provide valuable legal aid services to the African rural populations.

State-Funded Law Clinics

In African countries that require university law graduates to undertake a period of apprenticeship or vocational training, law graduates provide a valuable resource to assist with state-funded legal aid schemes. In South Africa, state-funded law clinics employ law graduate interns as public defenders in the district criminal courts. The clinics have proven to be an efficient and cost-effective method of

30. During 1996–97, two projects involving eight candidate attorneys were in operation. Legal Aid Board, *supra* note 27, at 21. The work of the legal aid interns mainly involves criminal cases, but they also undertake civil cases such as divorce. For instance, during 1997–98, the interns in four rural law firms completed 400 criminal cases and 73 civil cases. Calculations by author based on statistics in Legal Aid Board, Legotla: Statistics on the Work Done by way of Salaried Staff Models 7–7 (Nov. 1998).

31. Legal Aid Board *supra* note 27, at 24.

32. *Id.* at 21.

delivering services for the Legal Aid Board.[33] They also provide practical training and access to the legal profession for aspiring young lawyers. There may be scope for similar programs in other African countries, such as Nigeria.[34]

In 1993, the South African Attorneys Act[35] was amended to allow candidate attorneys with the necessary legal qualifications to obtain practical experience by undertaking community service rather than serving articles in an attorney's office.[36] Candidate attorneys may perform community service at law clinics accredited by provincial law societies, including clinics funded by the Legal Aid Board. The clinics are required to employ a principal (an attorney with sufficient practical experience) to supervise law graduates in the community service program. The candidate attorneys appear in the district courts and the principals in the regional and high courts. Interns who have been articled[37] for more than a year may also appear in the regional courts. Candidate attorney interns perform community service at a maximum ratio of ten interns to one supervising attorney.[38]

33. The Board calculated that the average cost of the 24,513 criminal and 12,997 civil cases handled by the law clinics during the pilot period from July 1, 1994 to December 31, 1996 was R433 (about $108). This included the costs for clinics that had only just been established. Ultimately, the cost per case was estimated at much less for the established clinics: about R350 or $87.50 per case. Legal Aid, Legal Aid Monthly Report (Feb. 4, 1997). This was less than half of the average cost of R976 (about $244) per case charged under the judicare system during the same period, and was also cheaper than the pure public defender model. During the period 1997–98, twenty law clinics completed 33,951 cases, of which 20,042 (59%) were criminal, and 13,909 (41%) civil. (Calculations by present writer based on statistics in Legal Aid Board, Legotla: Delivery of Legal Aid by way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys as of October 30, 1998 at 1–5 (Nov. 1998)). This figure compared favorably with the 18,263 civil cases done under the judicare scheme for the same period at probably twice the cost. *Id*.

34. For instance, it has been suggested that Nigerian law graduates in the National Youth Service Corps program could be seconded to the Legal Aid Council to assist as public defenders. David McQuoid-Mason, *Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council*, 47 J. Afr. L. 107–16 (2003).

35. Attorneys' Act 53 (1979).

36. Attorneys' Act 115 s. 2 (1993).

37. That is, newly graduated lawyers who have worked under the supervision of a licensed attorney.

38. Legal Aid Board, *supra* note 27, at 20. The maximum ratio of articled clerks to supervising attorneys in private law firms is three clerks to one attorney. Attorneys Act, *supra* note 35, at s 3(3). The present Chief Justice, Arthur Chaskalson, has suggested that compulsory community service for law graduates could help solve the problem of delivery of legal aid to poor sections of the community, particularly in criminal cases. Arthur Chaskalson, *Legal Interns Could Solve Legal Aid Problems,* De Rebus, Dec. 1997, at 782. The present writer previously made a similar suggestion as an alternative to national service when conscription still applied in the country. David McQuoid-Mason, *Public Defenders and Alternative Service*, 4 S. Afr. Crim. J. 267 (1991). The suggestion was greeted with some hostility in an editorial in the official journal of the attorneys' profession, which warned that representation by interns and paralegals "could be of such inferior quality that, in the worst cases, it would not satisfy the constitutional right to representation." Editorial*, Legal Aid Again: The Profession Should Not be Sidelined*, De Rebus, Apr. 1998, at 5. It went on to say: "The legal aid system should not be used as an avenue to allow disadvantaged students to have access to the profession: that is not its purpose." *Id.* The question of whether South African law graduates should be required to undertake compulsory community service (as is the case for all university graduates in Nigeria) was raised at the 1998 National Legal Aid Forum. The concept was discussed by a working commission on internship and training at the National Legal Aid Forum in 1998, which recommended that: (a) community

In 1994 the Legal Aid Board set up a pilot project involving partnerships with five university law clinics. The project was expanded to twenty-two university and other law clinics, and the Board allocated up to R430,000 ($107,000) per clinic to enable them to employ a supervising attorney and up to ten community service interns each.[39] Most of the state-funded law clinics have since been removed from the universities and incorporated into the justice centers.

Lessons Learned

The state-funded law intern public defender program in South Africa provides extended legal services at a moderate cost to needy members of the public and develops expertise, practical experience, and career opportunities for aspiring young lawyers. It is also a useful model for ensuring the gainful employment of young law graduates who are required to render community service to their country. Provided the interns receive proper training and supervision, their standard of service in the lower courts can match those of qualified attorneys or privately employed candidate attorneys because of their specialized knowledge in conducting criminal cases.

State-Funded Justice Centers

The most effective legal aid service models provide consumers with a "one stop shop" instead of sending them from place to place to obtain assistance. In South Africa, "justice centers" provide just such a service.

service should be introduced to improve the administration of justice, primarily to provide legal aid services; (b) the question of whether it should be compulsory (like medical internships) or voluntary should be further investigated; (c) community service should be primarily in the form of work in law clinics, public defender's offices and public interest law firms; (d) community service should be for not less than one year after graduation; (e) an independent body should be set up to control the enrollment and training of community service interns; (f) community service interns should receive proper training before providing services to the public; (g) the question of whether community service should replace all other forms of internship should be investigated; and (h) a pilot project on a voluntary basis should be introduced. David McQuoid-Mason, *National Legal Aid Forum, Kempton Park, Jan. 15–17 1998: Working Commission Recommendations,* 12 S. Afr. Crim. J. 48, 54–57 (1999). Since then, the Ministry of Justice has been re-examining the entry requirements for the legal profession, including the issue of community service. *Cf.* Department of Justice Legal Policy Unit Transformation of the Legal Profession 8 (unpublished manuscript, on file with author) (1999).

39. Where the nature of the work demanded it, some clinics employed eight interns and two qualified professional assistants instead of ten interns, so that the professional assistants could appear in the regional (senior) magistrate's courts. Legal Aid Board, *supra* note 25, at 20.

South African justice centers are similar to legal aid specialist law firms that have developed elsewhere,[40] except that they are fully state-funded and staffed by salaried lawyers and administrative staff in the employ of the Legal Aid Board. The centers bring together legal aid officers, public defenders, law clinic intern public defenders, professional assistants, supervising attorneys, paralegals, administrative assistants, and administrative clerks under one roof. Public defenders deal with criminal cases in the regional courts and high courts.[41] Law clinic interns do both civil and criminal work in the district courts.[42] Professional assistants appear in the regional courts. Supervising attorneys appear in the high courts and the regional courts. Paralegals assist with the initial screening of clients, while administrative assistants and clerks provide the necessary administrative back-up. Private lawyers are only used if the justice center cannot handle a case.[43]

Lessons Learned

The justice centers provide a full range of legal and paralegal services to indigent clients. They work well in the larger cities and towns, but not in the rural areas where there is insufficient work to justify their expense. In such circumstances, other models, such as cooperative agreements between the Legal Aid Board and rural law firms, public interest law firms, independent law clinics, or paralegal advice offices, may be more feasible.

In addition, the South African experience shows that justice centers are not as cheap to run as public defender and intern public defender law clinics that have very low overheads because they focus primarily on criminal work. However, they are still significantly cheaper than the judicare system after payment of the initial start-up costs.[44]

Public Interest Law Firms

Public interest law firms can play a valuable role in the delivery of civil legal aid services to indigent people.[45] They exist in many developing countries in the

40. *See generally* Symposium, *Partnerships Across Borders: A Global Forum on Access to Justic*e, 24 Fordham Int'l L. J. 1 (2000).

41. Regional courts can impose fines of up to R300,000 (about $46,000) and imprisonment of up to twenty-five years. Magistrates' Courts Act 32 (1944).

42. District courts can impose fines of up to R100,000 (about $15,333) and imprisonment of up to three years. *Id.*

43. *See* McQuoid-Mason, *Civil Legal Aid,* at 126.

44. *Id.* at 126, 127. For instance, the South African Legal Aid Board has calculated that during 2002, after establishing twenty-six justice centers it was able to save R114.6 million (about $15 million) or about a third of its budget compared with the cost of judicare. Legal Aid Board, Annual Report 2002 at 10 (2003).

45. *See generally* National Association for the Advancement of Colored People Legal Defense Fund, Public Interest Law Around the World (1992).

Americas,[46] Asia,[47] and Africa.[48] In Africa, the Ditshwanelo Centre in Botswana,[49] the Legal Assistance Centre in Namibia,[50] and the Legal Resources Foundation in Zimbabwe have played valuable roles in providing access to justice in their respective countries.

The best example of a private specialist law firm in South Africa is the Legal Resources Centre (LRC), the first site of which was established in Johannesburg in 1979.[51] In its twenty-one years of existence, the LRC has assisted millions of disadvantaged South Africans, either as individuals or communities who share a common problem. During the apartheid era, it used litigation and the threat of litigation to assert the rights of thousands of disadvantaged South Africans in several areas of the law. In addition, the LRC has worked with numerous advice centers staffed by paralegals.[52] Since the 1994 elections, the LRC has reassessed its position and now focuses on constitutional rights as well as land, housing, and development.[53] The LRC charges no fees and receives no state funds; it is financed by the Legal Resources Trust, which receives money from foreign and local donors. Recently the LRC and the Association of University Legal Aid Institutions have taken the lead in encouraging the Legal Aid Board to enter into cooperative agreements with independently-funded organizations to extend legal services to previously marginalized parts of the country.[54]

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46. *See* Hugo Fruhling, *From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America, in* Many Roads to Justice 55 (Mary McClymont & Stephen Golub eds., 2000).

47. *See e.g.,* Stephen Golub, *From the Village to the University: Legal Activism in Bangladesh, in* Many Roads to Justice 127; Stephen Golub, *Participatory Justice in the Philippines,* in Many Roads to Justice 197.

48. *See* Stephen Golub, *Battling Apartheid, Building a New South Africa, in* Many Roads to Justice 19 (Mary McClymont & Stephen Golub eds., 2000).

49. Information about Ditshwanelo can be found at www.ditshwanelo.org.bw.

50. *See Legal Assistance Centre Turns 15 This Week*, Namibian Economist, *available at* www.economist.com.na/2003/4jul/07-04-09.htm.

51. At present there are six centers, located in Johannesburg, Cape Town, Port Elizabeth, Grahamstown, Durban, and Pretoria. Legal Resources Centre, 1996 Annual Report at 25.

52. *Id* at 9.

53. The constitutional rights program deals with access to justice, gender equality, children's rights, the enforcement of socioeconomic rights such as health care, education, housing and water, and a constitutional reform program. The land, housing and development program includes rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform and urban and rural land development. Legal Resources Centre, 1998 Annual Report at 4; *c.f.* McQuoid-Mason, *Civil Legal Aid*, at 128. An important part of the LRC program is the training of paralegals and lawyers from disadvantaged communities. It employs twelve to fifteen young law graduates each year and trains interns from elsewhere in Africa and the developing world. Legal Resources Centre, 1998 Annual Report at 7.

54. *See generally* McQuoid-Mason, *Civil Legal Aid*, at 127–28.

Lessons Learned

Public interest law bodies provide a valuable adjunct to legal aid services for the poor and marginalized. Successful public interest law firms have highly professional staff and usually receive strong foreign and local donor-based financial support. They also receive support from leading lawyers in their countries and the judiciary. In addition, they enjoy a high national and international reputation. Strong public interest law bodies survive because they creatively respond to the changing dynamics of their societies.

University and Law School Legal Aid Clinics

Several African countries such as South Africa, Zimbabwe, Botswana, Namibia, Lesotho, Mozambique, Kenya, Sierra Leone, and Nigeria have university and law school legal aid clinics. Like state-funded law clinics, university legal aid clinics supply free legal advice to indigent persons, but they are independently funded and primarily staffed by law students under the supervision of qualified legal practitioners. Most law clinic models either require law students to work in a university law clinic or assign the students to an outside partnership organization where they can provide legal services under supervision.[55]

The concept of independently-funded university legal aid clinics developed in the United States in the late 1960s, when the Council on Legal Education for Professional Responsibility (CLEPR) was established with financial support from the Ford Foundation.[56] University legal aid clinics have existed in Commonwealth countries such as Canada, the United Kingdom, and South Africa since the early 1970s.[57]

Most of the twenty-one universities in South Africa operate campus law clinics independent of the state-funded law clinics,[58] and employ directors who are

55. David McQuoid-Mason, *The Organisation, Administration and Funding of Legal Aid Clinics in South Africa*, 1 NULSR 189, 193 (1986).

56. William Pincus, *Legal Clinics in the Law Schools, in* Legal Aid in South Africa 123 (Univ. Natal ed., 1974).

57. The first university legal aid clinic in South Africa was established by law students at the University of Cape Town in 1972. David McQuoid-Mason, An Outline of Legal Aid in South Africa 139–140 (1981). The first faculty-initiated law clinics were established at the Universities of the Witwatersrand and Natal (Durban) in August 1973. *Id.* at 148, 153. The Ford Foundation funded a legal aid conference in South Africa in 1973, which was the catalyst for the law clinic movement in the region. At the time of the conference, the only clinics in the country were at the Universities of Cape Town and the Witwatersrand, but within two years five others had been established. *Id.* at 139.

58. David McQuoid-Mason, *The Role of Legal Aid Clinics in Assisting Victims of Crime*, *in* Victimization: Nature and Trends 559, 559 n. 1 (W. J. Schurink et al. eds., 1992).

practicing attorneys or advocates. Where the director is a practicing advocate or attorney, the law clinic may seek accreditation from the local law society, and, if granted, candidate attorneys may be employed and trained at these institutions with a view to admission. Outside donors provide funding for law clinics. The Attorneys Fidelity Fund[59] subsidizes accredited legal aid clinics by providing funds to enable them to employ a practitioner to supervise the clinic.[60] More recently, the Association of University Legal Aid Institutions (AULAI) has set up the AULAI Trust with an endowment from the Ford Foundation to strengthen the funding of the clinics.[61]

In South Africa, law clinics provide free legal services to the needy and use the Legal Aid Board's means test as a flexible guideline. Clinic staff may represent clients in the lower and high courts in both criminal and civil matters.[62] Law students may not represent clients in court.[63] Approximately 3,000 law students graduate annually from South African law schools. If each final year law student worked on ten cases a year, mainly during the summer and winter vacations, this could provide legal assistance to 30,000 people.[64]

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59. The Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorneys' trust accounts. It is used to compensate members of the public who have suffered loss as result of fraud by practicing attorneys, but also makes money available for legal education.

60. David McQuoid-Mason, *The Organisation, Administration and Funding of Legal Aid Clinics in South Africa*, 1 NULSR 189, 193 (1986).

61. Stephen Golub, *Battling Apartheid, Building a New South Africa, in* Many Roads to Justice 19 (Mary McClymont & Stephen Golub eds., 2000).

62. Since 1994, the South African legal aid clinics have continued to deal with poverty law problems, some of which—such as housing, the quality of police services and social security—have continued as a result of non-delivery by the new government. S. Afr. Const. 1996; Act 200 of 1993 s. 236(2). Several clinics have begun to focus more on constitutional issues. At the University of Natal, Durban, for instance, the law clinic specializes in problems concerning women and children, administrative justice, land restitution and HIV/AIDS. The majority of clinics still engage in general practice. Fewer restrictions are being imposed by the law societies and candidate attorneys may do their mandatory internships as community service in accredited law clinics. As has been previously mentioned, the Attorneys Act 53 (1979) s. 2 (1A) (b) was amended by Section 2 of Act 115 (1993) to allow aspiring attorneys to "perform community service approved by the society concerned"—provided that the person who engages them is a practicing attorney, *inter alia*, "in the full-time employment of a law clinic, and if the council of the province in which that law clinic is operated, certifies that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic." Attorney's Act (1993) s. 3(1)(f).

63. Although student practice rules were drafted in 1985 to enable final year law students attached to law clinics to appear in criminal cases for indigent accused in the district courts these were never implemented. The Student Practice Rules for South Africa were based on the American Bar Association Model Rules for Student Practice. Council for Legal Education and Professional Responsibility, State Rules Permitting the Student Practice of Law: Comparisons and Comments 43 (1973) and submitted to the Association of Law Societies of South Africa in April 1985 for onward transmission to the then Minister of Justice. Although the rules were approved by all branches of the practicing profession and the law schools, they appear to have been blocked by bureaucrats in the Department of Justice. McQuoid-Mason, *Civil Legal Aid*, at 129 n. 82.

64. Minister of Justice and Department of Justice, Enhancing Access to Justice through Legal Aid: Position Paper for National Legal Aid Forum 25 (unpublished paper, on file with author).

Lessons Learned

More than twenty-five years ago, the role that university law clinics could play in developing African countries was described as follows: "The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility in the near future for legal services becoming widely available to the poor."[65] Indeed, in Botswana, the University of Botswana Legal Aid Clinic has been one of the few agencies providing legal aid services to indigent people for years. Students employed in legal aid clinics can play a valuable role in providing legal aid services in small and developing African countries. Law clinics also can play a useful role in assisting litigants to compel the government to provide constitutional rights, including the right to counsel.

The funding of law clinics tends to be uncertain, as such clinics generally rely on donor funding. However, the national legal aid structures and the university law clinics can enter into partnership agreements. In South Africa, for instance, the Legal Aid Board has entered into cooperation agreements with university legal aid clinics in order to compensate them for providing back-up legal services to clusters of paralegal advice offices. Not only will this improve the spread of legal aid services in a country, but additional funding from the state will also help to make the law clinics more financially viable.

Paralegal Advice Offices

Paralegal advice offices exist in many African countries. Some paralegals are paid professionals, while others are unpaid volunteers.[66] Some work closely with lawyers while others act completely independently. In most cases, paralegals are the first point of legal contact for the communities they serve. As a result, they

65. J. Reyntjens, *in* Perspectives on Legal Aid 36 (Zemans ed., 1979). The statement is still true today. The value of using properly supervised law students to deliver legal services has also been recognized as fulfilling the requirement of a constitutional right to counsel by the United States Supreme Court: "Law students as well as practicing attorneys may provide an important source of legal representation for the indigent." Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (Brennan, J., concurring). *See also* McQuoid-Mason, *Civil Legal Aid*, at 131.

66. *See* Stephen Golub, *Nonlawyers as Legal Resources for Their Communities*, *in* Many Roads to Justice 297, 301–306 (Mary McClymont & Stephen Golub eds., 2000).

provide a valuable link between their communities and the legal aid service providers.

In South Africa, a variety of organizations are involved in paralegal advice work. Many of these organizations educate the public about their legal rights in addition to training paralegals to give advice.[67] Some organizations concentrate on urban areas, while others focus on rural areas.[68] The organizations provide services at a variety of levels, ranging from advice only to full legal aid services. Organizations such as the Community Law and Rural Development Centre (CLRDC) have helped rural communities establish committees to select certain community residents for training as paralegals.[69] A variation of the South African CLRDC program has been established for rural areas in Sierra Leone and may prove to be a useful model for other African countries with comparatively large rural populations.[70]

67. Training of paralegal staff varies, from formal training offered by Lawyers for Human Rights, and the Community Law and Rural Development Centre in Durban, leading to diploma courses, to mainly practical experience obtained "on the job." Some of the more sophisticated advice offices are linked to organizations such as the Legal Resources Centre, Lawyers for Human Rights, and the Community Law and Rural Development Centre, Durban; others rely on free services provided by legal practitioners in private practice. Most advice offices offer mainly legal advice which very often resolves the problem. Many of them have built up expertise in particular areas, e.g., pensions, unemployment insurance, unfair dismissals, etc. Where the advice office cannot solve the problem, the party concerned is usually directed to the Legal Aid Board's offices or to a sympathetic law firm. Paralegals are also being included in the Board's new justice centers and cooperative agreements. A National Para-Legal Institute (NPLI) has been set up to assist the more than 350 paralegal advice offices in the country with training and fund-raising. It is also investigating paralegal accreditation certification procedures. The NPLI works closely with the Association of University Legal Aid Institutions (AULAI) by providing clusters of advice offices that are supported by the law clinics at the different universities. *See generally* McQuoid-Mason, *Civil Legal Aid,* at 131–33.

68. Paralegal advice offices are particularly useful in rural areas. A good example of a rural paralegal advice office is the Community Law and Rural Development Centre (CLRDC) in Durban, which was established at the University of Natal in 1989 to set up a network of rural paralegal advice offices and to do law-related education. It served a rural population of about one million living in the provinces of KwaZulu-Natal and the Eastern Cape and promoted the attainment and maintenance of democracy through development of a rights-based culture in which all levels of government were expected to honor their obligations and be accountable to their citizens. *See* McQuoid-Mason, *Civil Legal Aid,* at 134. At one stage, the CLRDC supervised fifty-six rural paralegal advice offices in communities that were governed by customary law and ruled by tribal authorities; these authorities had no formal training, and they administered communities and issues of traditional customary law in a manner that often conflicted with "Western law" and the new Constitution. Community Law and Rural Development Centre, Annual Report for the Financial Year January 1 to December 31, 2000 at 10 (2001).

69. The paralegals underwent two full-time two-month programs on law-related topics, including customary law and human rights, after which they did one year of practical training in their communities under the supervision of the CLRDC staff. Community Law and Rural Development Centre, Annual Report for the Financial Year January 1 to December 31, 2000 at 10 (2001). At the end of the course the successful candidates were issued with a diploma by the Faculty of Law, University of Natal, Durban. Other paralegal university certificate courses are run at Rhodes University, Johannesburg University, and Potchefstroom University. The CLRDC also provided continuing legal education for paralegals who had already completed the program. Apart from giving advice, the paralegals were required to conduct law-related workshops in their communities. In 2000, paralegals conducted 2,160 such workshops. *Id.* at 24.

70. Paul James-Allen, *Accessing Justice in Rural Sierra Leone—A Civil Society Response*, *in* Justice Initiatives 57–59 (2004).

In recent years, university law clinics, in partnership with the Legal Aid Board and through the justice centers, have provided legal support to the clusters of paralegal advice offices.

Lessons Learned

Paralegal advice offices can be used to complement conventional lawyer-based legal aid schemes. Since paralegals are often the first point of contact for people who need legal aid, they can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services. Paralegals should receive compensation and training for their services. In order to achieve this, paralegal offices need to be adequately funded. This can be accomplished in part by integrating them into the national legal aid scheme.[71]

CONCLUSIONS

The following conclusions can be drawn concerning suitable mechanisms for the delivery of legal aid services in the light of the South African experience:

1. In most developing African countries, the judicare approach, supplemented by pro bono work, is used to deliver legal aid services. However, in the larger cities and towns where a significant amount of state-funded criminal defense work is required, it may be more cost-effective to employ salaried lawyers as public defenders.
2. A holistic approach which uses a combination of methods involving both judicare and salaried lawyers is probably the most effective way of delivering legal aid services. Ideally, countries should try to provide legal aid litigants with a "one stop shop," such as the justice center, but this may not always be feasible.
3. Comparatively sophisticated legal aid systems, with a modest *per capita* expenditure on legal aid by the state, can be developed by employing law graduates in state-funded law clinics and rural law firms.
4. Given the shortage of legal aid lawyers and financial resources in developing countries, law students should be seen as a potentially

71. *See* McQuoid-Mason, *Civil Legal Aid,* at 135–36. The South African Legal Aid Board has recognized the important role played by paralegals by incorporating cluster arrangements involving advice offices and university law clinics into its cooperation agreements with the law clinics. Donor funding may be available for such initiatives. The South African initiatives began with funding by the International Commission of Jurists (Swedish Section) for clinics that undertook to support paralegal advice offices through the Association of University Legal Aid Institutions Trust (AULAI Trust).

valuable and inexpensive resource available to assist national legal aid schemes.

5. National legal aid structures should work closely with paralegal advice offices as they are often the first point of contact for people who need legal advice.

6. Where feasible and appropriate, national legal aid bodies should enter into cooperation agreements with university law clinics, public interest law firms, and private law firms to increase public access to legal aid and to provide legal support to paralegal offices.

A DEMAND-SIDE PERSPECTIVE ON LEGAL AID: WHAT SERVICES DO PEOPLE NEED?

THE NIGERIAN SITUATION

Adedokun A. Adeyemi[1]

INTRODUCTION

Equal access to law for rich and poor alike is essential to the maintenance of the rule of law. It is, therefore, critical to provide adequate legal advice and representation to all those threatened as to their life, property, or reputation who are not able to pay for such services. The primary obligation rests on the legal profession to use its best efforts to ensure that adequate legal advice and representation are provided, but the state and the community must assist the legal profession in carrying out this responsibility.[2]

The Lilongwe Declaration[3] not only recognizes financial barriers as a central impediment to access to justice, but obliges the legal profession, the state, and the community to ensure that the citizen's rights to due process and fair hearing are not dependent upon the depth of his or her pockets. Consequently, legal aid has universally come to bridge the gap between access to justice and indigence. But

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2. Resolution of the International Commission of Jurists Conference on the Rule of Law in a Free Society, (New Delhi, India, 1959).

3. *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, *in* Access to Justice in Africa and Beyond: Making the Rule of Law a Reality 39 (2007).

it has long been recognized that legal aid, if allowed to rest on only the traditional government-provided scheme, will never be able to provide sufficient access to justice for the poor.[4] Hence, many jurisdictions have opted to experiment with other types of schemes for the delivery of legal aid or assistance to indigent citizens. The fact that the bulk of the system's clientele are the poorer and the lower class members of society underscores the need for such delivery models in criminal justice administration.

In Nigeria, the right to legal aid for an indigent citizen whose rights have been infringed has itself been elevated to the level of a constitutional right. The Nigerian Constitution provides that:

> (4) The National Assembly—
>
> (b) shall make provisions—
>
> (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and;
>
> (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.[5]

This constitutional provision has introduced a rather unique dimension to the concept of legal aid: rather than seeking to assign or provide a lawyer for an accused person, it seeks to provide him with financial resources with which he can exercise his right to counsel. The Nigerian Supreme Court, in this regard, has insisted that a lawyer who is assigned to defend an indigent citizen must possess sufficient experience to enable him to defend that citizen with the requisite skill and diligence.[6] And, on a general note, the Supreme Court has confirmed the *raison d'etre* of legal aid as follows:

4. *Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa* (1999), *adopted* November 1–15, 1999, at the 26th Ordinary Session, African Commission on Human and Peoples' Rights.

5. Constitution, Art. 46, § 4, cl. b (1999) (Nigeria).

6. Per Oputa, J.S.C., in Udofia v. The State [1988] 3 N.W.L.R. (Pt. 4) 533 (Nigeria). That decision involved a trial for a capital offense; the lawyer assigned by the Legal Aid Council to defend the accused person was only within his first year of being called to the Bar. The trial was nullified by the Supreme Court.

> What is a hearing worth to an accused person who does not understand the language of the court, who does not know the rules of procedure, and who cannot properly present his case? The right to counsel is thus at the very root of, and is the necessary foundation for a fair hearing. The ordinary layman is not skilled in the science of law and therefore needs the aid and advice of counsel. It is because of this need that, in capital cases . . . the accused is not left undefended. If he cannot afford the services of counsel, the State assigns one to him.[7]

Types of Legal Aid Services Available in Nigeria

There are different types of legal aid services available in Nigeria: the formal legal aid scheme, provided by the Legal Aid Council;[8] the judicial legal aid scheme, whereby the courts appoint counsel for indigent accused persons standing trial for capital offenses;[9] legal aid provided by the Office of the Public Defender; the Nigerian Bar Association's pro bono services; NGOs offering free legal services, e.g., Civil Liberties Organization (CLO) and Committee for the Defence of Human Rights (CDHR); HURI Laws, the new constitutional arrangement of providing financial assistance to accused persons to hire lawyers of their choice;[10] and the training of paralegals by, for example, the CLO and Legal Research and Resources Development Centre (LRRDC), which provides low-level legal services through various NGOs and CBOs, particularly in the rural areas.[11]

It is within this context that this paper will examine the types of legal aid services required by the citizens of Nigeria within the framework of criminal justice administration; the paper will conclude with four substantive proposals for increasing the scope and dimension of these services.

Types of Legal Aid Services Required by Citizens

The issue of legal aid in criminal justice administration always involves the defense or the preservation of the rights of the citizen. Accordingly, the traditional

7. Per Oputa, J.S.C., in Josiah v. The State [1985] 1 N.W.L.R. (Pt. I) 125, 141 (Nigeria). *Compare* Idoko J. in Uzodinma v. C.O.P. ([1982] N.W.L.R. 325, 327 (Nigeria); *see also* Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

8. Provided for in Parts II and III of the Legal Aid Act (1976) Cap. 205 (Nigeria) as amended by the Legal Aid (Amendment) Act (1994).

9. Criminal Procedure Act (1990), Cap. 80, § 352 (Nigeria) which provides: "Where a person is accused of a Capital Offence . . . if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence."

10. Constitution, Art. 46, § 4, cl. b (1999) (Nigeria).

11. These are not statutorily provided, but are provided for as services by the non-governmental organizations (NGOs).

model of legal advice and representation is often employed at the pre-trial and trial stages. Thus, legal aid is offered, often by the NGOs, at the pre-trial stage.

Where an accused person has suffered prolonged pre-trial detention without being made to stand trial, the Office of the Public Defender (OPD) and sometimes the Chief Judges of the States High Courts must intervene to set due process in motion and to enable judicial consideration of the case. The OPD must do so with a view to ensuring a speedy trial or release from detention, either on the basis of prison visits by the Chief Judges or officials of the OPD, or on the basis of lists of prisoners awaiting trial forwarded by the Prisons Authorities.

At the trial level, the court either assigns a counsel to the accused or the Legal Aid Council, the OPD, the Nigerian Bar Association, or the NGOs make the assignment. Alternatively, the State can support the accused person financially to enable him to employ a lawyer of his choice.[12] The ODP and the NGOs also offer legal advice on request, while applications for bail are prosecuted either at the police stations or at the courts.

Further, the OPD and the NGOs assist citizens whose rights have been infringed by law enforcement officials, usually the police, in prosecuting their claims for the enforcement of their fundamental rights and receipt of award of compensation. NGOs also assist in prosecuting appeals, particularly for condemned criminals who have been on death row for long periods of time. Finally, citizens who suffered injuries while fighting crime in their employment, and who have been laid off by their employers without adequate compensation, have received legal assistance from the OPD to present their claims and obtain adequate compensation.

These services will now be considered *seriatim*.

Legal Representation

Legal representation takes place at both the pre-trial and the trial stages of criminal justice administration.

(a) Pre-trial Stages

Pre-trial representation is provided by the Office of the Public Defender (OPD) and various NGOs. Often, the goal of representation is to assist the suspect in securing release or an expeditious trial. Where a trial is contemplated, the lawyer

12. Constitution, Art. 46, § 4, cl. b (1999) (Nigeria).

processes a bail application for the defendant. The major problem, however, is that the police quite often refuse the lawyer access to the suspect at the point of making his statement. Usually, they feel that legal advice to the suspect at this stage will amount to interference with police investigation. Yet, the Constitution provides:

> Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.[13]

The period following arrest or detention is the most critical stage for securing the rights of a criminal suspect.[14] Subsequent processes may no longer be able to reverse an injustice effected at the statement-recording stage. Yet, the Legal Aid Council is precluded from appointing lawyers for suspects at this stage: it can only appoint lawyers to defend accused persons at criminal proceedings.[15]

It is clear that the proactive approach of the OPD, whereby it, suo motu, visits police stations to find cases requiring legal assistance within the police station—before statements are made—will certainly assist suspects to achieve justice, more than seeing them only in court during trial, as happens under the Legal Aid Scheme.

Also, the pro bono services of the Nigerian Bar Association (NBA) can be set usefully in motion at this stage, bearing in mind the importance of this stage to the direction of the subsequent trial.

(b) Trial Stages

At this stage, practically all the legal aid service providers are involved, from the courts (in capital cases), through the Legal Aid Council and OPD, to the NBA, FIDA and other NGOs.

In capital cases, the courts assign counsel to accused persons who have no lawyers of their own to defend them.[16] The Legal Aid Council can defend only cases of murder, manslaughter, malicious or wilful wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm, common assault, affray, stealing

13. Constitution, Art. 35, § 2 (1999) (Nigeria).

14. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

15. Legal advice can only be rendered in civil matters; but in criminal cases, counsel can only be assigned to defend accused persons in criminal proceedings. *See* Legal Aid Act (1976) Cap. 205 § 7, Second Schedule (Nigeria) as amended by the Legal Aid (Amendment) Act (1994).

16. Criminal Procedure Act (1990), Cap. 80, § 352 (Nigeria).

and rape,[17] as well as aiding, abetting or counselling or procuring the commission of, or being an accessory before or after the fact, or attempting or conspiring to commit, any of the offenses listed above.[18]

The Nigerian Legal Aid Scheme does not, however, cover offenses like treason, treachery, treasonable felony, armed robbery, robbery, and obtaining by false pretenses. Of these, judicial legal aid covers only the capital offenses of treason, treachery, and armed robbery. In these cases, the court appoints counsel for the accused persons.[19] This is a great gap in the Nigerian Legal Aid Scheme service delivery model. If stealing can be covered, its sister offense of false pretenses ought also to be covered. If common assault can be covered, then treasonable felony which, in fact, is attempted treason, and robbery should also be covered.

Furthermore, the financial limitation for qualification for legal aid under the Legal Aid Scheme is N5,000 per month.[20] Even though this is a great improvement over the N1,500 of the earlier provision,[21] it still leaves quite a sizeable portion of the population—who earn more than N5,000 per month, but are still unable to pay for private legal counsel—uncovered by the scheme. The limit should be raised to at least N10,000. Of course, the ability of government to pay for the scheme must always be borne in mind. Therefore, the complementary services of the OPD, NBA, FIDA, and other NGOs must be vigorously pursued and expanded.

Detention Without Trial

Awaiting Trial Prisoners (ATPs), who have been remanded to prison custody upon arraignment and have not returned to court for trial, present a unique set of challenges. Such prisoners have continued to languish in prison for months or even years. This is particularly common in cases of armed robbery, in which remand, for all practical purposes, fulfils the purpose of simply eliminating such prisoners from society, without any adjudicated conviction or sentence.

This class of prisoners receives the services of the Chief Judges of the States High Courts, who conduct periodic visits to the prisons to review such cases and release deserving detainees. The Chief Judge particularly provides services in cases in which there is no real evidence against the detainee, or he has spent in prison the period which the law prescribes as punishment for the offense (or an even longer period).

17. *See* Legal Aid Act, (1976) Cap. 205, Second Schedule Part A (Nigeria) as amended by the Legal Aid (Amendment) Act, 1994.
18. *Id.* Part B.
19. Criminal Procedure Act (1990), Cap. 80, § 352 (Nigeria).
20. Legal Aid Act, (1976) Cap. 205 (Nigeria) as amended by the Legal Aid (Amendment) Act, 1994.
21. Legal Aid Act, (1976) Cap. 205, § 9 (Nigeria).

In between the Chief Judge's visits, particularly in Lagos State, where the OPD is most developed in the Federation, the Chief Judge causes the list of such prisoners to be sent to the OPD for review and consideration. The OPD officials themselves visit the prisons in order to identify such ATPs and thereby enable them to take their cases to court to secure their release from prison. These efforts are now yielding fruit in Lagos State. The OPDs in the other States of the Federation are still in their embryonic stages.

NGOs such as FIDA, the CLO, and CDHR visit the prisons for the same purpose, and take on some cases in the courts in order to secure the release of such prisoners.

The OPD, NBA, FIDA, and other NGOs also visit police stations to identify suspects who have been detained there, some without an arraignment, for months (sometimes for more than a year). They are usually successful in persuading the police to release such people, and where the police do not cooperate, the organizations file appropriate applications in the courts to obtain the release of the suspects.

Bail

This is an alternative service provided by the OPD, NBA, FIDA, and other NGOs at the police station level, while the Legal Aid Council joins them to provide the service at the court level. The service involves filing the application for bail, negotiating it at the police station or arguing it in court, identifying suitable sureties for the bail, and ensuring that the conditions of bail are not unnecessarily onerous. These groups are also prepared to appeal on behalf of accused persons in appropriate cases.

Unlawful Arrests and Detention

Unlawful arrests also generate a need for legal assistance. The OPD, NBA, FIDA, CLO, CDHR, and other NGOs currently provide these services. The services range from negotiating with the police for release of suspects to lodging official reports with the Police Authorities. Where the Police Authorities fail to do justice, the NGOs take the matter to court to obtain a court order for the release of the suspect and, in some cases, to seek the award of compensation to the suspects. This approach is consistent with the constitutional provisions, according to which: "Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person."[22]

22. Constitution, Art. 35, § 6 (1999) (Nigeria).

Unlawful Injuries

Unlawful injuries arise where law enforcement personnel or a member of the public uses unlawful violence. Legal aid to victims of unlawful injuries aims to ensure that the victim receives the appropriate remedy, whether medical treatment, compensation, or both. A recent landmark case shows the possibilities of this service: A passenger in a motor vehicle was injured when a policeman unlawfully shot at the driver of a commercial vehicle with whom he was having an argument.[23] The bullet lodged in the passenger's spinal cord. After negotiations with the police failed, the OPD took the case to court; the court awarded the largest "special and general damages for injuries, disabilities, loss sustained and caused by the plaintiff when the defendants negligently and unlawfully inflicted gun shot injuries to the plaintiff's spinal cord and/or compensation to the plaintiff for the grievous gun shot injuries negligently inflicted on him at the spinal cord"—ever awarded N54,940,500.[24]

This award was a watershed moment for the enforcement of fundamental human rights. However, the Police Authorities have yet to pay the damages. They are currently in negotiation with the OPD as to how much they will be able to pay to the plaintiff, who would, but for the legal assistance of the OPD, have been without any remedy.

Unlawful Seizure of Property

Under the guise of criminal investigation, the police seize a great deal of property that they regard as being relevant to their investigations. Sometimes they arbitrarily seize other items of property in the course of such an investigation. They frequently retain the seized property, even when their investigation concerning the property has not revealed the commission of any crime. Here, the OPD has stepped into such matters and has often been able to secure the release of such property, sometimes with the release of the suspects, without any court involvement.

Prosecution of Criminal Offenders/Compensation for Victims of Crime

When a crime is committed against a poor citizen who is unable to obtain any remedy, either in terms of prosecution (where the offender dissuades the police and the prosecuting authorities from prosecuting) or compensation, legal assist-

23. *Osere v. Corporal Abiodun Kehinde & 3 Ors*, Suit No. ID/2040/97, order issued at the High Court No. 3, General Civil Division, Ikeja, on October 8, 2002 (unreported).
24. *Id*. per Hon. Justice B. O. Shitta-Bey.

ance has always been offered with the goal of securing some measure of justice. Because there is no right of prosecution by private citizens except by fiat of the Attorney General, the service here usually is to write a petition to the Inspector General of Police and the Attorney General, seeking criminal prosecution of the offender. Often, when this fails, publicity through the media is employed in order to put pressure on the police and prosecutorial authorities to ensure the prosecution of the offender.

Either in addition to or in lieu of this, the legal aid provider may sue the criminal offender for compensation for the victim's injury or loss. This seeks to assure that just as our systems protect the rights of criminal defendants, the rights of victims of crimes are safeguarded as well. Once again, OPD and the NGOs have been prominent in this area.

Prosecution of Appeals

On multiple occasions, NGOs have taken cases of condemned criminals who have been on death row for exceptionally long periods of time to the Supreme Court to seek a declaration that the death penalty is unconstitutional. Even though these efforts have not yet succeeded, they nonetheless represent a unique form of innovative legal assistance, whereby success would provide respite to hundreds of citizens, both those currently on death row and those facing trial for capital offenses.

However, greater successes have been recorded in the area of non-capital cases, where legal assistance has been offered to citizens who have been wrongly convicted, but who have no means of appealing such decisions. This has been an area where the NGOs have been the dominant service providers.

Pro Bono Legal Services for Juveniles

When Penal Reform International (PRI), in collaboration with the Constitutional Rights Project (CRP) and the National Human Rights Commission (NHRC), with funding from the European Union, initiated the Juvenile Justice Administration Project, a National Working Group on Juvenile Justice Administration (the JJA Working Group) was formed. With the support of UNICEF, the JJA Working Group is currently developing a Pro Bono Protocol on Juvenile Justice Administration in order to assure legal aid for juveniles. The JJA Working Group, in collaboration with the NHRC and UNICEF, hopes to soon approve the Protocol.

The JJA Working Group has also been working closely with the NBA on the development of the Protocol, which is expected to provide all forms of serv-

ices, ranging from legal advice to legal representation, and arranging contact with family members, as well as other appropriate authorities.

CONCLUSION

We have seen that the demands of citizens for legal aid services in criminal justice administration are fast developing beyond the mere traditional defense of accused persons in criminal trials. It is, for example, fast moving into areas of restorative justice for victims of crimes. Such expansion in the scope and dimensions of legal aid demands is also bound to increase the needed resources for the added legal aid services.

Accordingly, the following proposals are put forward:

1. Inasmuch as retributive justice is both combative and confrontational, with resultant tendency to violate human rights, the preservation of which thereby requires legal services, the African criminal justice systems should move emphatically away from retributive justice to restorative justice, with its traditional trappings of conciliatory and compensatory culture, with the aim of maintaining and preserving social equilibrium. In the atmosphere of such a culture, the demand for legal services is bound to decrease. Here, the community can be involved in the operation of restorative justice, thereby reducing the scope of operation of formal legal aid.
2. Pro bono services should be introduced into the legal profession, such that pro bono practice must become one of the conditions for obtaining practicing licences. This means that every legal practitioner must present evidence of his or her handling at least three pro bono cases in any single year before he or she will be entitled to the renewal of his practicing licence for the following year.
3. Every law faculty, as well as the Nigerian Law School, must commence clinical legal education on a massive scale. This must be done in order to ensure the expansion of the legal advice base of legal aid, bearing in mind the enormous manpower available in the number of law students who will be involved in the scheme.
4. Training of paralegals should be undertaken on a large scale, in order to enable them to take up simple legal advice all over the country, thereby freeing qualified legal practitioners for the handling of complex cases which may ultimately reach prosecution. Mean-

while, the paralegals will be able to work briskly on the numerous cases requiring simple legal advice all over the country.

These measures, if adopted, will ensure that legal aid becomes more broad based and not prohibitively expensive for either the government or any of the other stakeholders to operate. All of this will assure its availability to a much wider circle of citizens than it is currently targeting.

LEGAL AID AND ITS PROBLEMS IN THE SUDAN

John Wuol Makec[1]

I. Introduction

In this age of theories of democracy and respect for human rights, the appeal for an effective criminal justice system occupies the attention of many individuals and pressure organizations. The desire for justice generally, and criminal justice in particular, has for a number of years motivated many concerned legal experts to coin particular phrases aimed at promoting justice. For example, that justice must not only be done, but must be seen to be done; or that no person must be condemned unless he has been properly heard; or that an accused person must be presumed innocent until proven guilty.

But the objective of these legal maxims which is, in a nutshell, "justice," cannot adequately be achieved if the parties or accused persons are left alone in courts where they are likely to be disadvantaged by the tedious complexities of procedural requirements and incomprehensible legal jargon.

In these circumstances, accused persons or litigants must retain advocates to assist them. But only persons who are financially able can afford to do so. Then the question is: what about the poor, who constitute the majority in many societies?

An attempt to satisfy the needs of the poor led to the establishment of the legal aid system in the Sudan, where the advocates who represent the poor are paid from the budget of the Attorney General. However, the next outstanding question is whether the present legal aid system covers all of the accused persons in need. To answer this question requires a brief examination of the state justice system, and an attempt to ascertain whether the present legal aid system covers every accused person in need of assistance. This paper undertakes such an examination; it con-

1. Judge of the Supreme Court of the Sudan and published authority on Dinka customary law.

cludes with several proposals which call for the introduction of supplementary mechanisms of justice.

II. Formal State Justice System

The legacy of the British colonial administration in the Sudan is the existence of two parallel justice systems. The first is the formal justice system, administered by professional judges in the state courts. These courts apply laws enacted by the legislature; the judicial precedents largely incorporate the general legal principles of foreign origin. Procedure before these courts is very strict and rigid, and too complicated to be followed or understood by most parties or non-professional lawyers.

Owing to the rigidity and complexity of the procedures, many suits are dismissed on grounds of procedural irregularity or failure of an accused to defend himself effectively. The law confers upon every person the right to be represented before the court by an advocate, but the accused or litigant who appoints an advocate to represent him or her must generally pay the advocate's costs. Since poor people are the majority among the litigants and accused persons, the Advocates Act of 1970 introduced the system of legal aid.[2] Under this system, an advocate may be appointed, on the request of the Under-Secretary of the Attorney-General's Chambers (now Ministry of Justice) to represent an accused person. The advocate's fee or costs will ultimately be paid from the budget of the Attorney-General. In any other case the advocate shall tender legal aid to his or her client free of cost, but the Bar Association may pay him or her out of the Social Security Fund.

III. Parallel Subordinate Justice System

While the British administration in the Sudan established the formal justice system, it also set up a parallel, informal, and subordinate justice system manned by traditional authorities who were not necessarily literate or professional lawyers.

Traditional authorities in the southern Sudan are known as Chiefs; in the North they are called Sheikhs and Omdas. Before their replacement with a new system of courts, they applied customary law whose objectives were largely different from the state laws applicable in the state courts. The procedure and the concepts of justice under the respective legal systems were, in fact, in total divergence. The state laws were adversarial and retributive in nature, while customary laws were consensual and restorative in nature. Advocates did not appear to represent the

2. Advocates Act, §§ 37–39 (1970) (The Sudan).

accused persons or litigants before these courts, so the question of legal aid was not contemplated.

But changes in political objectives in the country resulted in legal changes which affected the judicial role of the traditional authorities in the northern Sudan. Judicial work was transferred to a People's Local Court manned by non-lawyers who were also non-traditional authorities. From 1986 to this day, the judicial work both in southern and northern Sudan is performed by non-lawyers in courts known as Town and Rural Courts.[3] In their criminal jurisdiction, these courts impose sentences, such as imprisonment and fines, which are provided by the State Penal Act of 1991. In their civil jurisdiction, they settle cases according to "other laws," which include customary law.

But again, the system of legal aid is not extended to parties appearing before the Town and Rural Courts because advocates do not appear and represent the parties there. Since members of these courts are appointed among ordinary non-lawyers, they are likely to be faced with divided loyalties which may affect their ability to deliver qualitative justice. On the one side, these judges are strictly required to demonstrate their compliance with the provisions of the Criminal Act of 1991. But on the other side, as members of a particular traditional community in the locality, they believe in the legitimacy of the rules of customary law whose objectives are entirely different from those embodied in the State criminal justice system. If these judges decide to follow the rules of customary law, they will be deemed to have made an unauthorized deviation from the existing State criminal justice system. It follows, therefore, that the accused persons or litigants, who are not represented by advocates before these courts, become victims of divided loyalty between two different legal systems.

After this brief survey of the two parallel justice systems in the country, the discussion in the next section turns to the causes of inaccessibility of legal aid to the majority of poor people.

IV. Causes of Inaccessibility of the Legal Aid System

Although it is the objective of the law to extend legal aid to every pauper who is unable to pay an advocate's costs, in practice the vast majority of Sudanese liti-

3. Town and Rural Courts were established by a system of regulations entitled "Town and Rural Courts Regulations for the year 2004" which replaced the previous regulations.

gants or accused persons do not benefit from the system for a variety of reasons. The causes of inaccessibility of legal aid include the following:

(a) Concentration of advocates in major cities: While the bulk of judicial work is discharged by junior state courts together with the Town and Rural Courts in the countryside, the advocates are attracted by lucrative work in major cities where the wealthy live, industrial work is concentrated, and more facilities are always available. Companies or large commercial businesses in cities pay advocates well. Consequently, advocates neglect the work in rural areas and small towns. Hence access to legal aid in the rural community or small towns becomes a rarity and even those persons who are able to pay advocate's costs may not be able to access their services immediately.

(b) Inadequacy of the number of advocates: Although there are about 2,000 advocates in the Sudan, their number is small when compared with the volume of legal work to be done in the country. This shortfall of lawyers has an adverse effect on the legal aid system. Further, as indicated above, the available number of advocates is not evenly divided throughout the whole country.

(c) Lack of publicity: The majority of people in the rural areas and small urban communities are unaware of the availability of a legal aid system in Khartoum, the capital city of Sudan. There are also a large number of people in the major cities who are unaware of the availability of a legal aid system. To inform the entire population of potential litigants or accused persons would require an extensive publicity campaign.

(d) Remoteness of legal aid authorities from the majority of the population: The authorities who can pay the costs of advocates who have tendered legal aid are too far away from the majority of people in the country. They are all centered in Khartoum, miles away from most of the people. Poor people who are already unable to pay an advocate's costs can hardly afford to finance their travels from the countryside to Khartoum to prove their pauperism before the legal aid authorities. There is no visible evidence of the existence of legal aid centers in the rural areas.

(e) Non-appearance of advocates before Town and Rural Courts: The non-appearance of professional lawyers before the Town and Rural Courts leaves the parties or accused persons in those courts to defend their cases alone. It follows, therefore, that legal aid cannot be tendered to parties in these fora.

(f) Inadequacy of legal aid sources: The authorities in the legal aid establishment do not always know in advance the number of potential accused persons or litigants who may claim legal assistance yearly. For this reason the estimated budget cannot always be sufficient. But over-estimation of this budget can hardly be expected because the government has other important priorities. Sometimes an accused person or litigant may be requested to make a partial contribution if he can because the fund is inadequate.

(g) The attitude of the officials in the legal establishment: The attitude of the officials charged with the responsibility of determining who is entitled to legal aid and who is not may lead to the rejection of genuine cases of indigency if there is no devised system of cross-checking.

In view of these problems, it becomes essential to propose a number of reform measures to supplement the existing system of legal representation of parties by advocates before the state courts.

V. Traditional Mechanisms as Supplements to Legal Aid under the Formal Justice System

The present process of representation of parties by advocates is commendable, but it has many accompanying difficulties, as outlined above. These difficulties can be addressed by the use of the traditional mechanisms as supplements to the current legal aid system. I suggest two types of reforms which are somewhat inter-related:

(a) The recognition and development of customary law, which does not require representation by lawyers, as a supplementary system of justice.

(b) The involvement of traditional authorities and community Elders and other bodies.

These suggested mechanisms of reform are discussed below.

Recognition and Development of Customary Law as a Supplementary Justice System

The application of customary law as a parallel justice system is not a new phenomenon in many African states. But in some states it has been treated with contempt as an inferior or subordinate justice system which serves the needs

of "backward" communities. Accordingly, it is believed by those who disregard the importance of customary law that it will gradually fade away as modernization increases. This conception misunderstands the potential of customary law to make a valuable contribution towards states' justice systems.

It is against this background that I suggest a sincere commitment by states to recognize and develop customary law as a supplement to alleviate the problems in the legal aid system.

Objectives of Customary Law

One of the main objectives of customary law is the establishment of peace and harmony between the parties and society as a whole through compromise, conciliation, and compensation. In this way, the social imbalance created by the commission of the wrongful or criminal act is restored. The desire to bring about conciliation or compromise between the parties brings the court more in line with a system of arbitration.

As discussed below, the court may adopt a persuasive role in order to induce an agreement, compromise, or settlement between the parties. Both parties must emerge as friends. A legal dispute should not leave the parties or the communities to which they belong as enemies.

The Role of Traditional Courts or Judges

Contrary to the adversarial system, where the judge is a mere referee and therefore does not take part in the judicial contest between the parties, a traditional court or a forum applying customary law plays a dual role. Since there are no advocates to represent the parties, the court or members of the forum play the role of investigator to elicit the necessary evidence based on true facts.

But the court or forum must guard against the temptation of partiality. Hence while the adversarial system is suitable where parties are represented by advocates, the inquisitorial system under customary law is suitable where parties are not represented by trained lawyers.

Procedure Under Customary Law

One of the most remarkable features of customary law is the simplicity and flexibility of its procedure. Since the rules of procedure regulate how the rules of substantive law are to be defended and enforced, they should not be made very difficult and complicated. They must be simple and comprehensible to every liti-

gant or accused of whatever level of understanding and to the court members themselves.

This simplicity of procedure is compatible with the principle of conciliation. Further, simplicity of procedure facilitates the speedy administration of justice without too much wasted effort and expense. Flexibility of procedure sometimes leads the court to resemble an arbitration forum of family members.

The court or justice forum may sometimes revise its own decision where it believes the decision was erroneous. Owing to the flexibility of procedure, the court may permit some experienced persons among the audience to adduce evidence. In this way the public assists the courts in the administration of justice.

The presence or involvement of the public ensures that justice will be done. This is because the litigants and the accused come from the community to which the audience at the court center belongs. Members of the public are aware of the facts of the case and they want justice to be done so that the community can live in harmony.

Since the procedural simplicity and flexibility decreases the likelihood that a party or accused person can be disadvantaged on the ground of procedural irregularity, it may not be essential for the parties to be represented before a Traditional Court or forum.

Justice System Under Customary Law

The justice system under customary law may, therefore, be summed up as follows:

(a) The traditional court or judge plays the role of advocate for both parties without becoming partial through the investigatory system.

(b) Simplicity and flexibility of court procedure ensures that no party will fail on grounds of procedural irregularity.

(c) At the end of the case there is no winner and loser as in the adversarial system.

Thus, the justice system as it is applied under customary law rarely causes anxiety or fear if accused persons or litigants are not represented by advocates or trained lawyers. It is therefore suggested that this justice system should be recognized in countries where it is rejected or not followed and developed to supplement or to cover the gaps which the legal aid system alone cannot satisfy. It must be stated,

of course, that there is no legal system that is one-hundred-percent perfect, but defects can be subject to correction or reform.

Council of Elders

The Council of Elders is a formal organ in communities led by kings, such as the Shilluk. Its members advise the King on public and judicial matters. In other communities the Council is an informal body which assists the chiefs in public and judicial matters.

These elders render their services free in the public interest. Today, many southern Sudanese have been displaced by war and they have settled in the suburbs of Khartoum and other cities or villages in northern Sudan. They have many legal disputes or offenses affecting their family relations. But they have no courts of their own to try these cases according to customary law.

"Provincial courts" have jurisdiction to settle these cases. However, the provincial judges who man these courts are not always knowledgeable in customary law. These judges therefore use the "Elders Group" system to assist them. The elders sit as a form of "court" or as "arbitrators" to hear the parties and their witnesses and ultimately make a decision. The provincial court then takes the decision of the elders as an advisory opinion and bases its own decision upon it.

The procedure and the objectives of customary law are followed by this body and so no party is disadvantaged by procedural requirements. Hence representation of parties by advocates is not required.

Recognition of this forum as one of the institutions of justice in the State may effectively lead to the fair administration of justice in circumstances where parties are not represented by lawyers.

Extra-Judicial Settlement of Legal Disputes by Elders

Legal disputes, whether criminal or civil, are always subject to settlement out of court by the Elders. A judicial proceeding is regarded as the last resort when there is a deadlock which the Council of Elders cannot resolve. Even when the case has already been taken to court, the door to settlement of the case is never closed.

Settlement of legal disputes outside the court is prevalent among communities where the maintenance of social relations supersedes economic or legal relations. Many cases are settled outside and so problems of representation again do not arise.

CONCLUSION

In conclusion, the proposed reform measures discussed above may be summed up as follows:

The role played by traditional authorities and the traditional justice system does not require representation of parties by advocates, since it is not retributive but conciliatory and restorative in nature.

Further, since most judicial work can be performed by non-professional judges or bodies, increased recognition of traditional justice systems may free up funding for legal aid, so that existing funding may become sufficient to cover the needs of those who apply for assistance.

TIMAP FOR JUSTICE:
A PARALEGAL APPROACH TO JUSTICE SERVICES IN SIERRA LEONE

Vivek Maru[1]

INTRODUCTION

Timap for Justice[2] is an experimental effort to provide basic legal services and improve access to justice in rural Sierra Leone. Because of a shortage of lawyers in the country and Sierra Leone's dualist legal structure, community-based paralegals, rather than lawyers, make up Timap's front line.

The program began in 2004 as a joint effort of the Open Society Justice Initiative (OSJI) and the National Forum for Human Rights. Two lawyers (Simeon Koroma, a Sierra Leonean Lawyer, and the author, a fellow with OSJI) direct the program. Directors train, supervise, and support the paralegals in their work.

The directors also provide direct legal representation and high-level advocacy for a small number of the cases which emerge from the paralegals' work. The program currently employs thirteen paralegals who work in five chiefdoms in the northern and southern provinces, as well as in the capital of Freetown. The program hopes to expand into five more chiefdoms in 2006.

Origins and Methodology

The maladministration of justice and the distance between the people and their government were among the root causes of Sierra Leone's civil war; those factors are responsible for some of the greatest lingering challenges facing the country today. Many Sierra Leoneans, especially in rural areas, perceive the legal system

1. Lawyer and Fellow of the Open Society Justice Initiative. An in-depth treatment of Timap for Justice's work in Sierra Leone can be found in the spring 2006 edition of Yale Journal of International Law. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide,* 31 Yale J. Int'l L. 428 (2006).

2. Timap is a Krio word for "stand up" or "stand up together."

and the government as they perceive black magic: as things to be feared rather than understood.

Legal services are hard to come by. The country only has about a hundred practicing lawyers and more than ninety of those are located in the capital of Freetown. The Lawyers' Center for Legal Assistance provides much needed legal aid to indigent clients, but the Center cannot meet the demand and its activities are largely limited to Freetown and provincial headquarter towns.

Moreover, under Sierra Leone's dualist legal structure, lawyers are barred from practicing in the customary courts, yet these are the institutions of most practical relevance to the majority of Sierra Leoneans. For these reasons, and based on their experiences in the field, the National Forum for Human Rights and the Open Society Justice Initiative collaborated to initiate a program to deliver basic justice services at the chiefdom level through community-based paralegals.

The program draws inspiration from South Africa. Community-based paralegals first emerged there during the anti-apartheid struggle and have since grown into a nationwide movement that is widely respected as a front line provider of legal services to poor South Africans. Paralegals in South Africa are now working toward statutory recognition of their profession and national accreditation of their training process.

Sierra Leone is, of course, quite a different context, and Timap for Justice is taking an experimental approach to its work. The program began on a small scale in order to focus on the development and refinement of its methods. After discussions with chiefdom authorities and community members, five chiefdoms were selected to pilot the program: three in Bo District and two in Tonkolili District. The program directors engaged in an informal community needs assessment in each chiefdom. These assessments aimed to identify justice problems and to begin to flesh out exactly what role paralegals could play. Findings from the assessments helped the directors to shape the first paralegal training.

The needs assessments revealed justice problems that arise between ordinary chiefdom residents (such as domestic violence and child abandonment) as well as justice problems that arise between the people and their authorities (such as favoritism by customary officials and corruption in government services). An overlapping set of customary and formal legal institutions govern, and sometimes cause, these problems. The crucial backdrop for all justice issues is severe poverty and lack of infrastructure. In Sierra Leone these include weak education and health care systems, poor roads, paucity of clean water, and a shortage of employment.

Timap for Justice recruited and hired the paralegals from the chiefdoms where they now work. They all have at least a secondary school education and a few have university degrees. At the outset, they participated in an intensive two-week training in law, the workings of the government, and paralegal skills. The directors continue to train and supervise the paralegals as the work continues.

The specific problems with which clients and community members approach the offices of Timap for Justice determine the substantive direction of the program. Common issues addressed include domestic violence, child abandonment, forced marriage, corruption, police abuse, economic exploitation, abuse of traditional authority, employment rights, the right to education, and the right to health. Paralegals employ diverse work methods.

Our program strives to serve clients and communities with the rigor and professional ethics of the legal profession. The paralegals follow a standardized system for maintaining case files, tracking and following up on cases, and recording their own efforts. Because our program is not exclusively adversarial and because we aim to serve the entire community, we tend to balance, more than most lawyers would, the interests of the clients who approach us with the interest of the community and the principles of human rights. But paralegal ethics and legal ethics coincide in their duties to protect client confidentiality and safety.

We aspire to make our program accountable to our host communities. We have established community oversight boards (COBs) in every chiefdom where we work. Community leaders make up the boards. They monitor the paralegals' work and ensure that the program serves the needs of the chiefdom well. Every COB has at least one woman and one representative of the youth. Members meet directly with the program's directors to provide feedback on paralegal performance.

Finally, our program employs a synthetic orientation toward the dualist legal structure, engaging both customary and formal institutions, depending on the needs of a given case.[3]

Future Plans and Sustainability

If the work continues to go well and we are convinced that paralegals can play a sufficiently useful role, we hope to extend paralegal services to a substantial por-

3. This theme is discussed further in an essay by Vivek Maru, *The Challenges of African Legal Dualism: An Experiment in Sierra Leone, in* Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses (2005), *available at* http://www.justiceinitiative.org/db/resource2?res_id=102523.

tion of the country. We are trying to maintain a low enough per-chiefdom cost to make the argument for wide-scale expansion realistic.

Many argue that the provision of basic legal services to the poor is a governmental obligation. Given the available resources in Sierra Leone, government funding would be a long-term hope at best. Even if it were available, however, government funding might pose a threat to our program's independence, since an important dimension of our work is to hold the government accountable.

Given the unlikelihood of government funding, major donors such as the aid agencies of G8 countries and multilateral institutions like UNDP and the World Bank might be more realistic sources of medium- and long-term support. The communities with whom we work and other concerned Sierra Leoneans may also contribute to program costs.

What Role do Paralegals Play in Sierra Leone?

The paralegals address justice-related problems at both individual and community levels.

They assist individual clients by:

- Providing information on legal rights and procedures.
- Assisting individuals in dealing with government authorities such as the police, the Ministry of Social Welfare, and the Ministry of Labor.
- Mediating disputes within a legal and human rights framework.

The paralegals address community-level problems by:

- Assessing community needs.
- Engaging in advocacy with authorities.
- Organizing community members to take collective action.
- Engaging in community education and community dialogue on justice issues.

Examples of Cases and Issues Timap Has Worked on:

- The Sierra Leone Farmers Association (SLFA) promised a village in Kakua Chiefdom seed rice but withheld the rice because an SLFA official

was interested in a bribe. A paralegal took up the issue with the SLFA and was able to ensure that they delivered the rice.

- A paralegal in Magburaka arranged, through negotiations with police, prison, and court officials, for the release of a juvenile pre-trial detainee whose length of detention had exceeded the maximum sentence of the crime for which the detainee had been charged. A paralegal in Freetown assisted by locating a relative of the detainee who traveled to Magburaka to sign for the detainee's release.
- Several market women in Tikonko chiefdom suffered personal injuries and loss of their wares when a truck in which they were riding negligently drove off the road. Because the owner of the truck ignored multiple letters from our paralegal, Timap's directors are suing in the High Court for compensation. It is common in Sierra Leone for poor people to sustain injuries from car accidents and receive nothing from the perpetrators or their insurers.
- In October 2004, the Gbonkolenken Youth Council was near collapse. Its members had accused its leadership of corruption and incompetence. The general membership body asked a Timap paralegal in Gbonkolenken to assist in an investigation and assessment of the Council. The paralegal helped to recover three million Leones (U.S.$1132.08) of the Council's property and to undertake an audit of the Council's finances. He organized a public "truth" hearing in which he persuaded various members of the Youth Council to admit their transgressions and to commit to plans for remediation. He prepared a report of his findings and recommendations and presented them to the Council's membership. He now has been asked to assist in developing a new constitution and structure for the council.
- The acting Paramount Chief in Kholifa Rowalla chiefdom removed a land case from customary court and insisted on handling it himself because the case involved his relatives. Before even reaching the merits, the chief assessed large procedural fines against the man opposing his relatives, for speaking out of turn, for stating that his right to his land was immune to interference by chiefs, and for challenging the paramount chief's right to hear the case. Our paralegal helped this man write to the customary law officer, who has supervisory authority over the customary courts. At the time there was only one customary law officer in the country; our client had not known that the customary law office existed. After receiving the letter, the customary law officer had the case reinstated in customary court.

THE PARALEGAL ADVISORY SERVICE: A ROLE FOR PARALEGALS IN THE CRIMINAL JUSTICE SYSTEM

Penal Reform International, with contributions by Clifford Msiska, Rhoda Igweta and Edouard Gogan

In considering good practices in legal aid provision, an ongoing question is how best to balance needs with costs. The two views cited below strike different notes. The first, advocated by Stephen Golub, takes a robust view of non-formal ways of providing legal aid.

> Today's heavy emphasis on judges, lawyers and courts is analogous to what the public health field would look like if it mainly focused on urban hospitals and the doctors staffing them, and largely ignored nurses, other health workers, maternal and public education, other preventive approaches, rural and community health issues, building community capacities, and nonmedical strategies (such as improving sanitation and water supply).
>
> The result is that the paradigm places great faith in a narrow view of the legal field: worshipping at the altar of institutionalization, as it were.
>
> In contrast, a full-fledged scrutiny of how the rules of the game affect the poor would consider the historical, cultural, social and political factors that shape both the formal and informal manifestations of how the poor interact with the law and would take both formal and informal types of law into account. That analysis might in turn learn from and apply strategies that enable the poor to affect the rules of the game and how they potentially can do so. Formal laws and state organizations of course would play important parts in this analysis. But the view of how they operate—and whether and how they can be reformed—would only be part of the picture. Underlying factors that shape their operations and alternative strategies that do not wholly or mainly rely on state organizations would be taken into account . . .

> Under Rule of Law orthodoxy . . . civil society is seen as an adjunct, at most, to state-oriented institutionalization: useful for building up constituencies for reform so that the "real work" of changing legal institutions can take place. That NGOs, CBOs, informal institutions and religious institutions can facilitate the delivery of justice is minimized.[1]

The second view is more cautionary towards non-formal approaches.

> Due to . . . economic realities . . . there is a very significant, market-driven demand for low-cost legal information and assistance. This demand is often filled by untrained and unregulated individuals. This new and burgeoning "legal business" calls for a thoughtful response from all who participate in the civil justice system, for it threatens to undermine one of the crucial tenets of the system: protection of the public from inaccurate, harmful "advice" about legal rights.[2]

A synthesis of both is possible. Indeed, when the American Bar Association's Commission on Non-Lawyer Practice examined "issues surrounding the delivery of law-related services to the public by persons other than licensed lawyers,"[3] it reached three major conclusions:

- Increasing access to affordable assistance in law-related situations is an urgent goal;
- Protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal; and
- When adequate protections for the public are in place, non-lawyers have important roles to perform in providing affordable access to justice.[4]

One scheme that has been developed in Africa uses non-lawyers, called "paralegals," in the criminal justice system. Different versions of this scheme have been adopted in Malawi, Kenya, and Benin. The remainder of this piece will describe each of those systems in detail.[5]

1. Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 41 Rule of Law Working Papers Series (Oct. 2003), http://www.ceip.org/files/publications/HTMLBriefs-WP/WP_Number_41_October_2003/2000a40bv01.html.

2. Chief Justice Richard P. Guy, *Positive Approaches to 21st-Century Access to Justice*, Washington State Bar Association Bar News, May 1999, *available at* www.wsba.org/media/publications/barnews/archives/1999/may-99-positive.htm.

3. American Bar Association Commission on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations (Aug. 1995), *available at* http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=338#One.

4. *Id.*

5. This section was compiled by Clifford Msiska, National Coordinator, Paralegal Advisory Service (PAS), Malawi; Rhoda Igweta, Programme Director, Kenya Prisons Paralegal Project (KPPP), Kenya; and Edouard Gogan, National Coordinator, Projet d'Assistance Judiciaire aux Detenus (PAJUDE), Benin.

The Paralegal Advisory Service began in Malawi in 2000 and has been adapted and applied in Benin, Kenya, and most recently, Uganda. The schemes in each country share common features. They train paralegals or non-lawyers in the criminal law and procedure and add practical skills (which include interviewing, information management, theatre skills) that enable these paralegals:

- to provide legal literacy to prisoners and to help them to understand the law and how to use it to represent themselves;
- to provide those in conflict with the law with appropriate legal advice and assistance;
- to link up the criminal justice system by improving communication, cooperation and coordination between the agencies;

The scheme that started in Malawi initially focused on those in prison.[6] This compass has broadened to include the courts and police stations. The number of paralegals has risen from eight in 2000 to thirty-seven—40% of whom are women—in 2005. Malawi's paralegals work in thirteen prisons covering 84% of the prison population; they have extended coverage to Malawi's five main police stations and four main court centers.

In Kenya, the scheme includes twelve paralegals (seven women) operating in five prisons around Nairobi. In Benin, four paralegals operate in four prisons. In October 2005, six paralegals (set to rise to twenty-four by year's end) began a fifteen-month pilot scheme in four districts in the north, south, west, and east of Uganda.

Overcrowding in African prisons is the most pressing problem confronting the prison services. The prison systems in the four countries mentioned are no exception.

Each scheme follows up individual cases with the prosecutor to ensure that cases are not lost in the system and are followed up more systematically. This helps push cases through the system. Where innovations are introduced in one country, they are shared with the others. Hence, the "Legal Aid Days" introduced in Kenya by the KPPP, where legal aid or pro bono lawyers attend the prisons and offer free advice to prisoners, have been applied by the PAS in Malawi.

6. The Paralegal Advisory Service started in Malawi in May 2000 in the four main prisons (Mzuzu, Lilongwe, Zomba, and Chichiri) holding 64% of the total prison population.

Both Benin and Malawi have created diversion programs. In appropriate cases involving a minor first-time offender who admits to his or her crime, the minor can be diverted from criminal prosecution on conditions set by the prosecutor.

Each scheme screens cases to reduce pre-trial detention. The paralegals do so by identifying those cases where (1) the court has granted the individual bail (reflecting a determination that the defendant does not pose a threat to the community), but the defendant cannot afford the surety; or (2) the individual has overstayed on remand without coming to trial and has served longer or as long on remand as he or she would have served on a sentence after conviction.

In Malawi, defendants awaiting trial on homicide charges constitute the largest body of remand prisoners. Some have been waiting ten years for trial. Following a paralegal aid clinic in the remand section of Zomba Central Prison, which explained the difference between murder and manslaughter, a number of prisoners indicated they would plead guilty to a charge of manslaughter. The paralegals passed this information on to the legal aid department and state prosecutors. As a result, thirty-three cases were reviewed and twenty-nine ended in pleas. The savings to the judiciary were estimated at $33,000 and earned a letter of commendation and thanks from the Chief Justice of Malawi.

In many jurisdictions, the police charge a suspect with "murder" as a matter of procedure. On review, a lawyer will adjust the charge to reflect the seriousness of the case and will often reduce the charge to manslaughter based on the facts. The problem is that the overworked lawyers often do not review the charges until the eve of trial. Therefore, the accused, who may be willing to enter a plea to the correct charge of manslaughter, must languish in prison charged with murder (which in many countries still attracts the death penalty). Furthermore, the accused will be unable to apply for bail because of the charge of a capital offense. Research by the Paralegal Advisory Service suggests that by working with lawyers in the legal aid department and with state advocates, paralegals could reduce the backlog at pre-trial hearings (currently at over 800 cases) by almost 50%. This would save the judiciary over $400,000.[7]

7. Over a period of months, between 2000 and 2001, paralegals from the PAS followed 91 capital cases set for trial. They found that of the 91 cases, 30 were effective trials, 45 resulted in pleas to manslaughter, and 16 resulted in no disposition (the defendant had died in custody, failed to appear, or witnesses could not be traced). In other words, 61 cases out of 91 were ineffective—or over 60%. These figures represent costs thrown away. In one large prison with over 300 homicide remandees, state advocates agreed that the proper charge in 30% of the cases pending was manslaughter. Add to this case files which have been lost, witnesses that have died, cases where the accused will have been irredeemably prejudiced by the delays in trial (and over which he or she had no control), and this figure is increased by 18%.

The achievements of these three schemes are charted below.

Benin Summary[8]

Between July 1, 2002 and June 30, 2004, the quantitative results of the PAJUDE have been as follows:

	Interventions	Parakou Prison	Abomey Prison	Ouidah Prison	Cotonou Prison	Total
1	Release from prison	40	22	48	55	165
2	Release from court	26	30	34	35	125
3	Release on bail	38	77	59	150	324
4	Amount of surety	61	99	48	170	378
5	Surety reduced	29	57	19	61	166
6	Cases awaiting decision of magistrates	63	55	82	199	399
7	Cases being studied by PAJUDE	56	181	77	665	979
8	Legal clinics	24	26	21	60	131

Kenya Summary[9]

In the six month period between February and July 2004, the KPPP in Kenya achieved the following results:

PRISON	Paralegal Clinic		Screening	Follow ups				Impact				
	Sessions	Remand Prisoners		Legal Advice	Telephone	Courts	Police	Relatives Located	Bail/ Bond Release	Safe Custody	Acquittal/ Discharge /Probation	Convicted/ Rehabilitation
Nairobi Area Allocation	35	1,697	1,325	678	497	44	22	274	133	0	46	25
Langata Women	60	1,800	380	150	220	41	0	230	120	6	100	25
Nairobi Children	29	320	141	61	48	31	51	48	17	11	58	15
Thika Women	5	60	90	50	17	12	3	21	33	1	23	7
Thika Men	10	400	365	139	100	21	4	97	84	8	29	15
TOTAL	139	4,277	2,301	1,078	882	149	80	670	387	26	256	87

8. Statistics on file with PRI.
9. Statistics on file with PRI.

Malawi Summary[10]

An overview of the PAS since extending the service beyond prisons to police stations and courts in the period 2004–2005 reveals that:

Prison	Total 2004	Total 2005	Grand Total
Prison clinics conducted	678	826	1,504
Prisoners attendance	21,057	21,754	42,811
Prisoner releases thru PAS	687	488	1,175

Court			
Accused assisted at court	1,715	3,725	5,440
Witnesses assisted at court	677	733	1,410
Bail granted	245	247	492
Juveniles diverted from formal justice system	91	108	199

Police			
Juveniles screened by PAS	246	517	763
No. Bailed	116	242	358
No. Diverted	56	130	186

In addition, in Malawi:

- The backlog of homicide cases has been reduced through early pleas and directions.
- The number of illegally remanded prisoners has been reduced from hundreds to tens and the police practice of "dumping" (i.e. remanding people to prison pending "further inquiries") individuals is less frequent.
- The judiciary has become more active. Magistrates visit prisons to screen the remand case load (borrowing from a practice in Bihar, India, known as "camp courts"), discharge those who have overstayed, grant bail, and list cases for trial using lists prepared in advance by the paralegals.
- Case flow has improved.
- Criminal justice agencies are meeting and finding local solutions to local problems, often at little or no additional cost.
- The remand population has stabilized at under 30% (from 50%).
- The cost per paralegal per month amounts to less than $450.

10. Statistics on file with PRI.

CONCLUSION

Where lawyers are few and far between, there is no alternative but to employ paralegals.[11] Where lawyers are present in sufficient numbers, it is nevertheless economically sensible to provide the complementary services offered by paralegals. The issue of sustainability moves from organizational sustainability (biased towards ineffective state institutions) to a more key consideration, namely, sustainability of impact. If an NGO offering legal services serves enough people, builds enough capacity for the poor to assert their own rights, or affects enough laws, such impact sufficiently justifies past and future donor investment.

11. A film on the work of the paralegals in Benin, Kenya, and Malawi, titled *Freedom Inside the Walls*, directed by Pierre Kogan, may be obtained by contacting prililongwe@penalreform.org or headofsecretariat@penalreform.org.

PROVIDING LEGAL AID IN CRIMINAL JUSTICE IN CAMEROON: THE ROLE OF LAWYERS

Nchunu Justice Sama[1]

Cameroon has a unique legal system, which is reminiscent of its colonial past.[2] It is referred to as a bi-jural country,[3] which alludes to the dual application of the French and English legal traditions. While French-oriented civil law applies in eight provinces[4] of the country, English common law applies in the remaining two English-speaking provinces.[5] Notwithstanding the dual legal system, lawyers are free to appear in court in any part of the country, provided that they can express themselves in the language used by that court. Alongside the two foreign traditions lies the customary law, which constitutes a host of traditional rules and norms.

Since independence, attempts have been made to codify many areas of the law, with considerable efforts to erode the Anglo-Saxon legal tradition. In substantive criminal law, Cameroon has a single Penal Code.[6] In addition, there are other sectoral uniform laws with criminal provisions, such as the Highway Code,[7] the Land Tenure Ordinance,[8] the Forestry, Wildlife and Fishery laws,[9] the Environmental Management Code,[10] and the Mining Code.[11]

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1. Barrister and director of Lawyers for Human Rights and Environmental (LHURE) Protection.
2. During the colonial administration, the French introduced civil law in what was then East Cameroon while the English introduced common law in what was then West Cameroon. These dual legal traditions have survived independence and reunification of the country.
3. Carlson Anyangwe, The Cameroonian Judicial System (1987).
4. That is, the provinces formerly comprising East Cameroon.
5. These two provinces formerly comprised West Cameroon.
6. Law No. 65-LF-24 (Nov. 12, 1965); Law No. 67-LF-1 (June 12, 1967).
7. Decree No. 79-341 (Sept. 3, 1979).
8. Ordinance No. 74-1 (July 6, 1974) (as amended).
9. Law No. 94-01 (Jan. 20 1994).
10. Law No. 96-12 (Aug. 5, 1996).
11. Law No. 1 (Apr. 6, 2001).

With respect to procedure, the Criminal Procedure Ordinance (CPO)[12] is applicable in the common law jurisdiction while the Code d'Instruction Criminel[13] is applicable in the civil law jurisdiction. Further, the laws of evidence and courtroom procedure are fundamentally different in the two jurisdictions. For instance, while the common law system is based on the adversarial criminal method, which applies a presumption of innocence until proven guilty, the civil law approach is based on the inquisitorial system, which presumes that the accused is guilty until proven innocent. Although the 1996 Constitution seems to provide a uniform perception of presumption of innocence, as will be seen below, this has remained an aspiration rather than a reality in the civil law jurisdiction.

In a country with a population of about 16 million, the Cameroon Bar is made up of 1,337 lawyers with 26 Pupil Lawyers.[14] Lawyers belong to a liberal profession, but the law emphasizes that their services must be rendered with remuneration.[15] This requirement seems to erode the very essence of legal aid, as it implies that the services of lawyers are only available to those who can pay. Under this regime, the legal services of lawyers are not accessible to the majority of the population, which is composed of the poor and the underprivileged. In addition, unlike in developed countries, specialization by Cameroonian lawyers in specific areas of legal practice is rare. Specialized criminal law lawyers, family law lawyers, or insurance lawyers are unheard of. Specialization is not proscribed, but most lawyers are general practitioners. The law also prohibits advertisement of legal services.

Advocates are obliged by their oath of office to perform their duties "in total independence with dignity, conscientiousness, probity and humaneness."[16] This is a positive obligation on the lawyers to render legal services to those who cannot otherwise afford them. It has contributed tremendously in the provision of legal aid by lawyers.

High prison congestion, with its concomitant consequences, renders it more acute for lawyers to play a role in making criminal justice more accessible. Cameroon's prisons host about 20,000 persons with existing capacity for about half

12. Criminal Procedure Ordinance, Laws of the Federation of Nigeria, Chapter 43 (1948) [hereinafter CPO].

13. Ordinance of Feb. 14, 1928 (as amended).

14. Roll of the Cameroon Bar Association, 2004 (on file with author).

15. Law to Organize Practice at the Bar, No. 90-59, § 1 (Dec. 19, 1990).

16. *Id*. § 15.

this number. Pre-trial detainees constitute about 80% of the prison population.[17] This does not include the thousands who are in police cells, gendarme cells, and other detention camps.

While some are held inappropriately, some inmates spend more time in pre-trial detention than the maximum imprisonment period fixed by law for the alleged offense. Consequently, it is not uncommon for detainees to get lost in the system and spend months or years in jail. Among these suffering masses are vulnerable groups like women, women with babies, juveniles, the elderly, and terminally ill persons.

The predicament of detainees is compounded by overcrowding and poor sanitary conditions. Some of the cells are infested with parasites and communicable diseases. Consequently, the prisons harbor serious health hazards such as tuberculosis, pneumonia, and scabies, which not only put the lives of the detainees in great peril but also pose a serious health risk to the wider community. A number of inmates die because of infection and poor detention conditions.

The very few with the means to retain lawyers may get bail or a prompt trial. Ordinarily the legal services of lawyers are inaccessible and unaffordable to prisoners, the bulk of whom are the very poor and members of disadvantaged groups. Unlike the police, the prison administration is very collaborative in the provision of legal aid by lawyers. Prison officers appear to regard the right to counsel as an inalienable right and generally allow prisoners to confer with their counsel under conditions of strict confidentiality.

Traditionally, it is incumbent upon advocates to defend the constitutional rights of citizens. The Cameroonian Constitution[18] guarantees certain fundamental rights that provide good incentives and positive legal instruments for the provision of legal aid in criminal justice by lawyers. For instance, the preamble provides:

> We the people of Cameroon . . . affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular to the following principles:

17. During our visit to the Bamenda Central Prisons on November 8, 2004, we found out that the juvenile section had a total of thirty inmates, twenty-five of whom were in pre-trial detention.

18. Constitution (1996) (Cameroon); Law No 96/06 (Jan. 18, 1996).

> All persons shall have equal rights and obligations . . .
>
> No person may be compelled to do what the law does not prescribe,
>
> No person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law, . . .
>
> The law shall ensure the right of every person to a fair hearing before the courts,
>
> Every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence,
>
> Every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment.

It should be noted that by virtue of Article 65 of the Constitution, the preamble is an article of the Constitution and thus enforceable and justiciable.[19]

Approaches in Providing Legal Aid in Criminal Justice

Notwithstanding the peculiarity of our legal and socio-political systems, Cameroonian lawyers have contributed tremendously to the provision of legal assistance in criminal justice. The approaches are varied and at times overlapping; they include the following.

1) Publicly Funded Legal Aid

A. Mandatory Legal Representation. The practice commonly known in Cameroon as "State briefs" emanates from the common law system. The Criminal Procedure Ordinance obliges courts to assign counsel in defense of any person charged with a capital offense.[20] This is limited to cases where the defendant does not initially have a lawyer. Once a lawyer has been assigned, he cannot thereafter accept a fee from the party he has been officially assigned to defend.[21] At the end of the case, the lawyer is paid through the state treasury. The fee is the equivalent of U.S.$9 per appearance and if the matter is out of the jurisdiction of the residence of the lawyer, an additional amount is paid to cover transportation and accommodation. Although the fee is comparatively trivial, many lawyers, especially younger lawyers or "new wigs," have defended many desperate citizens in such

19. Constitution, Art. 65 (1996) (Cameroon).
20. CPO, *supra* note 12, § 352.
21. The Internal Rules of the Bar § 60 (3) (July 20, 1979).

cases. At times, these lawyers even wait in court for cases to be assigned to them once they are aware that a capital murder case is coming up. This is evidence of their disposition to provide legal assistance to desperate defendants.

Further, the law empowers the court to assign lawyers to provide free legal services to any person in need. Bar rules provide: "[T]he competent judicial and legal officer may appoint ex-officio any advocate or advocate-in-training for the purpose of representing any natural person before his court in accordance with the instruments in force. The advocate or advocate-in-training so appointed shall not be entitled to any honorarium."[22]

The requirement of legal representation within the purview of this provision is not premised on the gravity of the case and not obligatory. The counsel so assigned is not entitled to any remuneration and, except for justifiable reasons accepted by the court, the lawyer cannot decline such a case.

B. Cases from the Legal Aid Commission. Legal aid commissions are another public mechanism through which lawyers render legal assistance to needy persons. The commissions are set up at courts of first instance, military tribunals, courts of appeal, and the Supreme Court.[23] Legal aid is granted as of right depending on the nature of the case or upon application premised on the state of poverty of the applicant. The commissions cover all costs related to the matter. Once legal aid is granted in a criminal matter, an advocate is appointed to represent the defendant. The lawyer's fee is U.S.$9 for each appearance.

In Cameroon, the decision whether to grant legal aid rests with the state institutions. The practice of retaining salaried lawyers like the duty solicitor scheme in the United Kingdom does not exist in Cameroon. Ideally, for aid to be effective it must be delivered promptly. In practice, however, this state-controlled legal aid system is fraught with many delays, such that it is not effective in assisting poor citizens to access justice. Not only are many citizens unaware of the existence of the legal aid commissions, but they scarcely meet.

2) "No Win No Fee"

"No win no fee" is a practice whereby lawyers' fees are contingent on the outcome of the case. Although this is predominantly practiced in civil matters, lawyers have extended it to criminal cases.

22. *Id.* § 40.

23. Law to Lay Down Regulations Governing Legal Aid, No. 76/521 § 3, (Nov. 9, 1976).

This is an area of much controversy in Cameroon. Ordinarily, a lawyer is prohibited from reaching with his client a fee agreement that depends on the outcome of the case. It is equally illegal to agree that the lawyer shall receive a share of the award in the case as his fee.[24] However, "no win no fee" is seen as a necessary evil where the practical need to render legal assistance to the poor is great enough to justify it.

In most bail cases where the client is in detention, it is common for lawyers to agree that their fees be paid after bail has been granted. In some trials, the lawyers agree to receive their fee or the balance at the end of the trial. Where the lawyer is acting for the complainant, they actually agree on a percentage of the amount awarded.

3) Pro Bono Legal Services

Lawyers in their day-to-day activities may provide free legal services in criminal matters for the indigent accused. These services range from counseling, legal education, consultation and bails to representation at trial and drafting of an appeal. The practice is premised on the perception of a traditional duty upon lawyers to render justice accessible to the under-privileged.

4) Legal Aid Centers

Although the running of legal aid centers is not expressly provided for by law, the practice is a corollary of the ethical duties of lawyers, the current democratization in Cameroon, its constitutional guarantees,[25] and the international conventions ratified by the country.[26] Donor initiatives have substantially contributed to the setting up of legal aid centers in Cameroon, though this particular approach is still to gain more prominence.

In partnership with the British Council, in 2000 the Cameroon Bar Association started two legal aid centers in Kumba, South West Province and Bamenda, North West Province. The centers offer the public free legal services, such as counseling, conflict resolution, and judicial and extra-judicial representations.

The centers have become less productive since the pilot funds put in by the British Council dried up two years ago. Further, the indisposition of many lawyers to provide pro bono legal services has substantially affected the output of the two centers. Today only the Bamenda legal aid center continues to function.

24. Law Organizing Practice at the Bar, No. 90-59 § 27(1); Internal Rules of the Bar § 60.

25. Constitution, Preamble (1996) (Cameroon).

26. For instance, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Both of these international conventions override national laws.

5) British Council's Human Rights in Prisons Project

In response to the inadequacies of the criminal justice system, the British Council in Cameroon initiated a project known as Programme d'Amelioration des Conditions de Detention et Respect des Droits de L'Homme (PACDET).

PACDET is a partnership with the Cameroon Bar Association and aims to improve the conditions of pre-trial detention, provide access to criminal defense, and enhance respect for human rights in the criminal justice sector. It is focused in the Douala and Yaounde prisons. Working in collaboration with forty-three lawyers, the project has secured bail for hundreds of detainees. It ensures that advice and representation are available to detainees who would otherwise be abandoned in the prison system.

Challenges to the Provision of Legal Aid

1) Ineffectiveness of the Publicly Funded System

As mentioned above, the granting of legal aid is exclusively within the control of the state authorities. As a result, the publicly funded legal aid system is fraught with certain fundamental drawbacks that impair the provision of aid by lawyers.

First, the legal aid commission scarcely sits because of a lack of quorum. For instance, the legal aid commission of the Court of First Instance of Mezam sat only once in 2004 and granted only four out of six applications for legal aid.[27] Consequently, very few cases are assigned to lawyers from this commission. It is noteworthy that in the civil law jurisdiction of the country, the commission meets more regularly and assigns many more cases to lawyers.

The second drawback of the publicly funded system is that remuneration is quite low and discouraging for lawyers.[28] Many lawyers do not accept publicly funded legal aid files because of the meager remuneration.[29] Consequently, most of the lawyers involved in this approach are "new wigs," who at times lack the requisite experience to handle serious offenses like capital murder. Empirically, there is a need for lawyers with the experience and skills commensurate with the gravity of the offenses assigned to them.

27. The commission is composed of: (a) The president of the court or his deputy; (b) The state counsel or his deputy; (c) An administrator or his representative with the registrar-in-chief acting as the Secretary.

28. 5000 CFA (£5,000) per appearance.

29. This is in stark contrast to the U.K., where about £500 million (5 billion CFA) was spent on criminal defense in 2001–2002.

2) Economic Factors

Capitalistic tendencies influence some lawyers to avoid what are commonly referred to as "Father Christmas cases," or cases where the demand is not backed by the ability to pay. This kind of mindset renders the services of lawyers unaffordable to ordinary citizens; it may also account for the limited participation of lawyers in the pro bono services required by the British Council Legal Aid Centers in Kumba and Bamenda.

Furthermore, lawyers pay very high and multiple taxes,[30] and do so in poor economic conditions. Against this economic backdrop, many lawyers prioritize their own survival and the importance given to legal aid becomes at times secondary.

3) Ignorance and Lack of Demand

With more than half of the population of Cameroon illiterate and residing in the rural areas, many citizens are not aware of the existence of legal aid schemes or even their rights to access those services. Public awareness of legal assistance by lawyers, especially in criminal matters, is very low. Many people perceive lawyers as some sort of money-grabbers, rather than as professionals disposed to provide legal aid. The public's ignorance of fundamental human rights is also a major constraint. Consequently, lawyers can do very little to assist people who are not aware of their basic rights or regard them as unenforceable.

4) Inaccessibility of Courts

Although in theory each administrative subdivision is entitled to a Court of First Instance (Magistrate Court) and each division is entitled to a High Court, in practice most of the subdivisions and divisions lack courts. With very few courts, lawyers lack the avenue to offer legal assistance to needy persons.

5) Legal Framework

The existing legal framework neutralizes the ability of lawyers to render accessible justice in the criminal justice system. As already mentioned, Cameroon is a bi-jural country with no harmonized criminal procedure. Prevailing repressive laws,[31] like the law on the state of emergency, and that on maintenance of law and order, sanction indiscriminate arrests and administrative detentions. With more impetus accorded by the jurisdiction of the Military Tribunal,[32] these laws pro-

30. Lawyers pay yearly business licenses, income taxes for each matter, value added taxes, 20% taxes in their rents, etc.

31. Law on the State of Emergency, No. 90-047 (Dec. 19, 1990); Law Relating to Maintenance of Law and Order, No 90-54 (Dec. 19, 1990).

32. Law on the Jurisdiction of Military Tribunals, No 90-048 (Dec. 19, 1990) (as amended).

vide for long periods of remand and oust the jurisdictions of ordinary courts in granting bail or hearing cases.

In addition, notwithstanding the sound constitutional guarantees highlighted previously, qualifying phrases in the Constitution such as "subject . . . to the higher interest of the state" and permissive standards like the use of the word "may" clearly provide opportunities for the government to effectively override those provisions that ensure access to justice.[33] This is compounded by the contradictory constitutional guarantees of independence of the judiciary.[34]

Ineffective implementation of international law standards constitutes another hindrance. Cameroon has ratified many pro-human rights and access to justice conventions, which guarantee, on paper, a criminal justice system that meets the aspirations and needs of the general public. But they have not been incorporated into national laws and procedures to give lawyers positive instruments for providing legal aid. Even where some international conventions are incorporated into national law, implementation is at times difficult under a practically dependent judiciary.

6) Inaccessible Legal Services of Lawyers.

The Cameroon Bar Association has only 1,337 lawyers in a country with a population of about sixteen million people. Lawyers are therefore too few to render adequate legal aid to needy persons. In addition, almost all lawyers are based in urban areas such as towns and cities. For instance, the North Province has twelve lawyers who are all based in Garoua, the provincial headquarters. The Northwest Province has ninety-eight lawyers, all but four of whom are based in Bamenda, the provincial capital.[35] Consequently, the services of lawyers are relatively inaccessible to the rural poor who constitute a significant percentage of the population.

While there is a school for training of magistrates in Cameroon, there is no formal institution for training of lawyers. Pupil lawyers train under other lawyers without any specific training program or external supervision. Consequently, they lack basic training on human rights laws and practices. Most of the lawyers lack

33. The 1996 Constitution provides that "Freedom shall be guaranteed to each individual, subject to respect for the rights of others and the higher interest of the state." It further provides that "No person may be prosecuted, arrested or detained except in cases and according to the manner determined by law." Constitution, Preamble (1996) (Cameroon).

34. Constitution, Art. 37–41 (1996) (Cameroon).

35. *See* Bulletin du Batonnier Dec. 2003–Jan. 2004 (on file with author).

knowledge and requisite skills in contemporary and innovative approaches to rendering legal aid.[36]

7) Judicial Delays

Delays in the criminal justice process negatively impact the provision of legal aid. Slow court processes and multiple adjournments caused by congestion of cases, incomplete case files, non-appearance of witnesses, and non-production of defendants from prison custody are very common. Some criminal matters remain pending in court for five or six years. Considering that the investigation and prosecution of criminal matters is substantially within the purview of the Legal Department,[37] lawyers usually have very little to do with the lengthy delays.[38] However, it must be mentioned that some lawyers have the propensity of clogging the wheels of justice by adopting tactics that unnecessarily prolong cases.

8) Lack of Cooperation

For justice to be rendered accessible and affordable, there must be cooperation between lawyers and governmental and other institutions in the criminal justice process. Such cooperation will positively impact the quality and effectiveness of legal aid rendered by lawyers. However, this cooperation between the stakeholders in the criminal justice process is lacking. For instance, most of the investigators such as the police and the gendarmes regard and treat lawyers as unwanted meddlers who have no right to intervene on behalf of any suspect. In some instances lawyers have been physically assaulted by the police at police stations when the lawyers attempted to intervene on behalf of detained clients. Some investigators arrogantly send away lawyers on the basis that the job of a lawyer is limited to the court. With this lack of cooperation, effective provision of legal aid by lawyers in the criminal justice system cannot be attained.

CONCLUSION

Despite the activities of Cameroonian lawyers in the provision of legal aid, Cameroon's prisons are still over-congested and dominated by pre-trial detainees. Human rights abuses are still very high, and thousands of people who need assistance from lawyers cannot access them. From the supply side, lawyers in Cameroon are not adequately responding to the plight of the poor and vulnerable masses in the provision of legal aid.

36. For example, running law centers, Paralegal Services, Legal Aid Clinics, ADRs, etc.

37. Law on Judicial Organization in Cameroon, No 89/019 § 23 (Dec. 19, 1989).

38. *The People v. Asanga Asongwe*, CFIBA/1128 C/01-02. This case was handled by the author's firm before the Court of First Instance, Bamenda. It was instituted in court on July 19, 2002, and to this date the hearing has not begun. It has suffered twenty adjournments and was at one time struck out for want of diligent prosecution.

◆ SECTION V ◆
Appendices

A. THE REGIONAL LAW FRAMEWORK: RESOLUTIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR) AND REGIONAL DECLARATIONS

APPENDIX ONE

ACHPR RESOLUTION ON THE RIGHT TO RECOURSE AND FAIR TRIAL, 1992

The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992;

Conscious of the fact that the African Charter on Human and Peoples' Rights is designed to promote and protect human rights in accordance with the provisions contained in the Charter and recognised international human rights standards;

Recognising that the right to a fair trial is essential for the protection of fundamental human rights and freedoms;

Bearing in mind that Article 7 of the African Charter on Human and Peoples' rights;

1. Considers that every person whose rights or freedoms are violated is entitled to have an effective remedy;

2. Considers further that the right to fair trial includes, among other things, the following:

    a. All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations;

    b. Persons who are arrested shall be informed at the time of arrest, in a language which they understand, of the reason for their arrest and shall be informed promptly of any charges against them;

    c. Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released;

    d. Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court;

    e. In the determination of charges against individuals, the individual shall be entitled in particular to:

i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice;

ii) Be tried within a reasonable time;

iii) Examine or have examined, the witness against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

iv) Have the free assistance of an interpreter if they cannot speak the language used in court;

3. Persons convicted of an offence shall have the right of appeal to a higher court;

4. Recommends to States Parties to the African Charter on Human and Peoples' Rights to create awareness of the accessibility of the recourse procedure and to provide the needy with legal aid;

5. Decides to continue to be seized with the right to recourse procedures and fair trial with the view of elaborating further principles concerning this right.

APPENDIX TWO

ACHPR RESOLUTION ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, 1999, AND DAKAR DECLARATION AND RECOMMENDATIONS

The African Commission on Human and Peoples' Rights meeting at its 26th Ordinary Session, held in Kigali, Rwanda, from 1–15 November 1999;

Considering the provisions of the African Charter on Human and Peoples' Rights relating to the right to a fair trial, in particular Articles 7 and 26;

Recalling the resolution on the Right to Recourse and Fair Trial adopted by the Commission at its 11th Ordinary session in Tunis, Tunisia, in March 1992;

Recalling further the resolution on the Respect and the Strengthening of the Independence of the Judiciary adopted at the 19th Ordinary session held in Ouagadougou, Burkina Faso, in March 1996;

Noting the Recommendations of the Seminar on the Right to a Fair Trial in Africa held in collaboration with the African Society of International and Comparative Law in Dakar, Senegal, from 9–11 September 1999;

Recognising the importance of the right to a fair trial and legal assistance and the need to strengthen the provisions of the African Charter relating to this right;

1. **ADOPTS** the attached Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa;

2. **REQUESTS** the Secretariat of the Commission to forward the Dakar Declaration and Recommendations to Ministries of Justice and Chief Justice of all States parties, Bar Associations and law schools in Africa and non-governmental organizations with observer status, and to report to the 27th Ordinary Session in this regard;

3. **DECIDES** to establish a Working Group on Fair Trial under the supervision of Commissioner Kamel Rezag-Bara and consisting of members of the Commission and representatives of non-governmental organizations;

4. **REQUESTS** the Working Group to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance under the African Charter and submit it to the 27th Ordinary Session of the Commission and for comments and observations by the Members of the Commission during the period between the 27th and the 28th Sessions;

5. **FURTHER REQUESTS** the Working Group to report to the 28th Ordinary Session on the final draft of the general principles and guidelines on fair trial and legal assistance for consideration;

6. **REQUESTS** the Secretariat to provide the Working Group with all support and assistance needed to implement this mission.

DAKAR DECLARATION AND RECOMMENDATIONS

In conformity with its mandate of promotion and protection of human rights in Africa, the African Commission on Human and Peoples' Rights ("the Commission") in collaboration with the African Society of International and Comparative Law organized a seminar on the right to fair trial from 9–11 September 1999 in Dakar, Senegal.

Participants had the benefit of presentations from a wide range of experts, scholars, human rights activists, lawyers and judges, including those from the office of the UN High Commissioner for Human Rights, the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the International Criminal Tribunal for Rwanda, as well as African and International NGOs, which provided a comparative analysis of the implementation of the right to fair trial.

Provisions of the African Charter on Human and Peoples' Rights, in particular Articles 7 and 26, the Resolution on the Right to Recourse Procedure and Fair Trial adopted by the African Commission on Human and Peoples' Rights in Tunis in March 1992, and the resolution on the Respect and Strengthening of the Independence of the Judiciary adopted in Ouagadougou, in March 1996 formed the basis of the discussions. The seminar also took into consideration the Conclusions and Recommendations of the International Seminar on the Right to Fair Trial, held by the Arab Lawyers Union in collaboration with the Commission in Cairo in December 1995.

Participants also took account of political, social and economic contexts affecting the realisation of fair trials in Africa including armed conflicts and other situations that give rise to massive human rights violations and were concerned that the ratification of human rights instruments by African states are not always followed by concrete measures to implement the obligations assumed under these treaties.

Participants identified diverse issues that inhibit the realization of fair trial and measures which could lead to the effective protection of this right in Africa. Specific issues were highlighted during the discussions in order to define practical steps which need to be taken by various actors such as the Commission, African states, judicial officers, legal practitioners and non-governmental organizations to ensure and enhance the implementation of fair trial standards.

DECLARATION

The right to fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines. The realization of this right is dependent on the existence of certain conditions and is impeded by certain practices. These include:

1. Rule of Law, Democracy, and Fair Trial

The right to fair trial can only be fully respected in an environment in which there is respect for rule of law and fundamental rights and freedoms. The rule of law includes the existence of fully accountable political institutions.

2. Independence and Impartiality of the Judiciary

While there are constitutional and legal provisions which provide for the independence of the judiciary in most African countries, the existence of these provisions alone does not ensure the independence and impartiality of the judiciary. Issues and practices which undermine the independence and impartiality of the judiciary include the lack of transparent and impartial procedures for the appointment of judges, interference and control of the judiciary by the executive, lack of security of tenure and remuneration and inadequate resources for the judicial system.

3. Military Courts and Special Tribunals

In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a pure military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards. They should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

4. Traditional Courts

It is recognized that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population in African countries. However, these courts also have serious shortcomings, which result in many instances in a denial of fair trial. Traditional courts are not exempt from the provisions of the African Charter relating to fair trial.

5. Independence of Lawyers and Bar Associations

An independent Bar Association is essential to the protection of fair trial guarantees. Bar Associations should protect and uphold the independence of their members. The ability of lawyers to represent their clients without any harassment, intimidation or interference is an important tenet of the right to a fair trial. In many countries lawyers who represent unpopular causes or persons or groups who are perceived to be opponents of the government themselves become targets for harassment or persecution. An important safeguard for lawyers is that they should not be identified with their clients or their clients' causes as a result of discharging their functions. Cross-border relationships between Bar Associations and the ability of African lawyers to represent a person in countries other than their own enhances the independence of lawyers and Bar Associations.

6. Other Human Rights Defenders

Paralegals, parents or families of victims of human rights violations and crime or of suspects and accused persons and human rights workers representing victims, suspects or accused persons should not be identified with the persons they represent and should not face harassment, intimidation or persecution when they act to protect human rights of such persons, including the right to fair trial.

7. Impunity and Effective Remedies

The failure of the state to deal adequately with human rights violations often results in the systematic denial of justice and, in some instances, conflict and civil war. In societies recovering from conflict situations, the right to effective redress and justice is often discarded in favour of political expediency. The right to fair trial does not permit the use of amnesty to absolve perpetrators of human rights violations from accountability.

8. Victims of Crimes and Abuse of Power

The right to fair trial would be meaningless unless victims of crimes and abuse of power have access to the courts and to an effective remedy. Fair trial standards and national laws and procedures do not adequately protect the rights and interests of such victims who are entitled to judicial procedures that are fair and which protect their well-being and dignity.

9. Legal Aid

Access to justice is a paramount element of the right to a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. 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. The contribution of the judiciary, human rights NGOs and professional associations should be encouraged.

10. Women and Fair Trial

Judicial processes and institutions reflect societal discrimination against women. Gender discrimination affects women in accessing justice and as prospective litigants, accused in criminal trials, as victims of crime, as witnesses and as legal representatives before judicial institutions. Women are not adequately represented in judicial positions and legal procedures are not sufficiently sensitive to issues that affect them.

11. Children and Fair Trial

Children are entitled to all the fair trial guarantees and rights applicable to adults and to some additional protection. The African Charter on the Rights and Welfare of the Child requires that: “Every child accused of or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect of human rights and fundamental freedoms.”

RECOMMENDATIONS

The African Commission should:

- Consolidate and expand all its pronouncement on the right to fair trial into a coherent body of principles, acting under Article 45(1)(b) of the African Charter;
- Prioritize specific aspects of fair trial in Africa, such as access to legal aid, proceedings before military and traditional courts, impunity, and discrimination against women in judicial proceedings for discussion in the agenda of its regular sessions;
- Direct its Special Rapporteurs to focus special attention on aspects of the right to fair trial which fall within or are related to their mandates;
- Monitor the improvement of access to justice and effective redress by requesting state parties to include in their reports a special section which addresses the implementation of the right to fair trial, including an analysis of the resources provided to judicial institutions as a proportion of the national budget of the state;
- Take up the issue of the right to fair trial, including the independence of the judiciary, and establish contact with the judiciary and local bar associations during promotional and protective mission to states;
- Work in collaboration with the Office of the High Commissioner for Human Rights and other appropriate intergovernmental institutions to provide technical assistance to states for enhancing the performance and procedures of judicial institutions in the realisation of the right to fair trial;
- Establish a specific mechanism of follow up and monitoring of the right to fair trial in Africa;
- Disseminate annually a compendium of its decisions and resolutions to the Ministry of Justice of each state with a request that it be distributed to law schools, judicial officials, judicial training centres, bar associations and law enforcement agencies;
- Transmit this document to the Minister of Justice and the head of the judiciary in each state party with a request that it be disseminated to judicial and law enforcement officials, bar associations and law schools.

States parties to the African Charter should:

- Allocate adequate resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantees to users of the legal process;
- Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes;
- In collaboration with Bar Associations and NGOs, enable innovative and additional legal assistance programs to be established including allowing paralegals to provide legal assistance to indigent suspects at the pre-trial stage and pro-bono representation for accused in criminal proceedings;
- Seek technical assistance from the Office of the High Commissioner, other UN agencies and bilateral and multilateral sources to reform constitutional and legal provisions for effective implementation of the right to fair trial, including the protection of the rights of victims of crime and abuse of power and their defenders;
- Improve judicial skills through programs of continuing education, giving specific attention to the domestic implementation of international human rights standards, and to increase the resources available to judicial and law enforcement institutions;
- Incorporate the African Charter into the domestic law and adopt concrete measures at the national level to implement their obligations under the Charter, including specific measures to uphold their obligation to protect the right to fair trial;
- Take immediate measures to ensure better and effective representation of women in judicial institutions, reform judicial procedures which discriminate against women and provide gender awareness training to judicial and law enforcement officials;
- Include in their periodic report to the Commission a special section which addresses the implementation of the right to fair trial, including an analysis of the resources provided to judicial institutions as a proportion of the national budget of the state;
- Work in collaboration with local communities to identify and address issues within the traditional courts which are obstacles to the realization of the right to fair trial;
- Ensure that the law is applied without discrimination to ordinary persons and state officials alike and that abuse of power is promptly investigated and those found responsible prosecuted;

- Establish an age of criminal responsibility below which children may be presumed incapable of committing a crime and establish separate or specialised procedures and institutions to deal with accused children;
- Ratify all treaties relevant to the right to a fair trial, including the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Statutes of the International Criminal Court, if they have not done so already;
- Respect the independence of lawyers and bar associations, including their right to undertake their duties without any interference and/or intimidation;
- Ensure that all trials before military courts respect the right to a fair trial and that civilians are not tried before such courts;
- Take measures to ensure that all cases involving civilians are tried before regular courts and that special courts, where they exist, are abolished and phased out;
- Take progressive steps to abolish the death penalty and in the meanwhile to ensure that all persons tried for an offence where the death penalty is a competent sentence are afforded all the rights to a fair trial;
- Afford rights of audience to lawyers from other African countries and consider the adoption of regional or sub-regional treaties for this purpose, where such instruments do not exist.

Judicial officials should:

- Examine shortcomings in constitutional and legal provisions which affect the right to a fair trial, including the rights of victims, and make specific recommendations to the authorities to remedy them;
- Make recommendations to the national authorities on resources and training needs of the judiciary to improve the implementation of fair trial guarantees;
- Establish, where it does not exist, a forum for regular discussion between representatives of judicial institutions, law schools, and law enforcement agencies to address problems which undermine the right to a fair trial;
- Establish contact with the African Commission for the purposes of obtaining regular information on developments relevant to domestic implementation of the right to a fair trial under the African Charter;

- Bring to the attention of the Commission cases or practices which threaten the independence and impartiality of the judiciary;
- Take measures and institute processes to tackle practices, including corruption, which undermine their independence and impartiality;
- Adopt measures to ensure the elimination of discrimination against women both as regards their appointment as judicial officials and as participants in judicial proceedings.

Bar Associations should:

- In collaboration with appropriate Government institutions and NGOs enable paralegals to provide legal assistance to indigent suspects at the pre-trial stage;
- Establish programs for pro-bono representation of accused in criminal proceedings;
- Establish a forum for regular discussions with government and judicial officials on ways in which the implementation of the right to a fair trial could be improved;
- Take steps to protect and assure the integrity and independence of members of the legal profession;
- Take active steps to support the recruitment and appointment of women to judicial positions and provide gender awareness training to their members;
- Institute a program of continuing education for its members on issues that advance fair trial rights and seek appropriate technical assistance and resources to realize this;
- Establish programs of cooperation with legal professional organizations in other countries and encourage states to afford rights of audience to lawyers from other African countries where such rights do not exist.

Non-governmental Organizations and Community Based Organizations should:

- Consider innovative and alternative ways in providing legal assistance to indigent accused including through the establishment of paralegal programs, legal aid clinics, legal defence funds and public interest litigation programs;
- Establish programs in conjunction with the judiciary and other state bodies to contribute to the training of judicial and law enforcement officials in aspects of fair trial rights;

- Undertake studies of fair trial issues and make recommendations regarding the measures to be taken by the different organs of state to improve the delivery of justice and fair trial;
- In collaboration with law enforcement agencies, to produce posters in simple language on the rights of accused persons or detainees and display these in all places of detention;
- Assist the Commission to disseminate its decisions and distribute to law schools, judicial officials, judicial training centres, law enforcement agencies and bar associations documents and information relevant to fair trial.

APPENDIX THREE

ACHPR PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA, 2001

The African Commission on Human and Peoples' Rights;

Recalling its mandate under Article 45(c) of the African Charter on Human and Peoples' Rights (the Charter) "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation;"

Recalling Articles 5, 6, 7, and 26 of the Charter, which contain provisions relevant to the right to a fair trial;

Recognising that it is necessary to formulate and lay down principles and rules to further strengthen and supplement the provisions relating to fair trial in the Charter and to reflect international standards;

Recalling the resolution on the Right to Recourse and Fair Trial adopted at its 11th ordinary session in March 1992, the resolution on the Respect and the Strengthening of the Independence of the Judiciary adopted at its 19th ordinary session in March 1996 and the resolution Urging States to Envisage a Moratorium on the Death Penalty adopted at its 26th ordinary session in November 1999;

Recalling also the resolution on the Right to a Fair Trial and Legal Assistance, adopted at its 26th session held in November 1999, in which it decided to prepare general principles and guidelines on the right to a fair trial and legal assistance under the African Charter;

Solemnly proclaims these Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and urges that every effort is made so that they become generally known to everyone in Africa; are promoted and protected by civil society organisations, judges, lawyers, prosecutors, academics and their professional associations; and are incorporated into their domestic legislation by State parties to the Charter and respected by them:

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted, competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:

(a) Equality of arms between the parties to proceedings, whether they be administrative, civil, criminal, or military;

(b) Equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;

(c) Equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;

(d) Respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

(e) Adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) An entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

(g) An entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;

(h) An entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;

(i) An entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and;

(j) An entitlement to an appeal to a higher judicial body.

3. Public Hearing

(a) All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body.

(b) A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public.

(c) Adequate facilities shall be provided for attendance by interested members of the public.

(d) No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined.

(e) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings.

(f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be:

1. In the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence;
2. For reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

(g) Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.

(h) Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.

(i) Nothing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at trial. Any judgement rendered in legal proceedings, whether civil or criminal, shall be pronounced in public.

4. Independent Tribunal

(a) The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities.

(b) Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner.

(c) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law.

(d) A judicial body's jurisdiction may be determined, *inter alia*, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties.

(e) Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

(f) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.

(g) All judicial bodies shall be independent from the executive branch.

(h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

(i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.

(j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:

1. Prescribe a minimum age or experience for candidates for judicial office;
2. Prescribe a maximum or retirement age or duration of service for judicial officers;
3. Prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;
4. Require that only nationals of the state concerned shall be eligible for appointment to judicial office.

(k) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

(l) Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.

(m) The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.

(n) Judicial officers shall not be:

1. Liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions;
2. Removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body;
3. Appointed under a contract for a fixed term.

(o) Promotion of judicial officials shall be based on objective factors, in particular ability, integrity and experience.

(p) Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

(q) Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

(r) The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.

(s) Judicial officers are entitled to freedom of expression, belief, association and assembly. In exercising these rights, they shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

(t) Judicial officers shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

(u) States may establish independent or administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery processes of judicial bodies. Such mechanisms, which shall be constituted in equal part of members of the judiciary and representatives of the Ministry responsible for judicial affairs, may include processes for judicial bodies receiving and processing complaints against its officers.

(v) States shall endow judicial bodies with adequate resources for the performance of their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.

5. Impartial Tribunal

(a) A judicial body shall base its decision only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

(b) Any party to proceedings before a judicial body shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of the judge or judicial body appears to be in doubt.

(c) The impartiality of a judicial body could be determined on the basis of three relevant facts:

1. That the position of the judicial officer allows him or her to play a crucial role in the proceedings;
2. The judicial officer may have expressed an opinion which would influence the decision-making;

3. The judicial official would have to rule on an action taken in a prior capacity.

(d) The impartiality of a judicial body would be undermined when:

1. A former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
2. A judicial official secretly participated in the investigation of a case;
3. A judicial official has some connection with the case or a party to the case;
4. A judicial official sits as member of an appeal tribunal in a case which he or she participated in or decided in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down.

(e) A judicial official may not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.

B. JUDICIAL TRAINING:

1. States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.

2. States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.

3. States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation.

C. RIGHT TO AN EFFECTIVE REMEDY:

1. Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

2. The right to an effective remedy includes:
   (a) Access to justice;
   (b) Reparation for the harm suffered;
   (c) Access to the factual information concerning the violations.
3. Every State has an obligation to ensure that:
   (a) Any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;
   (b) Any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities;
   (c) Any remedy granted shall be enforced by competent authorities;
   (d) Any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy.
4. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.

D. COURT RECORDS AND PUBLIC ACCESS:

1. All information regarding judicial proceedings shall be accessible to the public, except information or documents that have been specifically determined by judicial officials not to be made public.
2. States must ensure that proper systems exist for recording all proceedings before judicial bodies, storing such information and making it accessible to the public.
3. All decisions of judicial bodies must be published and available to everyone throughout the country.
4. The cost to the public of obtaining records of judicial proceedings or decisions should be kept to a minimum and should not be so high as to amount to a denial of access.

E. LOCUS STANDI:

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

F. ROLE OF PROSECUTORS:

1. States shall ensure that:
   (a) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law, including the Charter;
   (b) Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
2. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, housing, transport, conditions of physical and social security, pension and age of retirement and other conditions of service shall be set out by law or published rules or regulations.
3. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.
4. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
5. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.
6. The office of prosecutors shall be strictly separated from judicial functions.
7. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of decisions of judicial bodies and the exercise of other functions as representatives of the public interest.
8. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

9. In the performance of their duties, prosecutors shall:
   (a) Carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;
   (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
   (c) Keep matters in their possession confidential, unless the performance of duty or needs of justice require otherwise;
   (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the provisions below relating to victims.

10. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

11. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

12. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

13. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, judicial bodies, the legal profession, paralegals, non-governmental organisations, and other government agencies or institutions.

14. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors, which allege that they acted in a manner that is inconsistent with professional standards,

shall be processed expeditiously and fairly under appropriate procedures prescribed by law. Prosecutors shall have the right to a fair hearing including the right to be represented by a legal representative of their choice. The decision shall be subject to independent review.

15. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

G. ACCESS TO LAWYERS AND LEGAL SERVICES:

1. States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic, or other status.

2. States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar.

3. States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.

H. LEGAL AID AND LEGAL ASSISTANCE:

1. The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

2. The interests of justice should be determined by considering:
   (a) In criminal matters:
      1. The seriousness of the offence;
      2. The severity of the sentence.
   (b) In civil cases:
      1. The complexity of the case and the ability of the party to adequately represent himself or herself;
      2. The rights that are affected;
      3. The likely impact of the outcome of the case on the wider community.

3. The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

4. An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.

5. When legal assistance is provided by a judicial body, the lawyer appointed shall:
   (a) Be qualified to represent and defend the accused or a party to a civil case;
   (b) Have the necessary training and experience corresponding to the nature and seriousness of the matter;
   (c) Be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;
   (d) Advocate in favour of the accused or party to a civil case;
   (e) Be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.

6. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:
   (a) When legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;
   (b) Where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.

7. Given the fact that in many States the number of qualified lawyers is low, States should recognize the role that paralegals could play in the provision of legal assistance and establish the legal framework to enable them to provide basic legal assistance.

8. States should, in conjunction with the legal profession and non-governmental organizations, establish training, the qualification procedures, and rules governing the activities and conduct of paralegals. States shall adopt legislation to grant appropriate recognition to paralegals.

9. Paralegals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.

10. Non-governmental organizations should be encouraged to establish legal assistance programmes and to train paralegals.

11. States that recognize the role of paralegals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.

I. INDEPENDENCE OF LAWYERS:

1. States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

2. States shall ensure that lawyers:
   (a) Are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference;
   (b) Are able to travel and to consult with their clients freely both within their own country and abroad;
   (c) Shall not suffer, or be threatened with, prosecution or administrative, economic, or other sanctions for any action taken in accordance with recognized professional duties, standards, and ethics.

3. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

4. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession, or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

5. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a judicial body or other legal or administrative authority.

6. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

7 Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

8. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

9. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

10. Lawyers shall always loyally respect the interests of their clients.

11. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and the protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

12. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional association shall be elected by its members and shall exercise its functions without external interference.

13. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

14. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

15. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession,

before an independent statutory authority, or even before a judicial body, and shall be subject to an independent judicial review.

16. All disciplinary proceedings shall be determined in accordance with the code of professional conduct, other recognized standards and ethics of the legal profession and international standards.

J. CROSS BORDER COLLABORATION AMONGST LEGAL PROFESSIONALS:

1. States shall ensure that national legislation does not prevent collaboration amongst legal professionals in countries in their region and throughout Africa.

2. States shall encourage the establishment of agreements amongst states and professional legal associations in their region that permit cross-border collaboration amongst lawyers including legal representation, training and education, and exchange of information and expertise.

K. ACCESS TO JUDICIAL SERVICES:

1. States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic, or other status.

2. States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.

3. In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

4. States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable

or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.

L. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:

1. The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.

2. While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.

3. Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

M. PROVISIONS APPLICABLE TO ARREST AND DETENTION:

1. Right to Liberty and Security

(a) States shall ensure that the right of everyone on its territory and under its jurisdiction to liberty and security of person is respected.

(b) States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.

(c) Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.

(d) Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody transfers and imprisonment, and of other officials authorized by law to use force and firearms.

(e) Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release

may be subject to certain conditions or guarantees, including the payment of bail.

(f) Expectant mothers and mothers of infants shall not be kept in custody pending their trial, but their release may be subject to certain conditions or guarantees, including the payment of bail.

(g) States shall ensure, including by the enactment of legal provisions, that officials or other persons who arbitrarily arrest or detain any person are brought to justice.

(h) States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation.

2. Rights Upon Arrest

(a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.

(b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right.

(c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody.

(d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization.

(e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.

(f) 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.

(g) Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution.

(h) Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.

3. Right to be Brought Promptly Before a Judicial Officer

(a) Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

(b) The purpose of the review before a judicial or other authority includes to:

1. Assess whether sufficient legal reason exists for the arrest;
2. Assess whether detention before trial is necessary;
3. Determine whether the detainee should be released from custody, and the conditions, if any, for such release;
4. Safeguard the well-being of the detainee;
5. Prevent violations of the detainee's fundamental rights;
6. Give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.

4. Right of Arrested or Detained Person to Take Proceedings Before a Judicial Body

Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.

5. Right to Habeas Corpus

(a) States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.

(b) Anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty.

(c) In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

(d) Any other competent authority entitled under law of the State or by any international legal instrument to which the State is a party may also have access to such places.

(e) Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatsoever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.

6. Right to be Detained in a Place Recognised by Law

(a) Any person deprived of liberty shall be held in an officially recognised place of detention.

(b) Accurate information shall be recorded regarding any person deprived of liberty including:

1. His or her identity;
2. The reasons for arrest;
3. The time of arrest and the taking of the arrested person to a place of custody;
4. The time of his or her first appearance before a judicial or other authority;
5. The identity of the law enforcement officials concerned;
6. Precise information concerning the place of custody;
7. Details of the judicial official or other authority informed of the arrest and detention.

(c) Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be promptly available to their family members, their legal representative or to any other persons having a legitimate interest in the information.

(d) An official up-to-date register of all persons deprived of liberty shall be maintained in every place of detention and shall be made available to any judicial or other competent and independent national authority seeking to trace the whereabouts of a detained person.

7. Right to humane treatment

(a) States shall ensure that all persons under any form of detention or imprisonment are treated in a humane manner and with respect for the inherent dignity of the human person.

(b) In particular, States must ensure that no person, lawfully deprived of his or her liberty is subjected to torture or to cruel, inhuman or degrading treatment or punishment. States shall ensure that special measures are taken to protect women detainees from ill-treatment, including making certain that their interrogation is conducted by women police, or judicial officials.

(c) Women shall at all times be detained separately from men and while in custody they shall receive care, protection and all necessary individual assistance—psychological, medical and physical—that they may require in view of their sex and gender.

(d) It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself, or to testify against any other person.

(e) No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his or her capacity of decision or his or her judgement.

(f) No detained person shall, even with his or her consent, be subjected to any medical or scientific experimentation which could be detrimental to his or her health.

(g) A detained person or his or her legal representative or family shall have the right to lodge a complaint to the relevant authorities regarding his

or her treatment, in particular in case of torture or other cruel, inhuman or degrading treatment.

(h) States shall ensure that effective mechanisms exist for the receipt and investigation of such complaints. The right to lodge complaints and the existence of such mechanisms should be promptly made known to all arrested or detained persons.

(i) States shall ensure, including by the enactment of legal provisions, that officials or other persons who subject arrested or detained persons to torture or to cruel, inhuman or degrading treatment are brought to justice.

(j) States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of torture or cruel, inhuman or degrading treatment or punishment is enabled to claim compensation.

8. Supervision of places of detention

(a) In order to supervise strict observance of relevant laws and regulations and international standards applicable to detainees, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention.

(b) A detained person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with the above principle, subject to reasonable conditions to ensure security and good order in such places.

N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGES:

1. Notification of charge

(a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language which he or she understands, of the nature and cause of the charge against him or her.

(b) The information shall include details of the charge or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused.

(c) The accused must be informed in a manner that would allow him or her to prepare a defence and to take immediate steps to secure his or her release.

2. Right to counsel

(a) The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.

(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.

(c) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial, and appeal proceedings.

(d) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

3. Right to adequate time and facilities for the preparation of a defence

(a) The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(e) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception, or censorship and in full confidentiality.

1. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.
2. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.
3. The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.
4. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
5. The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.
6. Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know and challenge all the evidence which may be used to support the decision. All evidence submitted must be considered by the judicial body.
7. Following a trial and before any appellate proceeding, the accused or the defence counsel has a right of access to (or to consult) the evidence which the judicial body considered in making a decision and the judicial body's reasoning in arriving at the judgement.

4. The right to an interpreter

(a) The accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used before the judicial body.

(b) The right to an interpreter does not extend to the right to express oneself in the language of one's choice if the accused or the defence witness is sufficiently proficient in the language of the judicial body.

(c) The right to an interpreter applies at all stages of the proceedings, including pre-trial proceedings.

(d) The right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.

(e) The interpretation or translation provided shall be adequate to permit the accused to understand the proceedings and for the judicial body to understand the testimony of the accused or defence witnesses.

(f) The right to interpretation or translation cannot be qualified by a requirement that the accused pay for the costs of an interpreter or translator. Even if the accused is convicted, he or she cannot be required to pay for the costs of interpretation or translation.

5. Right to trial without undue delay

(a) Every person charged with a criminal offence has the right to a trial without undue delay.

(b) The right to a trial without undue delay means the right to a trial which produces a final judgement, and if appropriate, a sentence without undue delay.

(c) Factors relevant to what constitutes undue delay include the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings.

6. Rights during a trial

(a) In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor.

1. The prosecution and defence shall be allowed equal time to present evidence.
2. Prosecution and defence witnesses shall be given equal treatment in all procedural matters.

(b) The accused is entitled to a hearing in which his or her individual culpability is determined. Group trials in which many persons are involved may violate the person's right to a fair hearing.

(c) In criminal proceedings, the accused has the right to be tried in his or her presence.

1. The accused has the right to appear in person before the judicial body.
2. The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.
3. The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.

(d) The accused has the right not to be compelled to testify against him or herself or to confess guilt.

1. Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.
2. Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.

(e) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.
2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.
3. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

(f) The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

1. The prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence.
2. The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.
3. The accused has the right to be present during the testimony of a witness. This right may be limited only in exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.
4. If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness.
5. If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant shall have the opportunity, personally, or through defence counsel, to cross-examine the witness at trial. However, the right of a defendant to cross-examine witnesses personally may be limited in respect of victims of sexual violence and child witnesses, taking into consideration the defendant's right to a fair trial.
6. The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice.

(g) Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations.

7. Right to benefit from a lighter sentence or administrative sanction

(a) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time

when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefrom.

(b) A lighter penalty created any time before an accused's sentence has been fully served should be applied to any offender serving a sentence under the previous penalty.

(c) Administrative tribunals conducting disciplinary proceedings shall not impose a heavier penalty than the one that was applicable at the time when the offending conduct occurred. If, subsequent to the conduct, provision is made by law for the imposition of a lighter penalty, the person disciplined shall benefit thereby.

8. Second trial for same offence prohibited

No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

9. Sentencing and punishment

(a) Punishments constituting a deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

(b) In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.

(c) Sentence of death shall not be imposed or carried out on expectant mothers and mothers of infants and young children.

(d) States that maintain the death penalty are urged to establish a moratorium on executions, and to reflect on the possibility of abolishing capital punishment.

(e) States shall provide special treatment to expectant mothers and to mothers of infants and young children who have been found guilty of infringing the penal law and shall in particular:

1. Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
2. Establish and promote measures alternative to institutional confinement for the treatment of such mothers;
3. Establish special alternative institutions for holding such mothers;

4. Ensure that a mother shall not be imprisoned with her child;
5. The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

10. Appeal

(a) Everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal.
   1. The right to appeal shall provide a genuine and timely review of the case, including the facts and the law. If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused.
   2. A judicial body shall stay execution of any sentence while the case is on appeal to a higher tribunal.

(b) Anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction, and States should take steps to ensure that such appeals become mandatory.

(c) When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law.

(d) Every person convicted of a crime has a right to seek pardon or commutation of sentence. Clemency, commutation of sentence, amnesty, or pardon may be granted in all cases of capital punishment.

O. CHILDREN AND THE RIGHT TO A FAIR TRIAL:

(a) In accordance with the African Charter on the Rights and Welfare of the Child, a child is any person under the age of 18. States must ensure that domestic legislation recognises any person under the age of 18 as a child.

(b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.

(c) States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system whether as suspects, accused, complainants or witnesses.

(d) States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.

(e) No child shall be subjected to arbitrary arrest or detention.

(f) Law enforcement officials must ensure that all contacts with children are conducted in a manner that respects their legal status, avoids harm and promotes the well-being of the child.

(g) When a child suspected of having infringed the penal law is arrested or apprehended, his or her parent, guardians or family relatives should be notified immediately.

(h) The child's right to privacy shall be respected at all times in order to avoid harm being caused to him or her by undue publicity, and no information that could identify a child suspected or accused of having committed a criminal offence shall be published.

(i) States shall consider, wherever appropriate, with the consent of the child and his or her parents or guardians, dealing with a child offender without resorting to a formal trial, provided the rights of the child and legal safeguards are fully respected. Alternatives to criminal prosecution, with proper safeguards for the protection of the well-being of the child, may include:

1. The use of community, customary or traditional mediation;
2. Issuing of warnings, cautions and admonitions accompanied by measures to help the child at home with education and with problems and difficulties;
3. Arranging a conference between the child, the victim and members of the community;
4. Making use of community programmes such as temporary supervision and guidance, restitution and compensation to victims.

(j) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. Any child who has been arrested for having committed a crime shall be released into the care of his or her parents, legal guardians or family relatives unless there are exceptional reasons for his or her detention. The competent authorities shall ensure that children are not held in detention for any period beyond 48 hours.

(k) Children who are detained pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

(l) Every child arrested or detained for having committed a criminal offence shall have the following guarantees:

1. To be treated in a manner consistent with the promotion of the child's dignity and worth;
2. To have the assistance of his or her parents, a family relative or legal guardians from the moment of arrest;
3. To be provided by the State with legal assistance from the moment of arrest;
4. To be informed promptly and directly, in a language he or she understands, of the reasons for his or her arrest and of any charges against him or her, and if appropriate, through his or her parents, other family relative, legal guardians, or legal representative;
5. To be informed of his or her rights in a language he or she understands;
6. Not to be questioned without the presence of his or her parents, a family relative or legal guardians, and a legal representative;
7. Not to be subjected to torture or any other cruel, inhuman or degrading treatment or punishment or any duress or undue pressure;
8. Not to be detained in a cell or with adult detainees.

(m) States shall establish separate or specialized procedures and institutions for dealing with cases in which children are accused of or found responsible for having committed criminal offences. The establishment of such procedures and institutions shall be based on respect for the rights of the child, shall take into account the vulnerability of children and shall promote the child's rehabilitation.

(n) Every child accused of having committed a criminal offence shall have the following additional guarantees:

1. To be presumed innocent until proven guilty according to the law;
2. To be informed promptly and directly, and in a language that he or she understands, of the charges, and if appropriate, through his or her parents or legal guardians;
3. To be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;
4. To have the case determined expeditiously by a competent, independent and impartial authority, or judicial body established by law in a fair hearing;
5. To have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative, or legal guardians, during the proceedings;
6. Not to be compelled to give testimony or confess guilt; to examine or have examined adverse witnesses and to obtain the participation of witnesses on his or her behalf under conditions of equality;
7. If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority, or judicial body according to law;
8. To have the free assistance of an interpreter if he or she cannot understand or speak the language used;
9. To have his or her privacy fully respected at all stages of the proceedings.

(o) In disposing of a case involving a child who has been found to be in conflict with the law, the competent authority shall be guided by the following principles:

1. The action taken against the child shall always be in proportion not only to the circumstances and gravity of the offence but also the best interest of the child and the interests of society;
2. Non-custodial options which emphasise the value of restorative justice should be given primary consideration, and restrictions on the personal liberty of a child shall only be imposed after careful consideration and shall be limited to the possible minimum. Non-custodial measures could include:
    i. Care, guidance, and supervision orders; probation;
    ii. Financial penalties, compensation, and restitution;
    iii. Intermediate treatment and other treatment orders;

iv. Orders to participate in group counselling and similar activities;

v. Orders concerning foster care, living communities, or other educational settings.

3. A child shall not be sentenced to imprisonment unless the child is adjudicated of having committed a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

4. Capital punishment shall not be imposed for any crime committed by children and children shall not be subjected to corporal punishment.

(p) States shall ensure that child witnesses are able to give their best evidence with the minimum distress. Investigation and practices of judicial bodies should be adapted to afford greater protection to children without undermining the defendant's right to a fair trial. States are required, as appropriate, to adopt the following measures in regard to child witnesses:

1. Child witnesses shall not be questioned by the police or any investigating official without the presence of his or her parents, a family relative or legal guardians, or where the latter are not traceable, in the presence of a social worker;

2. Police and investigating officials shall conduct their questioning of child witnesses in a manner that avoids any harm and promotes the well-being of the child;

3. Police and investigating officials shall ensure that child witnesses, especially those who are victims of sexual abuse, do not come into contact with or are not made to confront the alleged perpetrator of the crime;

4. The child's right to privacy shall be respected at all times and no information that could identify a child witness shall be published;

5. Where necessary, a child witness shall be questioned by law enforcement officials through an intermediary;

6. A child witness should be permitted to testify before a judicial body through an intermediary, if necessary;

7. Where resources and facilities permit, video-recorded pre-trial interviews with child witnesses should be presented;

8. Screens should be set up around the witness box to shield the child witness from viewing the defendant;

9. The public gallery should be cleared, especially in sexual offence cases and cases involving intimidation, to enable evidence to be given in private;
10. Judicial officers, prosecutors and lawyers should wear ordinary dress during the testimony of a child witness;
11. Defendants should be prevented from personally cross-examining child witnesses;
12. The circumstances in which information about the previous sexual history of alleged child victims may be sought or presented as evidence in trials for sexual offences must be restricted.

P. VICTIMS OF CRIME AND ABUSE OF POWER:

(a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.

(b) States must ensure that women who are victims of crime, especially of a sexual nature, are interviewed by women police or judicial officials.

(c) Sates shall take steps to ensure that women who are complainants, victims or witnesses are not subjected to any cruel, inhumane, or degrading treatment.

(d) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

(e) States are required to investigate and punish all complaints of violence against women, including domestic violence, whether those acts are perpetrated by the state, its officials or agents or by private persons. Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation, and to prevent further violence.

(f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by:

1. Informing them of their role and the scope, timing, and progress of the proceedings and the final outcome of their cases;
2. Allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
3. Providing them with proper assistance throughout the legal process;
4. Taking measures to minimize inconvenience to them, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

(g) Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

(h) Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses, the provision of services and the restoration of rights.

(i) States should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

(j) Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws or international law, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.

(k) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

1. Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
2. The family, in particular dependants of persons who have died or become physically or mentally incapacitated.

(l) States are encouraged to establish, strengthen, and expand national funds for compensation to victims.

(m) States must ensure that:

1. Victims receive the necessary material, medical, psychological, and social assistance through state, voluntary, non-governmental, and community-based means;
2. Victims are informed of the availability of health and social services and other relevant assistance and are readily afforded access to them;
3. Police, justice, health, social service, and other personnel concerned receive training to sensitize them to the needs of victims, and guidelines are adopted to ensure proper and prompt aid.

Q. TRADITIONAL COURTS:

(a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.

(b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:

1. Equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political, or other opinion, national or social origin, means, disability, birth, status or other circumstances;
2. Respect for the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhumane, or degrading punishment or treatment;
3. Respect for the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;
4. Respect for the equality of women and men in all proceedings;
5. Respect for the inherent dignity of women, and their right not to be subjected to cruel, inhumane, or degrading treatment or punishment;
6. Adequate opportunity to prepare a case, present arguments and evidence, and to challenge or respond to opposing arguments or evidence;
7. An entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;

8. An entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;
9. An entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the traditional court;
10. An entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions;
11. An entitlement to an appeal to a higher traditional court, administrative authority, or a judicial tribunal;
12. All hearings before traditional courts shall be held in public and its decisions shall be rendered in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children.

(c) The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:
   1. They shall be independent from the executive branch;
   2. There shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.

(d) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats, or interference, direct or indirect, from any quarter.
   1. The impartiality of a traditional court would be undermined when one of its members has:
      i. Expressed an opinion which would influence the decision-making;
      ii. Some connection or involvement with the case or a party to the case;
      iii. A pecuniary or other interest linked to the outcome of the case.
   2. Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of any of its members or the traditional court appears to be in doubt.

(e) The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension, or removal proceedings.

R. NON-DEROGABILITY CLAUSE:

No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability, or any other public emergency, may be invoked to justify derogations from the right to a fair trial.

S. USE OF TERMS:

For the purpose of these Principles and Guidelines:

(a) "*Arrest*" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

(b) "*Criminal charge*" is defined by the nature of the offence and the nature and degree of severity of the penalty incurred. An accusation may constitute a criminal charge although the offence is not classified as criminal under national law.

(c) "*Detained person*" or "*detainee*" means any individual deprived of personal liberty except as a result of conviction for an offence.

(d) "*Detention*" means the condition of a detained person.

(e) "*Imprisoned person*" or "*prisoner*" means any individual deprived of personal liberty as a result of conviction for an offence.

(f) "*Imprisonment*" means the condition of imprisoned persons.

(g) "*Suspect*" means a person who has been arrested but not arraigned or charged before a judicial body.

(h) "*Judicial body*" means a dispute resolution or adjudication mechanism established and regulated by law and includes courts and other tribunals.

(i) "*Judicial office*" means a position on a judicial body.

(j) "*Judicial officer*" means a person who sits in adjudication as part of a judicial body.

(k) "*Legal proceeding*" means any proceeding before a judicial body brought in regard to a criminal charge or for the determination of rights or obligations of any person, natural or legal.

(l) "*Traditional court*" means a body which, in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.

(m) "*Habeas corpus*," or "*amparo*" is a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body.

(n) "*Victim*" means persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws or that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress.

APPENDIX FOUR

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, 1987

OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986

(Excerpts)

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
   (a) the right to an appeal to competent national organizations against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations, and customs in force;
   (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
   (c) the right to defence, including the right to be defended by counsel of his choice;
   (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of

appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

APPENDIX FIVE

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, 1990

OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.

(Excerpts)

Article 2: Definition of a Child

For the purposes of this Charter, a child means every human being below the age of 18 years.

Article 17: Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

   (a) Ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhumane, or degrading treatment or punishment;

   (b) Ensure that children are separated from adults in their place of detention or imprisonment;

   (c) Ensure that every child accused in infringing the penal law:

      (i) Shall be presumed innocent until duly recognized guilty;

      (ii) Shall be informed promptly in a language that he/she understands and in detail of the charge against him/her, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

      (iii) Shall be afforded legal and other appropriate assistance in the preparation and presentation of his/her defence;

      (iv) 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;

(v) Shall not be compelled to give testimony or confess guilt.

(d) Prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family, and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Article 30: Children of Imprisoned Mothers

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

(a) Ensure that non-custodial sentences will always be first considered when sentencing such mothers;

(b) Establish and promote measures alternative to institutional confinement for the treatment of such mothers;

(c) Establish special alternative institutions for holding such mothers;

(d) Ensure that a mother shall not be imprisoned with her child;

(e) Ensure that a death sentence shall not be imposed on such mothers;

(f) The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family, and social rehabilitation.

APPENDIX SIX

THE KAMPALA DECLARATION ON PRISON CONDITIONS IN AFRICA, 1996

Between 19–21 September 1996, 133 delegates from 47 countries, including 40 African countries, met in Kampala, Uganda. The President of the African Commission on Human and Peoples' Rights, Ministers of State, Prison Commissioners, Judges and international, regional and national non-governmental organisations concerned with prison conditions all worked together to find common solutions to the problems facing African prisons. The three days of intensive deliberations produced The Kampala Declaration on Prison Conditions in Africa, which was adopted by consensus at the closure of the conference.

Prison conditions:

Considering that in many countries in Africa the level of overcrowding in prisons is inhuman, that there is a lack of hygiene, insufficient or poor food, difficult access to medical care, a lack of physical activities or education, as well as an inability to maintain family ties;

Bearing in mind that any person who is denied freedom has a right to human dignity;

Bearing in mind that the universal norms on human rights place an absolute prohibition on torture of any description;

Bearing in mind that some groups of prisoners, including juveniles, women, the old, the mentally and physically ill, are especially vulnerable and require particular attention;

Bearing in mind that juveniles must be separated from adult prisoners and that they must be treated in a manner appropriate to their age;

Remembering the importance of proper treatment for female detainees and the need to recognise their special needs;

The participants at the International Seminar on Prison Conditions in Africa, held in Kampala from 19 to 21 September 1996, recommend:

1. That the human rights of prisoners should be safeguarded at all times and that non-governmental agencies should have a special role in this respect that is recognised and supported by the authorities;

2. That prisoners should retain all rights which are not expressly taken away by the fact of their detention;

3. That prisoners should have living conditions which are compatible with human dignity;

4. That conditions in which prisoners are held and the prison regulations should not aggravate the suffering already caused by the loss of liberty;

5. That the detrimental effects of imprisonment should be minimised so that prisoners do not lose their self respect and sense of personal responsibility;

6. That prisoners should be given the opportunity to maintain and develop links with their families and the outside world, and in particular be allowed access to lawyers and accredited paralegals, doctors, and religious visitors;

7. That prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release;

8. That special attention should be paid to vulnerable prisoners and that non-governmental organisations should be supported in their work with these prisoners;

9. That all the norms of the United Nations and the African Charter on Human and People's Rights on the treatment of prisoners should be incorporated into national legislation in order to protect the human rights of prisoners;

10. That the Organisation of African Unity and its member states should take steps to ensure that prisoners are detained in the minimum conditions of security necessary for public safety.

Remand Prisoners:

Considering that in most prisons in Africa a great proportion of prisoners are awaiting trial, sometimes for several years;

Considering that for this reason the procedures and policies adopted by the police, the prosecuting authorities and the judiciary can significantly influence prison overcrowding;

The participants at the International Seminar on Prison Conditions in Africa, held in Kampala from 19 to 21 September 1996 recommend:

1. That the police, the prosecuting authorities and the judiciary should be aware of the problems caused by prison overcrowding and should join the prison administration in seeking solutions to reduce this;

2. That judicial investigations and proceedings should ensure that prisoners are kept in remand detention for the shortest possible period, avoiding, for example, continual remands in custody by the court;

3. That there should be a system for regular review of the time detainees spend on remand.

Prison Staff:

Considering that any improvement in conditions for prisoners will be dependent on staff having a pride in their work and a proper level of competence;

Bearing in mind that this will only happen if staff are properly trained;

The participants at the International Seminar on Prison Conditions in Africa held in Kampala from 19 to 21 September 1996 recommend:

1. That there should be a proper career structure for prison staff;

2. That all prison personnel should be linked to one government ministry and that there should be a clear line of command between central prison administration and the staff in prisons;

3. That the State should provide sufficient material and financial resources for staff to carry out their work properly;

4. That in each country there should be an appropriate training programme for prison staff to which UNAFRI should be invited to contribute;

5. That there should be a national or sub-regional institution to deliver this training programme;

6. That the penitentiary administration should be directly involved in the recruitment of prison staff.

Alternative Sentencing:

Noting that in an attempt to reduce prison overcrowding, some countries have been trying to find a solution through amnesties, pardons, or by building new prisons;

Considering that overcrowding causes a variety of problems including difficulties for overworked staff;

Taking into account the limited effectiveness of imprisonment, especially for those serving short sentences, and the cost of imprisonment to the whole of society;

Considering the growing interest in African countries in measures which replace custodial sentences, especially in the light of human rights principles;

Considering that community service and other non-custodial measures are innovative alternatives to imprisonment and that there are promising developments in Africa in this regard;

Considering that compensation for damage done is an important element of non-custodial sentences;

Considering that legislation can be introduced to ensure that community service and other non-custodial measures will be imposed as an alternative to imprisonment;

The participants at the International Seminar on Prison Conditions in Africa held in Kampala from 19 to 21 September 1996 recommend:

1. That petty offences should be dealt with according to customary practice, provided this meets human rights requirements and that those involved so agree;

2. That whenever possible petty offences should be dealt with by mediation and should be resolved between the parties involved without recourse to the criminal justice system;

3. That the principle of civil reparation or financial recompense should be applied, taking account of the financial capability of the offender or of his or her parents;

4. That the work done by the offender should if possible recompense the victim;

5. That community service and other non-custodial measures should, if possible, be preferred to imprisonment;

6. That there should be a study of the feasibility of adapting successful African models of non-custodial measures and applying them in countries where they are not yet being used;

7. That the public should be educated about the objectives of these alternatives and how they work.

African Commission on Human and Peoples' Rights:

Considering that the African Commission on Human and Peoples' Rights has the mandate to ensure the promotion and the protection of human and people's rights in Africa;

Considering that the Commission has shown on many occasions its special concern on the subject of poor prison conditions in Africa and that it has adopted special resolutions and decisions on this question previously;

The participants at the International Seminar on Prison Conditions in Africa, held in Kampala, Uganda, from 19 to 21 September 1996, recommend that the African Commission of Human and Peoples' Rights:

1. Should continue to attach priority to the improvement of prison conditions throughout Africa:

2. Should nominate a Special Rapporteur on Prisons in Africa as soon as possible:

3. Should make the member states aware of the recommendations contained in this Declaration and publicise United Nations and African norms and standards on imprisonment:

4. Should cooperate with non-governmental organisations and other qualified institutions in order to ensure that the recommendations of this Declaration are implemented in all the member states.

Plan of Action for the Kampala Declaration on Prison Conditions in Africa:

Considering that the All-Africa Seminar held in Kampala, Uganda, 19–21 September 1996, adopted a Declaration on prison conditions in Africa, hereafter the Kampala Declaration, which constitutes a historical document of crucial importance;

Considering the appointment of the Special Rapporteur on Prisons and Conditions of Detention in Africa, as was originally recommended in the Kampala Declaration;

Noting with appreciation that the Kampala Declaration's importance was recognised when it was *noted* in, and annexed to, a resolution on International Cooperation for the Improvement of Prison Conditions in Developing Countries by the United Nations Commission on Crime Prevention and Criminal Justice, at its sixth session (Vienna, May 1997);

The Plan of Action set out below is recommended as a means of implementing the Kampala Declaration. It is addressed to governments and institutions as well as to NGO and associations, and meant to be a source of inspiration for concrete actions.

KAMPALA PLAN OF ACTION

1. Prisons in Africa are over-crowded and inadequately resourced. The conditions for prisoners are inhuman; the conditions for staff are intolerable. This over-use of imprisonment does not serve the interests of justice, nor does it protect the public, nor is it a good use of scarce public resources. Imprisonment should only be imposed by the court when there is no other appropriate sentence. People should be sent to prison only when they have committed very serious offences or when the protection of the public requires it. A concerted response from African nations and the international community is required to reduce the use of imprisonment throughout the continent and ensure that international standards and norms for the treatment of prisoners are adhered to.

2. Prisons in Africa should be considered in the context of economic development, social and cultural values and social change. Emphasis should be placed on providing education, skills-based training, and a work programme that is in the interests of the rehabilitation of the offender while incorporating elements of self-sufficiency and sustainability of both the prison institutions and the detainees as a community.

3. In many developing countries, there is concern about an increased rate of crime. An understandable response is to send more people to prison, resulting in increased prison populations. This response has little effect on rates of crime. The majority of detainees are in pre-trial detention for petty crimes or serving short terms of imprisonment. Alternative sentences to imprisonment need to be developed and promoted in suitable cases. Pre-trial detainees should have access to bail by right, and their numbers should be kept as low as possible. Courts need to speed up the trial process. Informal avenues that do not include the courts—such as diversion, mediation and reconciliation—should be explored.

4. The prison exists to protect society from those who commit serious crimes. In order to achieve this aim, the prison needs to be provided with adequate resources, the important role of prison staff recognised, and standards and norms respected. The success of a prison system is measured by the security it offers society and the degree to which the treatment it provides rehabilitates offenders. It should only be used as a last resort, while alternatives and re-socialisation should be, as much as possible, preferred to imprisonment.

5. In light of these general considerations, the following recommendations are made as essential elements of an effective Plan of Action for consideration by governments and civil society groups in Africa:

- Governments should review penal policy in light of the Kampala Declaration and call on other national and international agencies (governmental and non-governmental) to assist them in this task;
- Interested bodies or agencies should co-operate to the fullest extent possible to assist the review process and provide technical assistance and material support;
- Research into non-custodial sentencing options, including community service, should be undertaken and broadly disseminated to assist governments in determining and implementing penal policy. Continued attention should be given to ways of reducing prison populations in conformity with international standards and norms;
- Urgent and concrete measures should be adopted that improve conditions for vulnerable groups in prisons and other places of detention; such as juveniles, women, mothers and babies, the elderly, terminally ill and very sick, the mentally ill, the disabled, and foreign nationals. Procedures that take into account their special needs and adequate treatment during their arrest, trial and detention must be applied to these groups;

- Many prisoners require only minimal levels of security and should be accommodated in open institutions. Wherever possible, prisoners should be encouraged to involve themselves in educational and productive activities with the support of staff. International standards and norms on the treatment of prisoners should be incorporated in national legislation. These instruments—including the Kampala Declaration—should be extensively taught to prison staff and made widely available to prisoners, the media, and members of the public;
- Prison staff should be recognised for the important work they carry out and their role as public servants, and properly trained. Members of the public should be sensitised to prisons and the conditions of staff and prisoners. Public debate on penal policy and reform should be encouraged through the media. Visits to prisons by interest groups should also be welcomed and encouraged;
- The role that NGOs have to play in prisons is important and should be recognised by all governments. They should have easy access to places of detention and their involvement should be encouraged;
- Channels of communication should be set up with the Special Rapporteur (SR) on Prisons and Conditions of detention in Africa so that the SR can be assisted and supported in his important task;
- The African Commission on Human and Peoples' Rights should be invited to give priority to prison conditions in Africa, in accordance with the African Charter and other international instruments, and to give full support and assistance to the work of the SR. The Commission should also be invited to promote the Kampala Declaration amongst member States;
- Regional seminars should be convened to discuss regional initiatives and disseminate the findings and proceedings of these seminars throughout the continent, and enhance bilateral, multilateral and international co-operation, assistance and networking;
- A second pan-African conference on Prison Conditions in Africa should be held in 1999/2000, with the aim of assessing progress made and setting up new objectives.

6. African governments are urged to implement this Plan of Action as the collective endeavour of the African community to deal with the urgent crisis in the continent's prisons.

7. The SR should be invited to incorporate this Plan of Action in his work program, and disseminate it to governments and NGOs, as well as the media and the public at large.

APPENDIX SEVEN

THE OUAGADOUGOU DECLARATION ON ACCELERATING PRISON AND PENAL REFORM IN AFRICA, 2002

Recognising that there has been progress in raising general prison standards in Africa as recommended by the Kampala Declaration on Prison Conditions 1996;

Recognising also the specific standards on alternatives to imprisonment contained in the Kadoma Declaration on Community Service Orders in Africa 1997; and on good prison administration set out in the Arusha Declaration on Good Prison Practice 1999;

Noting the recognition given to these African standards by the United Nations as complementary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Declaration on the Basic Rights of Prisoners and the United Nations Standard Minimum Rules for non-custodial measures (the 'Tokyo Rules');

Mindful of the key role played by Africans in formulating an agenda for penal reform through the 1999 Egham Conference on 'A New Approach for Penal Reform in a New Century;'

Noting with satisfaction the important practical steps that have been taken to implement these standards at an African level through the activities of the African Commission on Human and Peoples' Rights and its Special Rapporteur on Prisons and Conditions of Detention;

Commending the practical measures that have been taken by prison authorities in African countries to apply these standards in their national jurisdictions;

Recognising that notwithstanding these measures there are still considerable shortcomings in the treatment of prisoners, which are aggravated by shortages of facilities and resources;

Welcoming the growing partnerships between governments, non governmental organizations and civil society in the process of implementing these standards;

Emphasising the importance of a criminal justice policy that controls the growth of the prison population and encourages the use of alternatives to imprisonment;

The participants at the second pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18–20 September 2002, recommend:

1. Reducing 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.

2. Making African prisons more self-sufficient

Further recognition should be given to the reality that resources for imprisonment are severely limited and that therefore African prisons have to be as self sufficient as possible. Governments should recognize, however, that they are ultimately responsible for ensuring that standards are maintained so that prisoners can live in dignity and health.

3. Promoting the reintegration of offenders into society

Greater effort should be made to make positive use of the period of imprisonment or other sanction to develop the potential of offenders and to empower them to lead a crime-free life in the future. This should include rehabilitative programmes focusing on the reintegration of offenders and contributing to their individual and social development.

4. Applying the rule of law to prison administration

There should be a comprehensive law governing prisons and the implementation of punishment. Such law should be clear and unambiguous about the rights and duties of prisoners and prison officials. Officials should be trained to follow proper administrative procedures and to apply this law fairly. Administrative decisions that impact on the rights of prisoners should be subject to review by an independent and impartial judicial body.

5. Encouraging best practice

Further exchange of examples of best penal practice is to be encouraged at national, regional and international levels. This can be enhanced by the establishment of an all-African association of those involved in penal matters. The rich experience available across the continent can best be utilized if proven and effec-

tive programmes are progressively implemented in more countries. The Plan of Action to be developed from the proceedings of the Ouagadougou Conference will serve to further such exchange.

6. Promoting an African Charter on Prisoners' Rights

Action should be taken to promote the draft African Charter on Prisoners' Rights as an instrument that is appropriate to the needs of developing countries of the continent and to refer it to the African Commission on Human and Peoples' Rights and the African Union.

7. Looking towards the United Nations Charter on the Basic Rights of Prisoners

The international criminal justice community should look towards developing a United Nations Charter of Basic Rights for Prisoners with a view to strengthening the rule of law in the treatment of offenders. African experience and concerns should be reflected in this Charter, which should be presented to the Eleventh United Nations Congress on the Prevention of Crime and Criminal Justice in Bangkok, Thailand, 2005.

THE OUAGADOUGOU PLAN OF ACTION

The participants recommend the following measures as forming part of a plan of action to implement the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa.

The document is addressed to governments and criminal justice institutions as well as to non-governmental organisations and associations working in this field. It is meant to be a source of inspiration for concrete actions.

1. Reducing the prison population

Strategies for preventing people from coming into the prison system include:

- Use of alternatives to penal prosecution such as diversion in cases of minor offences with particular attention to young offenders and people with mental health or addiction problems.
- Recognition of restorative justice approaches to restore harmony within the community as opposed to punishment by the formal justice system—

including wider use of family group conferencing, victim offender mediation and sentencing circles.

- Use of traditional justice as a way of dealing with crime in line with constitutional guarantees and human rights standards.
- Improving referral mechanisms between the formal (State) justice system and the informal (non State) justice system.
- Decriminalisation of some offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts, and disobedience to parents.

Strategies for reducing the numbers of unsentenced prisoners include:

- Co-operation between the police, the prison services, and the courts to ensure trials are speedily processed and to reduce the delays of remand detention through: regular meetings of caseload management committees including all criminal justice agents at the district, regional and national levels; making of costs orders against lawyers for unnecessary adjournments; targeting cases of vulnerable groups.
- Detention of persons awaiting trial only as a last resort and for the shortest time possible, including: increased use of cautioning; improved access to bail through widening police powers of bail and involving community representatives in the bail process; restricting the time in police custody to 48 hours; setting time limits for people on remand in prison.
- Good management of case files and regular review of the status of remand prisoners.
- Greater use of paralegals in the criminal process to provide legal literacy, assistance, and advice at a first aid level.

Strategies for reducing the numbers of sentenced prisoners include:

- Setting a target for reducing the prison population.
- Increased use of proven effective alternatives, such as community service and exploring other sanctions such as partially or fully suspended sentence, probation and correctional supervision.
- Imposition of sentences of imprisonment only for the most serious offences and when no other sentence is appropriate, i.e. as a last resort and for the shortest time possible.
- Consideration of prison capacity when determining decisions to imprison and the length and terms of imprisonment.

- Review and monitoring of sentencing practice to ensure consistency.
- Powers to courts to review decisions to imprison, with a view to substituting community disposals in place of prison.
- Early and conditional release schemes, furloughs and home leave—criteria for early release should include compassionate grounds based on health and age.

2. Making African prisons more self-sufficient

- Foster prison agriculture, workshops, and other enterprises for the good of prisoners and staff.
- Develop appropriate technology to reduce costs (e.g., use of biogas for cooking, more effective wood burning stoves).
- Promote transparent management of prisons.
- Encourage training courses and study visits for staff on best practices in prison management.
- Involvement of staff and prisoners in agricultural production and prison industries through the establishment of management committees.

3. Promoting the reintegration into society of alleged and convicted offenders

- Promote rehabilitation and development programmes during the period of imprisonment or non-custodial sentence schemes.
- Ensure that unsentenced prisoners have access to these programmes.
- Emphasise literacy and skills training linked to employment opportunities.
- Promote vocational training programmes certificated to national standards.
- Emphasise development of existing skills.
- Provide civic and social education.
- Provide social and psychological support with adequate professionals.
- Promote contact with the family and community by: encouraging civil society groups to visit the prison and work with offenders; improving the environment for visitors so that physical contact is permissible; providing facilities for conjugal visits; setting up a privilege system including day, weekend and holiday leave subject to satisfying appropriate criteria.

- Sensitize families and community in preparation for the reintegration of the person back into society and involve them in rehabilitation and development programmes.
- Develop half way houses and other pre-release schemes in partnership with civil society groups.
- Extend the use of open prisons in appropriate circumstances.

4. Applying the rule of law to prison administration

- Ensure that prisons are governed by prison rules that are publicised and made known to prisoners and staff.
- Review prison legislation in line with national constitutional guarantees and international human rights law.
- Encourage independent inspection mechanisms, including the national media and civil society groups.
- Ensure staff are trained in the application of the relevant laws and international principles and rules governing the management of prisons and the prisoners' rights.

5. Encouraging best practice

- Publicise the Kampala Declaration on Prison Conditions in Africa 1996, the Kadoma Declaration on Community Service Orders in Africa 1997, the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa 2002; the reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa; and the reports and statements of the heads of Correctional Services Conference of Central, Eastern and Southern Africa (CESCA).
- Develop and promote models for replication throughout the continent, such as the Community Service scheme developed in Zimbabwe, the diversion scheme in Namibia and South Africa, the sector-wide approach in Uganda, the prison farm and paralegal models developed in Malawi, or the use of biogas technique developed in Rwanda.
- Emphasise primary health care, hygiene education, nutrition, and sanitation promotion in the prisons and link health care of prisoners with the Ministry of Health.
- Develop approaches to HIV/AIDS based on international standards, including sensitization and prevention campaigns for staff, prisoners, and families, as well as provision of condoms inside the prisons. Include the issue of HIV/AIDS in prison in campaigns of sensitization for the community.

- Apply UN safeguards guaranteeing protection of the rights of those facing the death penalty where not yet abolished.
- Promote specific juvenile justice laws and systematic use of alternatives to imprisonment to deal with young offenders.
- Encourage the establishment of a pan-African penal reform network.

6. Promoting regional and international charters on prisoners' rights

- Publicise the draft African Charter on Prisoners' Rights to be finalised and further adopted by the African Commission on Human and Peoples' Rights (ACHPR).
- Contribute to finalising and promoting the United Nations Charter on the Rights of Prisoners.

B. THE INTERNATIONAL LAW FRAMEWORK

APPENDIX EIGHT

UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

Adopted and proclaimed by General Assembly resolution 217 A (III)
of 10 December 1948.

(Excerpts)

Article 9

No one shall be subjected to arbitrary arrest, detention, or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

APPENDIX NINE

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

(Excerpts)

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order

(*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned

on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

APPENDIX TEN

UN CONVENTION ON THE RIGHTS OF THE CHILD, 1989

Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989

Entry into force 2 September 1990

(Excerpts)

Article 37

States Parties shall ensure that:

(a) No child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognise the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth and which reinforces

the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt, to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent, and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education, and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

APPENDIX ELEVEN

UN STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE

("THE BEIJING RULES"), 1985

Recommended for adoption by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and adopted by General Assembly resolution 40/33 of 29 November 1985

(Excerpts)

2. Scope of the rules and definitions used

2.1 The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status.

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts:

(a) *A juvenile* is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

(b) *An offence* is any behaviour (act or omission) that is punishable by law under the respective legal systems;

(c) *A juvenile offender* is a child or young person who is alleged to have committed or who has been found to have committed an offence.

4. Age of criminal responsibility

4.2 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental, and intellectual maturity.

7. Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses, and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

11. Diversion

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such a decision to refer a case shall be subject to review by a competent authority upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

13. Detention pending trial

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an education setting or home.

13.3 Juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance—social, educational, vocational, psychological, medical, and physical—that they may require in view of their age, sex and personality.

14. Competent authority to adjudicate

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

15. Legal counsel, parents and guardians

15.1 Throughout the proceedings the juvenile shall 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.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

18. Various disposition measures

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible. Such measures, some of which may be combined, include:

(a) Care, guidance and supervision orders;

(b) Probation;

(c) Community service orders;

(d) Financial penalties, compensation, and restitution;

(e) Intermediate treatment and other treatment orders;

(f) Orders to participate in group counselling and similar activities;

(g) Orders concerning foster care, living communities, or other educational settings;

(h) Other relevant orders.

19. Least possible use of institutionalisation

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

APPENDIX TWELVE

UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY, 1990

Adopted by General Assembly resolution 45/113 of 14 December 1990

(Excerpts)

Article 18

The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education, or training should not cause the continuation of the detention;

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

APPENDIX THIRTEEN

UN STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES

("THE TOKYO RULES"), 1990

Adopted by General Assembly resolution 451110 of 14 December 1990

(Excerpts)

5. Pre-trial dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6. Avoidance of pre-trial detention

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offenders shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

17. Public participation

17.1 Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing

non-custodial measures and the family and community. It should complement the efforts of the criminal justice administration.

17.2 Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.

APPENDIX FOURTEEN

UN GUIDELINES ON THE ROLE OF PROSECUTORS, 1990

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

(Excerpts)

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual, or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights, and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

APPENDIX FIFTEEN

UN BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT, 1988

Adopted by General Assembly resolution 43/173 of 9 December 1988

(Excerpts)

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after the arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communication and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional

circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing of a law enforcement official.

5. Communication between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

APPENDIX SIXTEEN

UN STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, 1957

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

(Excerpts)

Article 93

For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

APPENDIX SEVENTEEN

UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS, 1990

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation, and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic, or other status.

3. 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.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. 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.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time, and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic, or other status, except that a requirement,

that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals, or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers:

(a) Are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;

(b) Are able to travel and to consult with their clients freely both within their own country and abroad; and

(c) Shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards, and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves

in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. 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.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

APPENDIX EIGHTEEN

UN DECLARATION ON BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, 1985

Adopted by General Assembly resolution 40/34 of 29 November 1985

(Excerpts)

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

APPENDIX NINETEEN

WORLD PRISON POPULATION LIST, INTERNATIONAL CENTRE FOR PRISON STUDIES, KING'S COLLEGE, UNIVERSITY OF LONDON

Table begins on page 277.

International Centre for Prison Studies

World Prison Population List

(Sixth Edition)

Roy Walmsley

Introduction

The World Prison Population List gives details of the number of prisoners held in 211 independent countries and dependent territories. It shows the differences in the level of imprisonment across the world and makes possible an estimate of the world prison population total. The information is the latest available at the end of February 2005.

This is the sixth edition of the list. Previous editions were published in the Research and Statistics Directorate of the UK Home Office. ICPS is happy to continue this work, which complements the information which it already publishes and updates regularly on the World Prison Brief sections of its website www.prisonstudies.org.

It has been compiled, like previous editions, from a variety of sources. In almost all cases the original source is the national prison administration of the country concerned, or else the Ministry responsible for the prison administration. Most figures relate to dates between mid-2002 and the end of February 2005. Since prison population rates (per 100,000 of the national population) are based on estimates of the national population they should not be regarded as precise. In order to compare prison population rates in different regions of the world, and to estimate the number of people held in prison in the country for which information is not available, median rates have been used because they minimise the effect if countries with rates that are untypically high or low.

The List has a number of weaknesses. Figures are not available for eleven countries and the information does not relate to the same date. Comparability is further compromised by different practice in different countries, for example with regards to whether all pre-trial detainees and juveniles are held under the authority of the prison administration, and also whether the prison administration is responsible for psychiatrically ill offenders and offenders being detained for treatment for alcoholism and drug addiction. People held in custody are usually omitted from national totals if they are not under the authority of the prison administration.

Despite its limitations it is hoped that the World Prison Population List will be found useful by academic criminologists who are studying the use of imprisonment world-wide and by non-governmental organisations who are interested in variations in criminal justice practice. The data — for all its imperfections — may prompt fresh thought among policy makers and other criminal justice experts about the size of the prison population in their country, given the high costs and disputed efficacy of imprisonment.

Key points

- Over 9 million people are held in penal institutions throughout the world, mostly as pre-trial detainees (remand prisoners) or having been convicted and sentenced. Almost half of these are in the United States (2.09m), China (1.55m plus pre-trial detainees and prisoners in 'administrative detention') or Russia (0.76m).
- The United States has the highest prison population rate in the world, some 714 per 100,000 of the national population, followed by Belarus, Bermuda and Russia (all 532), Palau (523), U.S. Virgin Islands (490), Turkmenistan (489), Cuba (487), Suriname (437), Cayman Islands (429), Belize (420), Ukraine (417), Maldive Islands (416), St Kitts and Nevis (415), South Africa (413) and Bahamas (410).
- However, almost three fifths of countries (58%) have rates below 150 per 100,000. (The rate in England and Wales — 142 per 100,000 of the national population — is above the mid-point in the World List).
- Prison population rates vary considerably between different regions of the world, and between different parts of the same continent. For example:
  - in Africa the median rate for western African countries is 52 whereas for southern Africa countries it is 324;
  - in the Americas the median rate for south central American countries is 152 whereas for Caribbean countries it is 324;
  - in Asia the median rate for south central Asian countries (mainly the Indian sub-continent) is 55 whereas for (ex-soviet) central Asian countries it is 386;
  - in Europe the median rate for southern European countries is 80 whereas for central and eastern European countries it is 184;
  - in Oceania (including Australia and New Zealand) the median rate is 111.
- Prison populations are growing in many parts of the world. Updated information on countries included in previous editions of the World Prison Population List shows that prison populations have risen in 73% of these countries (in 64% of countries in Africa, 79% in the Americas, 88% in Asia, 69% in Europe and 69% in Oceania).

Table 1 AFRICA

	Prison population total (n° in penal institutions incl. Pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000) of national population)	Source of prison population total
Northern Africa					
Algeria	38,868	01/01/2004	32.05m	121	NPA
Egypt	c. 80,000	/98	66.0m	c. 121	Criminal justice expert, Egypt
Libya	11,790	31/07/2004	5.7m	207	NPA
Morocco	54,200	06/04	31.1m	174	Moroccan HR C'ttee report
Sudan	c. 12,000	03/03	27.9	115	NPA
Tunisia	23,165	31/12/1996	9.15m	253	United Nations 5th survey
Western Africa					
Benin	4,961	30/09/2000	6.1m	81	NPA
Burkina Faso	2,800	09/02	12.2m	23	NPA
Cape Verde	775	12/99	423,000	178	NPA
Côte d'Ivoire	10,355	08/03/2002	16.6m	62	NPA
Gambia	450	09/02	1.4m	32	NPA
Ghana	11,379	26/12/2003	21.25m	54	NPA
Guinea (Conakry)	3,070	mid-2002	8.4m	37	NPA
Mali	4,040	02/02	11.9m	34	NPA
Mauritania	1,185	09/03	2.9m	41	US State Dpt HR Report
Niger	c. 6,000	mid-2002	11.6m	c. 52	NPA
Nigeria	39,153	29/02/2004	126.0m	31	NPA
Senegal	5,360	09/02	9.9m	54	NPA
Togo	3,200	08/03	4.9m	65	Afro News
Central Africa					
Angola	6,008	04/04/2003	13.6m	44	NPA
Cameroon	20,000	06/03	16.0m	125	NPA
Central African Rep.	4,168	/01	3.8m	110	NPA
Chad	3,883	mid-2002	8.4m	46	NPA
Congo (Brazzaville)	918	/93	2.4m	38	PRI, from NPA
Dem. Rep. Congo	c. 30,000	01/04	52.8m	c. 57	Crim. justice experts, DRC
Sao Tome e Principe	130	04/02	165,000	79	NPA
Eastern Africa					
Burundi	7,914	/03	6.8m	116	Ministry of Justice, Burundi
Comoros	c. 200	/98	658,000	c. 30	Crim. justice expert, Comoros

Table 1 AFRICA (cont'd)	Prison population total (n° in penal institutions incl. Pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000) of national population)	Source of prison population total
Djibouti	384	16/12/1999	629,000	61	Min. Foreign Aff. Djibouti
Ethiopia	c. 65,000	mid-2003	70.7	c. 92	Crim. justice expert, Ethiopia
Kenya	55,000	09/04	32.5m	169	Office of Vice-President, Kenya
Madagascar	c. 19,000	/03	17.4m	c. 109	Ministry of Justice, Madagascar
Malawi	8,566	20/11/2003	12.2m	70	NPA
Mauritius	2,565	04/03	1.2m	214	NPA
Mozambique	8,812	31/12/1999	17.6m	50	UNDP report
Rwanda	112,000*	mid-2002	8.1m	-*	NPA
	* (Prison population total includes 103,134 held on suspicion of participation in genocide.)				
Seychelles	149	/03	80,000	186	US State Dpt HR Report
Tanzania	43,244	01/05/2004	37.2m	116	NPA
Uganda	c. 21,900	05/02	24.7m	c. 8	NPA (15 902) + c. 6,000 in local prisons
Zambia	13,200	12/03	10.8m	122	NPA
Zimbabwe	c. 20,000	31/12/2003	12.9m	c. 155	US State Dpt HR Report
Mayotte (France)	161	01/12/2004	189,000	85	Ministry of Justice, France
Réunion (France)	1,054	01/12/2004	772,000	137	Ministry of Justice, France
Southern Africa					
Botswana	6,105	03/12/2004	1.8m	339	NPA
Lesotho	3,000	mid-2002	2.1m	143	NPA
Namibia	4,814	31/12/2001	1.8m	267	NPA
South Africa	186,739	31/08/2004	45.2m	413	NPA
Swaziland	3,245	31/12/2002	1.0m	324	NPA

Figures not available Western Africa: Guinea Bissau, Liberia, Sierra Leone.
Central Africa: Equatorial Guinea, Gabon.
Eastern Africa: Eritrea, Somalia.

Table 2 AMERICAS

	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
North America					
Canada	36,389*	02/03	31.44m	116	Statistics Canada
	* (Average daily population, including young offenders, 01/04/2002-31/03/2003)				
USA	2,085,620	31/12/03	292,2m	714	US Bureau of Justice Statistics
Bermuda (UK)	343	11/11/03	64,500	532	NPA
Greenland (Denmark)	107	05/10/04	56,400	190	Danish NPA
Central America					
Belize	1,074	/03	256,000	420	US State Dpt HR Report
Costa Rica	7,619	11/04	4.3m	177	Ministry of Justice, Costa Rica
El Salvador	12,117	/04	6.6m	184	Int'l Corrections & Prisons Assoc'n
Guatemala	8,307	2/03	12.2m	68	PRI Newsletter 53, 2003
Honduras	11,236	mid-04	7.1m	158	Int'l Corrections & Prisons Assoc'n
Mexico	191,890	28/11/04	105.5m	182	NPA
Nicaragua	5,610	31/10/04	5.6m	100	NPA (excl. those in police lockups)
Panama	10,630	3/03	3.0m	354	Criminal justice expert, Panama
Caribbean					
Antigua & Barbuda	184	24/01/05	68,320	269	NPA
Bahamas	1,280	10/02	312,000	410	NPA
Barbados	992	11/11/03	270,000	367	NPA
Cuba	c. 55,000	/03	11.3m	c. 487	Nils Christie, Oslo University
Dominica	243	31/12/03	72,000	337	US State Dpt HR Report
Dominican republic	13,836	28/04/04	8.8m	157	NPA
Grenada	237	22/02/05	89,400	265	NPA
Haiti	3,519	/03	8.3m	42	NPA (excl. those in police lockups)
Jamaica	4,744	18/11/03	2.7m	176	NPA
St Kitts & Nevis	195	09/03	47,000	415	US State Dpt HR Report
St Lucia	460	08/03	160,000	287	US State Dpt HR Report

Table 2 AMERICAS (cont'd)	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
St Vincent & Grenadines	397	01/02/05	117,000	339	US State Dpt HR Report
Trinidad & Tobago	3,991	10/03	1.3m	307	NPA
Aruba (Netherlands)	231	21/01/05	71,200	324	NPA
Cayman Islands (UK)	187	17/12/04	43,600	429	NPA
Guadeloupe (France)	767	01/12/04	444,000	173	Ministry of Justice, France
Martinique (France)	671	01/12/04	396,000	169	Ministry of Justice, France
Neth. Antilles (Netherlands)	780	11/98	214,000	364	Dutch NPA
Puerto Rico (US)	15,046	31/12/03	3.9m	386	US Bureau of Justice statistics
Virgin Islands (UK)	43	19/08/99	20,000	215	Prison reform coordinator, UK Overseas Territories
Virgin Islands (US)	559	31/12/03	114,000	490	US Bureau of Justice statistics
South America					
Argentina	56,313	31/12/02	38.15m	148	Prison statistics system 'SNEEP'
Bolivia	6,768	12/03	8.9m	76	NPA
Brazil	330,642	06/04	180.7m	183	NPA
Chile	33,098	30/06/02	15.6m	212	NPA, via ILANUD
Colombia	68,545	10/04	45.2m	152	NPA
Ecuador	13,045	/03	13.0m	100	NPA
Guyana	1,295	01/05	768,000	169	NPA
Paraguay	4,088	/99	5.48m	75	ILANUD, from NPA
Peru	32,129	10/04	28.1m	114	NPA
Suriname	1,1933	30/06/99	442,000	437	ILANUD, from NPA and others
Uruguay	7,100	09/03	3.4m	209	Criminal justice expert, Uruguay
Venezuela	21,342	08/07/03	25.7m	83	NPA
French Guyana (France)	691	01/12/04	193,000	358	Ministry of Justice, France

Table 3 ASIA

	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Western Asia					
Bahrain	911	31/12/97	589,000	155	United Nations 6th Survey
Iraq	c. 15,000	04/04	25.2m	c. 60	'Washington Times,' USA
Israel	13,603	06/09/04	6.5m	209	NPA
Jordan	5,448	02/02	5.15m	106	PRI
Kuwait	c. 3,700	/03	2.5m	c. 148	US State Dpt HR Report
Lebanon	5,375	12/11/04	3.7m	145	NPA
Oman	2,020	/00	2.5m	81	United Nations 7th Survey
Qatar	570	/00	599,000	95	United Nations 7th Survey
Saudi Arabia	23,720	/00	21.6m	110	United Nations 7th Survey
Syria	14,000	/97	15.0m	93	Conference paper, January 1998
United Arab Emirates	c. 6,000	12/98	2.4m	c. 250	Criminal justice experts in UAE
Yemen	14,000*	/98	16.9m	83*	PRI Newsletter 33, 1998
		* (government managed prisons only)			
Central Asia					
Kazakhstan	58,300	31/08/03	15.1m	386	PRI, Almaty
Kyrgyztan	19,500	03/02	5.0m	390	NPA
Tajikistan	c. 10,000	09/03	6.3m	c. 159	Criminal justice expert, Tajikistan
Turkmenistan	c. 22,000	10/00	4.5m	c. 489	BBC, from Interfax
Uzbekistan	48,000	08/03	26.1m	184	NPA
South Central Asia					
Bangladesh	74,170	05/04	149.5m	50	NPA
India	313,635	mid-03	1,065.5m	29	National Human Rights Commission
Iran	133,658	07/04	69.0m	194	NPA
Maldive Is.	1,098*	/96	265,000	414*	Ministry of Justice, Maldive Islands
		* (sentenced prisoners only)			
Nepal	7,132	/02	24.2m	29	PRI
Pakistan	86,000	/04	157.3m	55	Criminal justice expert, Pakistan
Sri Lanka	20,975	31/12/03	19.15m	110	NPA, Asia-Pacific annual conference

Table 3 ASIA (cont'd)	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
South Eastern Asia					
Brunei Darussalam	463	mid-04	366,000	127	NPA, Asia-Pacific annual conference
Cambodia	6,778	mid-04	14.5m	47	NPA, Asia-Pacific annual conference
Indonesia	84,357	09/03	219.9m	38	NPA, Asia-Pacific annual conference
Malaysia	43,424	mid-04	24.9m	174	NPA, Asia-Pacific annual conference
Myanmar (Burma)	c. 60,000	/04	50.1m	c. 120	NPA
Philippines	70,383	/99	74.5m	94	UNAFEI, from crim. just. expert, Phil's
Singapore	16,835*	mid-04	4.3m	392*	NPA, Asia-Pacific annual conference
	* (does not include those in drug rehabilitation centres run by the Singapore Prison Service)				
Thailand	168,264	31/12/04	63.85m	264	NPA
Timor-Leste	c. 320	01/02/03	778,000	41	UN High Commissioner for HR
Vietnam	55,000	mid-98	77.6m	71	NPA, Asia-Pacific annual conference
Eastern Asia					
China	1,548,498*	12/03	1,308.7m	118*	NPA, Asia-Pacific annual conference
		* (sentenced prisoners only)			
Japan	73,734	01/01/04	127.8m	58	NPA, Asia-Pacific annual conference
Korea (Republic of)	57,902	30/06/04	48.0m	121	NPA, Asia-Pacific annual conference
Mongolia	6,400	mid-04	2.6m	246	NPA, Asia-Pacific annual conference
Taiwan	57,037	11/04	22.7m	251	NPA
Hong Kong (China)	13,226	03/06/04	7.0m	189	NPA
Macau (China)	875	30/06/04	445,000	197	NPA, Asia-Pacific annual conference

Figures not available

South Central Asia: Afghanistan; Bhutan.

South Eastern Asia: Laos.

Eastern Asia: Korea (Democratic People's Republic of North Korea).

Table 4 EUROPE

	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Northern Europe					
Denmark	3,774	05/10/04	5.41m	70	NPA
Estonia	4,571	01/04/04	1.35m	339	NPA
Finland	3,719	15/04/04	5.22m	71	NPA
Iceland	115	01/09/04	292,000	39	NPA
Ireland	3,417	30/09/04	4.03m	85	NPA
Latvia	7,796	01/01/05	2.31m	337	NPA
Lithuania	8,063	01/01/04	3.45m	234	NPA
Norway	2,975	01/09/04	4.6m	65	NPA
Sweden	6,755	01/10/03	8.96m	75	NPA
United Kingdom					
–England & Wales	75,320	25/02/05	53.02m	142	NPA
–Northern Ireland	1,275	24/02/05	1.78m	72	NPA
–Scotland	6,742	25/02/05	5.11m	132	NPA
Faeroe Is. (Denmark)	14	5/10/04	46,700	30	Danish NPA
Guernsey (UK)	107	02/12/04	65,100	164	NPA
Isle of Man (UK)	62	24/11/04	74,800	83	NPA
Jersey (UK)	168	26/11/04	90,600	185	NPA
Southern Europe					
Albania	3,778	11/03	3.6m	105	NPA
Andorra	61	01/09/03	67,800	90	C of E Annual Penal Statistics
Bosnia & Herzegovina					
–Federation	1,509	31/01/05	2.6m	58	Ministry of Justice Federation of B+H
–Republika Srpska	1,052	31/12/04	1.4m	75	Ministry of Justice Federation of B+H Rep. Srpska
Croatia	3,010	30/06/04	4.44m	68	NPA
Greece	8,760	16/12/04	10.65m	82	Ministry of Justice
Italy*	57,046	30/06/04	58.17m	98	NPA
* (By agreement with Italy, persons imprisoned by San Marino and Vatican City are held in Italian prisons.)					
Macedonia (F Yug Rep)	1,598	01/09/03	2.06m	78	C of E Annual Penal Statistics
Malta	278	01/09/03	388,000	72	C of E annual Penal Statistics
Portugal	13,498	01/12/04	10.54m	128	NPA
Serbia & Montenegro					
–Serbia	7,487	01/09/03	8.1m	92	C of E Annual Penal Statistics

Table 4 EUROPE (cont'd)	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
–Montenegro	734	01/09/03	680,000	108	C of E Annual Penal Statistics
–Kosovo	1,182	07/03	1.9m	62	Statistical Office of Kosovo
Slovenia	1,129	24/02/05	2.0m	56	NPA
Spain	59,899	18/02/05	42.93m	140	NPA
Gibraltar (UK)	19	17/12/04	27,800	68	NPA
Western Europe					
Austria	8,700	01/02/05	8.18m	106	NPA
Belgium	9,245	01/03/04	10.5m	88	NPA
France	55,028*	01/12/04	60.14m*	91	Ministry of Justice, France
* (metropolitan France, excluding departments and territories in Africa, the Americas and Oceania)					
Germany	79,329	31/08/04	82.60m	96	Federal Ministry of Justice
Liechtenstein*	18	01/09/03	34,200	53	C of E Annual Penal Statistics
* (by agreement with Austria, some persons imprisoned by Liechtenstein are held in Austrian prisons.)					
Luxembourg	655	16/02/05	455,300	144	NPA
Monaco*	13	10/98	33,000	39	Information from Pierre Tournier
* (by agreement with France, some persons imprisoned by Monaco are held in French prisons.)					
Netherlands	19,999	01/07/04	16.32m	123	NPA
Switzerland	6,021	01/09/04	7.39m	81	Federal Statistical Office
Europe/Asia					
Armenia	2,866	01/04/04	3.21m	92	NPA
Azerbaidjan	16,345	01/09/03	8.24m	198	C of E Annual Penal Statistics
Cyprus	355*	01/09/03	709,000*	50	NPA
* (does not include the internationally unrecognised Turkish Republic of Northern Cyprus (TRNC). Including TRNC the population of Cyprus is estimated at about 809,000 in 2003, plus about 100,000 Turkish settlers.)					
Georgia	7,091	18/08/04	4.3m	165	PRI
Russian Federation	763,054	01/01/05	143.4m	532	NPA
Turkey	67,772	03/04	71.43m	95	NPA
Central and Eastern Europe					
Belarus	52,500	/03	9.87m	532	Ministry of Internal Affairs
Bulgaria	11,060	01/02/05	7.76m	143	NPA
Czech Republic	18,830	31/01/05	10.22m	184	NPA
Hungary	16,700	20/11/03	10.11m	165	NPA
Moldova	10,729*	01/09/03	3.61m*	297	C of E Annual Penal Statistics
* (does not include the internationally unrecognised Transdniestria. Including Transdniestria the national population of Moldova is estimated at 4.3 millions.)					

Table 4 EUROPE (cont'd)	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Poland	79,087	31/10/04	38.17m	209	NPA
Romania	39,015	11/01/05	21.65m	180	NPA
Slovakia	8,891	08/01/04	5.38m	165	NPA
Ukraine	198,386	01/09/03	47.7m	416	C of E Annual Penal Statistics

Table 5 OCEANIA

	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Australia	23,362	mid-04	19.9m	117	NPA, Asia-Pacific Annual Conference
Fiji	1,083	mid-04	847,000	128	NPA, Asia-Pacific Annual Conference
Kiribati	81	mid-04	100,800	80	NPA, Asia-Pacific Annual Conference
Marshall Is.	23	/94	52,000	44	United Nations 5th Survey
Micronesia, Fed States of	39	/97	114,000	34	F S Micronesia Statistical Yearbook
Nauru	6	02/03	12,500	48	'The Grand Island Independent', Nebraska, USA
New Zealand	6,802	mid-04	4.06m	168	NPA, Asia-Pacific Annual Conference
Palau	103	19/02/03	19,700	523	Min. of Just.
Papua New Guinea	3,302	mid-02	5.0m	66	NPA, Asia-Pacific Annual Conference
Samoa	281	12/11/03	178,000	158	NPA
Solomon Is.	275	mid-04	491,000	56	NPA, Asia-Pacific Annual Conference
Tonga	116	mid-04	110,200	105	NPA, Asia-Pacific Annual Conference
Tuvalu	6	mid-00	10,800	56	NPA, Asia-Pacific Annual Conference
Vanuatu	93	mid-03	212,000	44	NPA, Asia-Pacific Annual Conference
American Samoa (US)	174	31/12/03	57,900	301	US Bureau of Justice Statistics
Cook Is. (NZ)	19	mid-03	21,000	90	NPA, Asia-Pacific Annual Conference
French Polynesia (France)	327	01/12/04	250,000	131	Ministry of Justice, France

Table 5 OCEANIA	Prison population total (n° in penal institutions incl. pre-trial detainees)	Date	Estimated national population	Prison population rate (per 100,000 of national population)	Source of prison population total
Guam (US)	579	31/12/03	164,000	353	US Bureau of Justice statistics
New Caledonia (France)	286	01/12/04	235,000	122	Ministry of Justice, France
Northern Mariana Is. (US)	136	31/12/03	78,400	173	US Bureau of Justice Statistics

Abbreviations				
	C of E	Council of Europe	PRI	Penal Reform International
	ILANUD	UN Latin American Institute	UNAFEI	UN Asia and Far East Institue
	NPA	National prison administration	UNDP	UN Developement Programme

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C. ADDITIONAL RESOURCES

APPENDIX TWENTY

A SERIES OF POINTERS CLARIFYING THE ROLE OF PARALEGALS

David McQuoid-Mason

What is a paralegal?

- Paralegals are people who are not advocates
- Paralegals are local people trained in:
  - ➢ Practical aspects of the law
  - ➢ Giving legal advice
  - ➢ Counseling
  - ➢ Administrative skills
  - ➢ Public legal education skills
- Paralegals may be:
  - ➢ Law graduates who have no license to practice as advocates
  - ➢ Ordinary people with no formal legal qualifications who have been trained in giving legal advice, administration, and public legal education skills

Why do we need paralegals?

- Paralegals are useful in rural areas because of:
  - ➢ The cost of employing advocates
  - ➢ The shortage of advocates in rural areas
  - ➢ The shortage of advocates willing to work with local people to solve local problems in the public interest
  - ➢ Communication problems in remote areas
  - ➢ The fact that they live in local villages and towns and know the kinds of problems the people face
  - ➢ The need to make sure that justice is accessible to everyone—including people in rural areas
  - ➢ The need to help the administration of the justice systems in democratic countries

What are the different types of paralegals?

- Paralegals may be salaried (e.g., in citizen advice offices, law firms, or public defenders' offices) or unpaid volunteers
- Paralegals may be employed in the following:
  - ➢ NGOs, where they assist local people with solving local problems by giving advice and legal education
  - ➢ Citizen Advice offices, where they take up cases, open files, solve cases, and refer cases to lawyers
  - ➢ Trade unions, where they specialize in labor law and use negotiation and mediation skills to settle disputes
  - ➢ Lawyers' associations, where they give advice, educate the public, and refer cases to lawyers
  - ➢ Law firms and public defenders' offices, where they do initial interviewing, give advice, take statements, gather evidence, and refer people to other organizations
  - ➢ Local government offices, where they assist the local government offices by providing primary legal advice to citizens

The role of paralegals

- The paralegals may do the following:
  - ➢ Give legal advice and general advice
  - ➢ Use paralegal manuals and pamphlets to give advice
  - ➢ Investigate cases that may need advocates
  - ➢ Link local people with advocates
  - ➢ Help to take statements and follow up on cases
  - ➢ Refer people to health and welfare agencies
  - ➢ Help solve problems with authorities through negotiation and mediation
  - ➢ Build networks with other paralegals and NGOs
  - ➢ Train local people in paralegal skills and teach them to train others
  - ➢ Run workshops with local people about the law
  - ➢ Publicize local legal events and problems
  - ➢ Help to lobby for improvements in the justice system

Should advocates and government officials work with paralegals?

- Many advocates and government officials do not like to work with paralegals because they think they are not qualified advocates
- Still, experience shows that advocates and government officials should work with paralegals because:
  - ➢ Paralegals help poor people to get justice
  - ➢ Paralegals do not take away clients from advocates
  - ➢ Paralegals bring cases to advocates and government officials
  - ➢ Paralegals can help advocates and government officials communicate with local people
  - ➢ Paralegals can tell advocates and government officials about conditions affecting local people

How paralegals can work with advocates and government officials:

- Paralegals can help where advocates and government officials:
  - ➢ Are not able to explain the law and legal procedures, and changes to them, in simple terms
  - ➢ Are not interested in the problems of local people
  - ➢ Are less interested in the problems of poor or rural people
  - ➢ Have little contact with local people or groups
  - ➢ Are not sensitive to local problems and needs
  - ➢ Make decisions without properly consulting with local people
  - ➢ Do not give full updates or reports back on cases
- Paralegals can overcome some of the above problems with advocates and officials by:
  - ➢ Telephoning the advocates and officials regularly to find out what is happening in certain cases
  - ➢ Asking advocates and officials to explain aspects of the law or language not understood by local people
  - ➢ Offering to help collect documents or evidence for use by the advocates or officials
  - ➢ Keeping advocates and officials informed of changes in conditions or developments affecting local people
  - ➢ Making sure that advocates and officials consult with local people before making certain decisions

- ➢ Asking advocates how much cases will cost or whether people can get legal aid
- ➢ Encouraging advocates to use non-litigation methods (e.g., negotiation and mediation) to solve local problems

Training of paralegals: different levels of training

- Basic training (general paralegal skills)
- Specialized training (on certain aspects of the law, e.g., criminal law, labor law, family law, etc.)
- In-service training (e.g., working with experienced paralegals in the field to learn practical skills)
- Refresher trainings (keeping paralegals up to date with new laws and skills)
- Advanced training skills (training experienced paralegals to be trainers of others)

The following are the general skills required by paralegals:

- Practical legal skills (e.g., taking statements, gathering evidence, drafting letters)
- Counseling skills (e.g., interviewing, listening, giving advice)
- Knowledge of basic laws and procedures (e.g., arrest and detention, bail, civil actions, criminal charges, etc.)
- Working with advocates (e.g., linking them to local people)
- Working with local people (e.g., using dispute resolution)
- Educating people about the law and legal procedures
- Referral skills (e.g., to advocates, doctors, social welfare agencies)
- Administration skills (e.g., typing, filing, diaries, records)
- Media skills (e.g., pamphlets, booklets, newspapers)
- Monitoring skills (e.g., reports, questionnaires, research)

Paralegal training methods

- Paralegals should use interactive training methods:
  - ➢ Lectures (should be kept short; use of visual aids, videos, and charts is encouraged)
  - ➢ Small group discussions
  - ➢ Role plays
  - ➢ Simulations
  - ➢ Case studies
  - ➢ Mock trials
  - ➢ Brainstorming
  - ➢ Practical exercises (e.g., writing statements or letters)
  - ➢ Field trips
  - ➢ Legislative hearings
  - ➢ Debates
  - ➢ Songs, stories, plays
  - ➢ Visual aids (cartoons, artwork, photographs)

Paralegals and access to justice

- Paralegals can play a valuable role in providing services in a variety of organizations:
  - ➢ Small villages in rural areas
  - ➢ Welfare and advice centers
  - ➢ NGOs
  - ➢ Trade union offices
  - ➢ Law firms
  - ➢ Public defenders' offices (interviewing, screening, referring and giving advice)
  - ➢ State advice offices

APPENDIX TWENTY-ONE

THE IMPACT ON PRISONS: OVERVIEW OF PROBLEMS LEADING TO HIGH PRISON OVERCROWDING AND DIAGRAM

Federica Dell'Amico[1]

INTRODUCTION

The pull-out diagram is a practical attempt to analyze the causes of prison overcrowding in Africa. The analysis starts at the end, as it were, with high prison overcrowding, and attempts to track back to establish the causes. Although this piece focuses on Africa, the analysis could easily apply elsewhere in the developing world.

HIGH PRISON OVERCROWDING: From the perspective of PRI, crafting practical solutions to the problem of prison overcrowding in Africa is of paramount importance.[2] Prison overcrowding must become a top priority for governments, given that the percentage of prison population in many countries is 200% or more than the real capacity of the prisons.[3]

The causes of prison overcrowding are complex; we have attempted to group them under various headings:

LIMITED SPACE: The number of prisons is often too few, generally due to a lack of government funds to build new prisons or to refurbish or expand existing ones. There is often poor use of the available space. Detention in maximum security institutions is overused, while open institutions for low-security prisoners are

1. Italian criminal lawyer.

2. The Plan of Action of The Kampala Declaration on Prison Conditions in Africa 1996 recommended: "Continued attention should be given to ways of reducing prison population in conformity with international standards and norms." *See* Appendix 6. The Ouagadougou Declaration on Accelerating Prison and Penal Reform, 2002, recommended, *inter alia*, the reduction of prison population, and made a number of recommendations of strategies for achieving that goal. *See* Appendix 7.

3. The percentages of overcrowding in some African countries are as follows: 159% in South Africa in 2004; 312.5% in Kenya in 2004; 193% in Tanzania in 2004; 228% in Benin in 2002; 194% in Senegal in 2003; 200% in Mali in 2003; 200% in Angola in 2003; 240% in Sudan in 2004; 309% in Malawi in 2004; 246% in Zambia in 2004; 206% in Uganda in 2004; 150% in Botswana in 2004. Penal Reform International, Questionnaires, 2004 (on file with Penal Reform International).

under-used. Juvenile offenders are not detained separately from adult offenders.[4] Women are often detained inappropriately, without consideration for their special needs. There is a lack of policy discussion on the application of non-custodial sentences or early release programs based on good behavior.

INCREASED PRISON ADMISSION: A term of imprisonment is very often a remedy of first, rather than last, resort to criminal offending, whether it is minor or not. This is of particular concern with regards to young offenders, women (and their children), the mentally ill, and drug or alcohol abusers.[5]

Alternatives to custody either do not exist or are not regularly applied by sentencers. Diversion mechanisms or other ways of resolving conflicts and disputes are not used, perhaps due to the lack of enabling legislation or, where it is provided for in the law, because potential beneficiaries are unaware of it.[6] Furthermore, there appears to be no real inquiry by the political or legal establishments into methods of linking these "informal" justice mechanisms to the formal justice system.[7]

Non-custodial sentences are often not applied because of a lack of enabling legislation or poor sentencing practice or because the criteria for their application have not been met. Again, vulnerable categories are particularly at risk, particularly young offenders and women.[8]

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4. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Art. 13.4 (1985) provides that "juveniles under detention pending trial shall be kept separate from adults." Art. 26.3 further provides that juveniles in institutions shall be kept separate from adults. And the African Commission on Human and Peoples' Rights African Charter on the Rights and Welfare of the Child, Art. 17.2 (1990) states that "States Parties to the present Charter shall in particular: […] (2) ensure that children are separated from adults in their place of detention or imprisonment."

5. *See* Standard Minimum Rules for the Treatment of Prisoners, Art. 82 (1)–(5) (1955).

6. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Art. 11 (1985) provides that "Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority." And the United Nations Standard Minimum Rules for Non-Custodial Measures ("The Tokyo Rules"), 2.5 (1990), provides that "Consideration shall be given to 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." The Guidelines on the Role of Prosecutors (1990) sets forth that "prosecutors shall give due consideration to diverting criminal cases from the formal justice system, with full respect for the rights of suspects and victims. States should explore possibility of adopting diversion schemes to alleviate excessive court load and avoid the stigmatisation of pre-trial detention, indictment and conviction […]." *See also* Kampala Declaration, "Alternative Sentencing," § 2, Appendix 6.

7. *See* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Art. 5 & 7 (1985), Appendix 18; Kampala Declaration, "Alternative Sentencing," § 2, Appendix 6.

8. *See* United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Art. 13.2 (1985), Appendix 11; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Art. 17 (1990); *see also* United Nations Standard Minimum Rules for Non-Custodial Measures, § § 5.1, 6.1, 6.2, Appendix 13; Kampala Declaration, Appendix 6; Kadoma Declaration on Community Service Orders in Africa (1997).

High recidivism rates continue, as prisons provide no meaningful programs of rehabilitation, and high levels of poverty exist outside of prisons. Where they exist, monitoring and inspection mechanisms are weak in screening the remand population.

PEOPLE STAYING IN PRISON TOO LONG: The causes include:

Length of pre-trial detention[9]

Detainees do not have access to bail[10] because they do not meet the conditions set by the court (sureties are too high) or because they do not know the legal procedures and they are not able to defend themselves.

Functionally, detainees do not enjoy the right to trial within a reasonable period of time due to resource constraints, the inefficiency of the system (poor coordination, communication and cooperation between criminal justice agencies), complex procedures, and the overuse of unnecessary adjournments.[11]

Length of sentences and use of minimum sentences

The lack of effective sentencing options means that imprisonment becomes a sentence of first resort.

No exercise of the right to appeal against conviction, because of the lack of legal awareness and technical know-how to draft the relevant document.

Ineffective monitoring/inspection mechanisms, including Boards of Visitors for young offenders.

LACK OF POLITICAL WILL TO ADDRESS THE PROBLEM OF PRISON OVER CROWDING: In many countries, governments find a strong, independent judiciary a hindrance.

9. Percentage of remand prisoners in comparison with convicted, in some countries: 70% in Benin in 2003, 64.7% in Mali in 2003, 60% in Angola in 2003, 50% in Tanzania in 2003, 60% in Uganda in 2004, 80% in Cameroon in 2004, 22% in Malawi in 2004, 40% in Kenya in 2003, and Liberia 97% in 2006. PRI visits, 2003, and PRI Questionnaires, 2004 (on file with PRI).

10. International Covenant on Civil and Political Rights, Art. 9 (1966), Appendix 9; United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Art. 3 (1988), Appendix 15; UN Standard Minimum Rules for Non-Custodial Measures, Appendix 13; Kampala Declaration, Appendix 6.

11. Beijing Rules, 13.1, Appendix 11; African Charter on Human and Peoples' Rights, Art. 7, Appendix 4; United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Art. 38, Appendix 15; Kampala Declaration, Appendix 6.

Politicians use police stings as expedient measures to answer public criticism. They point to the congested prisons as evidence that they are active in the "fight against crime."

Halfway down the diagram, the causes of prison overcrowding are reduced to the following:

- Inefficiency in the administration of criminal justice
- No legal advice or assistance in prisons, courts, or police stations
- Incapacity in support services especially for young, women (with children), ill offenders
- Legal illiteracy among the population and prisoners

Of these only the second, "No legal advice or assistance in prisons, courts and police stations" is unpacked and analyzed here. It is submitted that the absence of legal oversight, advice, and assistance is a principal cause of overcrowding and high remand populations in our prisons.

Legal Advice, Education, and Assistance

In courts, prisons, and police stations, many violations of human rights occur because prisoners lack access to legal assistance of even the most basic kind by lawyers or non-lawyers.[12]

LACK OF LEGAL ASSISTANCE AND REPRESENTATION BY LAWYERS: In the criminal justice system, prompt access to, and contact with, a lawyer is one of the foremost protections against abuse of human rights.[13] It is also a recognition of the prisoner's existence as a legal entity in his or her own right.

12. The Kampala Declaration on Prisons Conditions in Africa, 1996, recommends: "The prisoners . . . should be allowed access to lawyers and accredited paralegals." *See* Appendix 6.

13. *See* United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Art. 17.1, Appendix 15; see also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, ACHPR Doc/OS(XXX)247 (2001):

> (a) States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons […]
>
> (b) States shall ensure that an accused person […] is permitted representation by a lawyer of his or her choice;
>
> (c) States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.

However, the reality, in many African countries, is that even if international law instruments recognize the right to defense, such a right is not effectively respected and implemented in practice.[14]

In a number of these countries, legal representation is not available because lawyers are few, concentrated in the urban areas, and expensive. They frequently charge fees that are beyond the means of the average person.

Most private lawyers do not offer "pro bono" services, not only because they are few and inaccessible to the ordinary people (especially the poor); but because they have to bear the high costs of representation.

The international and regional norms place clear obligations on the State to provide legal aid services to indigent offenders.[15] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa[16] state:

LEGAL AID AND LEGAL ASSISTANCE:

> *(a) The accused […] has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.*
>
> *(b) The interests of justice should be determined by considering:*
>
> *1. in criminal matters:*
>
> *(i) the seriousness of the offence;*
>
> *(ii) the severity of the sentence.*

[...]

14. *See* Universal Declaration of Human Rights, Art. 11.1, Appendix 8. See also International Covenant on Civil and Political Rights, Appendix 9; African Charter on Human and Peoples' Rights, Art. 3, 7, Appendix 4; United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Art. 11, Appendix 15; United Nation Convention on the Rights of the Child, Art. 40, Appendix 10; African Charter on the Rights and Welfare of the Child, Art. 17.2, Appendix 5.

15. Universal Declaration of Human Rights, Appendix 8; United Nations Standard Minimum Rules for the Treatment of Prisoners, Art. 93, Appendix 16; International Covenant on Civil and Political Rights, Art. 14.3, Appendix 9; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Art. 15.1, Appendix 11; United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Art. 17.2, Appendix 15.

16. ACHPR Doc/OS(XXX)247 (2001).

(c) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty, or pardon.

(d) […]

(e) When legal assistance is provided by a judicial body, the lawyer appointed shall:

1. be qualified to represent and defend the accused […];

2. have the necessary training and experience corresponding to the nature and seriousness of the matter;

3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;

4. advocate in favour of the accused […];

5. be sufficiently compensated to provide an incentive to accord the accused […] adequate and effective representation.

(f) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:

1. when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person […];

2. where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused […], without any payment by him or her.

The effectuation of these ideals, however, is severely limited by the fact that some African countries do not have a functioning legal aid scheme. Among the causes are:

- The scope of legal aid is limited to special categories of offenses (e.g., capital cases) or it is only available subject to the satisfaction of conditions that make access to legal aid very difficult
- The low number of private lawyers, whether paid by the State, or willing/able to take on cases pro bono
- The low number of salaried lawyers employed by the State available to provide legal aid services

- Low government priority accorded to legal aid, which must compete for scarce funds and resources with other more 'eligible' priorities (such as education, health, infrastructure, etc.)

The result is that many defendants or detainees are ignorant of their rights and the criminal procedure and are unable to defend themselves in a court or exercise their full legal rights, including the right to appeal an unfavorable decision.

LACK OF LEGAL ASSISTANCE, ADVICE AND EDUCATION IN PRISONS, COURTS AND POLICE STATIONS BY NON-LAWYERS:

Legal services provided by non-lawyers, both in civil and in criminal law, have an increasingly important role to play for poor people wishing to access justice in the region, but this role is still to be recognized by the legal establishment.[17]

Among the problems:

- Non-recognition under national law

Sometimes there is no legislation covering legal assistance or legal aid, or existing legislation is outdated. In cases where legislation provides for legal aid, its meaning is restricted to litigation or representation by lawyers. Non-lawyers are not recognized as legal service or legal aid providers.

- Resistance from the bar

  Lawyers are committed to ensuring that non-lawyers are properly trained (to a standard certified by a formal legal education body) and that they are regulated (with attendant codes of conduct setting out duties, limits, and disciplinary rules).

  Furthermore, lawyers may be apprehensive that these "non-lawyers" will create a "two-tier" legal establishment, offering reduced price services that are not adequately regulated, and which will therefore undermine public confidence in the whole justice system.

17. The Plan of Action of the Ouagadougou Declaration, 2002, recommends a "greater use of paralegals in the criminal process to provide legal literacy, assistance, and advice at a first aid level," Appendix 7; *see also* Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Appendix 3.

- Lack of political will

  In many African countries, accessible justice is not a priority of the government of the day. These governments claim other competing priorities, such as health, food security, and education. The World Bank's Voices of the Poor study[18] makes clear that the reality for poor people is that "safety and security" are major preoccupations that rank on par with health and education. What is more, penal reform is often equated in the minds of politicians with being "soft on crime." Such attitudes are deeply entrenched, and public opinion is handicapped by the lack of information on sentencing alternatives and reform measures.

- Resistance from judiciary and police

  The presence of paralegals and other service providers is seen as a threat to the formal justice system, rather than an opportunity for partnership subject to certified training programs and regulatory mechanisms. Furthermore, the inclusion of non-lawyers as legal aid providers could reduce already scarce government resources. Finally, there is a fear that people will "shop" for justice from a range of service providers, not all of whom are competent.

- The lack/shortage of trained human resources

  There appears to be little interest in assisting accused persons and prisoners to understand and apply their rights, such as the right to remain silent, the right to an attorney, and the right of a juvenile to be accompanied by his/her parents.

  The participation of civil society groups in criminal justice is low or often non-existent.[19] In part, this is due to the exclusion of external actors in the legislation; but, in the main, the legislation is silent and it appears to be tacitly admitted by criminal justice agencies and civil society groups themselves that the sector is "off limits."

18. Deepa Narayan, Voices of the Poor: Can Anyone Hear Us? (World Bank ed., 2000).

19. United Nations Minimum Rules on Non-Custodial Measures, Appendix 13; Kampala Declaration and Plan of Action, Appendix 6; *see also* Ouagadougou Declaration, Appendix 7; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Appendix 3.

Again the role of civil society organizations may be inhibited by the "normal" attitude towards "criminals" of the public at large, which is generally punitive and ill-informed about more restorative approaches to justice.[20]

Underpinning all of the above is the lack of human, financial, and material resources to provide poor people with effective legal services.

20. United Nations Minimum Rules on Non-Custodial Measures, Art. 17.1, 17.2, 18.4, Appendix 13; *see also* Kampala Declaration, Appendix 6.

Access to Justice in Africa and Beyond

Over one million people are detained in prisons in Africa. Almost all of them are poor and cannot afford a lawyer. With no legal support, they spend years awaiting trial or receive long sentences, contributing to chronic overcrowding in squalid prisons throughout the continent.

In this book, criminal-justice practitioners from around the world explore practical ways of delivering legal aid in criminal matters to the poorest sectors of African and other developing societies. They articulate a broad and inclusive definition of legal aid call on governments, in partnership with civil society, to provide legal aid at all stages in the criminal justice process, to recognize the role of informal means of conflict resolution, including traditional forums, to diversify legal-aid service providers, and to encourage legal empowerment of all citizens. The book also contains the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and the Lilongwe Plan of Action, as well as excerpts from other key international declarations and guidelines pertaining to the treatment of ordinary people caught up in the criminal-justice system.

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