

## **INDEX OF GOOD PRACTICES IN PROVIDING LEGAL AID SERVICES IN THE CRIMINAL JUSTICE SYSTEM**

PRI focuses on developing 'models' from good practice identified on the African continent and around the world that serve to promote penal reform in ways which practically address many of the major problems facing criminal justice agencies. **This document considers a range of 'good practices' developed in Africa and elsewhere in providing legal aid services in the criminal justice system.** It is aimed at policy makers, penal reformers and stakeholders in the criminal justice system. It is part of PRI's efforts to maintain the momentum for penal reform in Africa flowing from the Kampala Declaration on Prison Conditions in Africa (1996) and Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (2002) and specifically seeks to further the recommendations contained in the Dakar Declaration on the Right to a Fair Trial and Legal Assistance in Africa (1999) and Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004). **It is a work in progress and comments and contributions are welcome.**

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## **Acknowledgements**

The source of inspiration for this Index and all PRI's work in Africa is Ahmed Othmani, co-founder and Chairman of Penal Reform International, who was killed by a car in Rabat in December 2004 and who worked indefatigably to promote penal reform in Africa and around the world.

PRI would like to thank Adam Stapleton who compiled this Index.

## **Index of Good Practices in Providing Legal Aid Services in the Criminal Justice System**

*Note: This Index should be read together with the earlier INDEX OF GOOD PRACTICES IN REDUCING PRE-TRIAL DETENTION since the 'benefits' of effective legal aid 'include elimination of unnecessary detention, speedy processing of cases, fair and impartial trials, and the reduction of prison populations.' (1)*

### **Introduction**

Legal aid may be a right but in few countries can it be termed a reality

The laws of most nations recognize the equal status of all people before the law, the presumption of their innocence (until proven guilty) and their right to legal representation. The international law framework is extensive and clear on the subject. (2)

Some constitutions make provision for legal representation at public expense 'where the interests of justice so require' (3) or where 'substantial injustice' would result (4); but many merely allow for legal representation and remain silent on the matter of costs.

At the international and regional levels, principles have been articulated that go into exhaustive detail concerning the quality of legal representation and onus on government to make the means available for its provision.(5)

The image we have of 'legal aid' is that of a lawyer pleading before a court on behalf of an indigent client. This lawyer may act for free (*pro bono* or *pro deo*); or as a public defender (on a salary paid by the state); or as a private lawyer (contracted for services and paid by the state).

Most countries can boast a legal aid service which employs one, both or all of the above models. What fewer countries can claim is that their legal aid schemes measure up to the exacting standards required by international norms.

What is the problem?

Why is the provision of legal aid services so difficult to get right? Is it a matter of cost? Numbers of lawyers? Quality of services?

Lawyers are expensive and often in short supply...

Certainly the provision of legal aid can be an expensive undertaking for government.<sup>1</sup> Many countries do not have adequate numbers of lawyers to service the legal needs of the population<sup>2</sup> and the overwhelming majority of the lawyers are city-based – as against the overwhelming majority of the population which is rural-based.

...not to mention the quality of services and degree of competence on offer

The quality of services is as questionable in the USA<sup>3</sup> where the sheer weight of case numbers overwhelms the services on offer to Nigeria where the Supreme Court has overturned a conviction where a serious felony was defended by an inexperienced young lawyer.<sup>4</sup>

After observing 91 capital trials in Malawi, the observers found 'in almost every case', the lawyer met his/her client at court for the first time minutes before the trial began and that out of the seven lawyers in the legal aid department, three had been just recruited from university and their first trials were capital cases.<sup>5</sup>

Research suggests the services of a lawyer represent the tip of legal services poor people need

In seeking to provide an effective legal aid service which is affordable by the state, the traditional approach has been to ask the advice of those who supply the services (usually lawyers): what services can lawyers supply and at what cost?

Unsurprisingly, the response is a broad-based lawyer-centred range of services from advice to representation - with emphasis on the representational role.

However from the research conducted around the world<sup>6</sup> and supported by the experience of PRI on the ground, the services ordinary people require project a different emphasis as summarized in the iceberg graphic below.

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<sup>1</sup> "Preliminary figures from the Department for Constitutional Affairs (UK) suggest that the costs of the legal aid system in England and Wales has risen by 25% in the past three years to over GBP 2 billion (\$3.6 billion). That is more than any other country in Europe. If the criminal courts are excluded, it is more even than America." The Economist, June 26<sup>th</sup> 2004

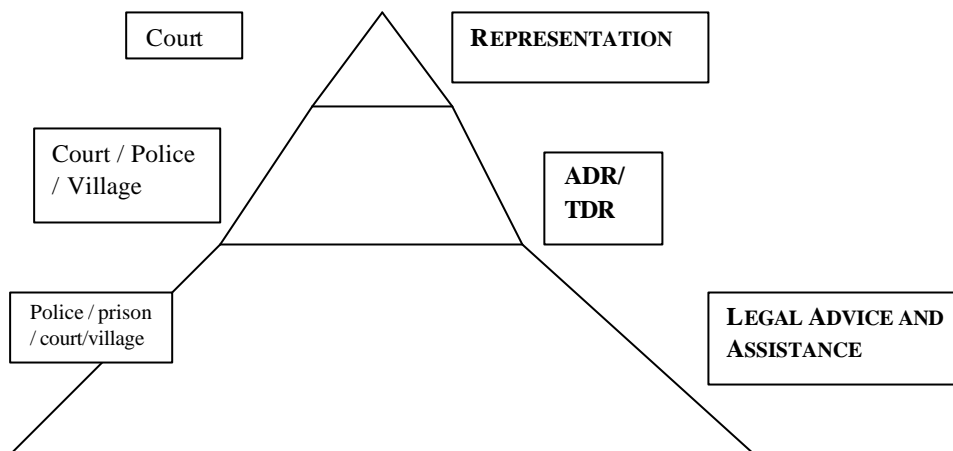
<sup>2</sup> Bangladesh: 30,000 lawyers for a population of 140 million; Malawi: 350 lawyers: 12 m; Niger: 77 lawyers: 11 m; Tanzania: 723 lawyers: 34m; Ethiopia: 434 lawyers: 67m; Uganda: 700 lawyers: 26m; Senegal: 300 lawyers: 10m; South Africa: 17,500 lawyers: 45 m. Source: PRI questionnaires to participating countries preparatory to the Lilongwe Conference on Legal Aid 2004

<sup>3</sup> Tom McNamee, June 20, 2005, 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'

<sup>4</sup> Udofia v The State [1988] 3 N.W.L.R., (Part 4), at page 533.

<sup>5</sup> Trial observations of Capital Cases conducted by the Paralegal Advisory Service, Malawi, 2001

<sup>6</sup> Voices of the Poor series, World Bank, 2000; Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems, PRI, 2001.



A demand-led approach suggests the highly specialized expertise of the lawyer represents the ‘tip’ of the iceberg of legal services needed. Ordinary people in general prefer to resolve their matters locally and amicably where possible.

A broader approach to resource allocation...

In general terms, the need is for basic legal advice and assistance to guide people in their immediate choices and enable them to navigate the justice system. The need is for education on the law delivered in a fashion that empowers people to apply the law to their own set of circumstances.

Specifically in terms of criminal justice – the subject of this Index – the need is for immediate access to legal advice and assistance at the police station on arrest and during interview, at court on first appearance and in the prisons.

Such advice, assistance and education may be provided by a lawyer; but it might be provided just as effectively and for less cost by a trained non-lawyer.

...supported by economic analysis...

An economic analysis of the law supports a broad-based approach to legal aid

*‘Reforms now require competition between legal providers for government legal aid contracts, provide new ways to finance litigation (such as contingency fees) to make the courts more affordable, and re-orient legal aid from subsidizing private litigation to providing public advice.’<sup>7</sup>*

In the health sector, the State seeks to strike a balance between high-cost, curative hospital care that tends to benefit the rich with low-cost primarily preventive services that tend to benefit the poor;

<sup>7</sup> World Bank. *Access to Justice*: [www1.worldbank.org/publicsector/legal/accesstojustice.htm](http://www1.worldbank.org/publicsector/legal/accesstojustice.htm)

equally in education, where resources are directed at high-cost university education (in favour of the rich) as against low-cost primary and secondary education (in favour of the poor).<sup>8</sup>

Yet this balance appears to escape the policy and decision-makers in the justice sector. In many countries the emphasis remains on the high-cost services provided by the lawyers and courts which many States cannot afford and inhibits their ability to provide meaningful legal aid services to the majority of people who find themselves in conflict with the law.

can provide access to appropriate advice and

assistance at the beginning of the criminal justice process

The fear expressed by some commentators – and it is a legitimate one – is that

*'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.'*<sup>9</sup>

The part played by the paramedic in providing primary and emergency health care services is useful in explaining the role of the paralegal in the early stages of the formal criminal justice system. In justice (as in health matters), an effective low-cost intervention at the first aid stage of the criminal justice system can serve to divert minor matters out of the system and leave only **the most serious and complex** matters for referral to the courts (hospital) and lawyers (doctors).

Paralegals (like paramedics) do not seek to substitute for lawyers (doctors), but free up their time so that they can focus on activities that require their expertise (ie advising on the evidence, representation and drafting of grounds of appeal).

The role of law students is being increasingly recognized as well

*Law clinics can play a useful role in assisting legal aid litigants to compel the governments to deliver in terms of their constitutional obligations, including the right to counsel. The funding of law clinics tends to be uncertain as they usually rely on donor funding. However, if a holistic approach is adopted in respect of legal aid services, partnership agreements can be entered into between the*

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<sup>8</sup> Taken from 'Pragmatism, Robin Hood and other themes: good governance and social well-being in developing countries' Birdsall, Nancy cited in 'International Human Rights in Context', Steiner and Alston, Clarendon Press, Oxford, 1996

<sup>9</sup> Chief Justice Richard P Guy, Washington State Supreme Court, May 1999 in 'Positive approaches to 21<sup>st</sup> Century Access to Justice. [www.wsba.org/media/publications/barnews/archives/1999/may-99-positive.htm](http://www.wsba.org/media/publications/barnews/archives/1999/may-99-positive.htm)

*national legal aid structures and the university law clinics. 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.*<sup>10</sup>

Inhuman conditions in prisons call for an urgent and creative response

The conditions in prisons around Africa and other parts of the world are 'inhuman'<sup>11</sup> and governments are in need of urgent assistance. In his keynote address to the Lilongwe Conference on Legal Aid, Justice Kriegler's exhortation is both uncompromising and urgent:

*[the conference] must concretise; give substance, shape and direction; prioritise and strategize. Above all, it must focus on execution, implementation. It must be innovative yet practical, testing anew what is accepted, settled and comfortable, asking whether sacred cows are sustainable. Thus, for instance, the awkward topic of paralegals has to be addressed unflinchingly. The conference must explore new ways of making legal aid truly effective, expanding its nature and scope, employing a variety of methods, aspects, players and modalities.*

*There is no time for window-dressing, puffery and false patriotism. There is no time for starry-eyed complacency or self-serving apologies for failure. Africa needs a radical and fearless reappraisal of where we really stand in relation to the ideal of legal aid for those who need it.'*<sup>12</sup>

Good practices here focus on the needs of people at the front end of the criminal justice system

Therefore this Index focuses on the 'good practices' PRI has identified in providing the kind of basic advice and assistance that is appropriate to the needs of people at the beginning of the criminal justice system ie: in the village, the police station, the court and the prison. These good practices can prevent unnecessary expenditure, time-wasting and personal misery and further the ends of justice - without necessarily having recourse to a lawyer.

Defining legal aid broadly

In line with the Lilongwe Declaration, we have defined legal aid

*'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,*

<sup>10</sup> 'The supply side: the role of private lawyers and salaried lawyers in the provision of legal aid – some lessons from South Africa' David McQuoid-Mason. Paper presented to the Lilongwe Conference on Legal Aid, November 2004

<sup>11</sup> Preamble to the Kampala Declaration on Prison Conditions in Africa (1996)

<sup>12</sup> Justice Johann Kriegler, former justice of the Constitutional Court, South Africa, keynote address to the Lilongwe Conference supra (see Appendix)

*religious and non-religious charitable organizations, professional bodies and associations, and academic institutions’.*

We have applied the same criteria in selecting the ‘good practices’ as in the earlier Index on reducing pre-trial detention, namely:

- they are generally low-cost
- they have a high impact
- they require the participation of a number of different actors
- they often involve partnerships with civil society
- they catalyse reform processes and assist change institutional attitude
- they conform to national constitutional guarantees and international human rights standards
- they pursue an approach that benefits the vulnerable and poor
- they are transferable from one country to another

and added:

- they do not require the expertise of a lawyer
- they link up with lawyers in serious and complex cases

We have not dealt with the issue of ‘means testing’ and instead borrowed from the Chilean principle of ‘unlimited eligibility’ whereby all those who seek legal aid shall be so aided on the assumption that if they had the means to retain a private lawyer, they would do so.

How to use this text *This is a work in progress.*

*We invite those who read this document to critique it and add to it.*

*Within each section, we attempt briefly to describe the problem to be addressed and then summarise the solution or ‘good practice’ that has been provenly effective in tackling the problem(s) identified. The summary is not meant to be exhaustive.*

*Our hope and intention is that those interested in the summary will contact the practitioners directly to learn more (contact details appear below each ‘good practice’ listed). In this way, we seek to encourage closer interaction between countries, agencies and organisations, and individuals.*

## I. IN THE VILLAGE

### 1. Settling disputes

*“The term ‘access to justice’ is often used to refer exclusively to access to the formal state justice system. This belies the fact that in rural areas, where the vast majority of people live, as well as in some urban communities, ‘western-style justice’ is distrusted and avoided by most...access 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...”<sup>13</sup>*

In many countries still, most people live in the countryside. They live in communities where everyone knows (of) each other and minds each other's business closely. A criminal act committed by A against B may have its roots in a long-standing dispute between the parties of which the criminal act is but a symptom. Therefore adjudication in the instant case will not resolve the dispute and so produce more cases on a tit for tat basis.

In many post-conflict societies the justice system has all but collapsed leaving ordinary people no remedy other than to sort out disputes between themselves.

We consider two practices below in two very different settings in S Kivu province of the DRC and Bangladesh.

<b>Settlement through mediation</b> DRC, Bangladesh
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Contact: Bangladesh: Madaripur Legal Aid Association (MLAA): [mlaa@banqla.net](mailto:mlaa@banqla.net) (Fazlul Huq, Secretary; Khan Md Shahid, Chief Co-ordinator. Tel: 88 661 55518  
DRC: Heritiers de la Justice : [heritiers@yahoo.com](mailto:heritiers@yahoo.com);

### Summary

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 in the eastern provinces.<sup>14</sup> In Bangladesh the corrupt practices of the lower judiciary and lawyers, coupled with the time and expense of resolving matters at court has eroded public confidence in the formal justice system.

In the DRC, most people apply to their chiefs and elders for settlement of disputes and judgment even in serious criminal matters (due to the absence of courts) and only apply to the State justice system when an official stamp is needed (eg in civil matters concerning guardianship and adoption). However due to the displacement of communities and corruption of traditional chiefs and elders, new mechanisms have been developed by NGOs and faith groups to assist people resolve their disputes.

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<sup>13</sup> 'Access to Justice in sub-Saharan Africa: the role of Traditional and Informal Justice systems'. PRI, 2000

<sup>14</sup> In the province of South Kivu, in the east of the country which continues to experience conflict, there are some 40 lawyers all of whom are based either in Bukavu or in Uvira. There are two courts which function (in Bukavu and Uvira) and serve an estimated population of 1m persons.

*Héritiers de la Justice*, a non-governmental organization, has set up *Comités de Médiation et Défense* (mediation and defence committees) which have been established throughout South Kivu. These committees have established sub-committees which themselves have established individual cells. The members are trained in human rights and mediation skills and provided with a basic introduction to the laws. They target local leaders such as nurses, pastors and teachers. They link up with other faith groups, Christian, Moslem and Bah'i and operate a schools programme. In the two years of operation (since 2002), they had registered 2,300 dossiers and completed about 250 cases. The service is provided free of charge and involves an amicable and prompt settlement of the dispute.<sup>15</sup>

The Commission for Justice and Peace of the Catholic Church has developed similar mechanisms. Their *commissions d'arbitrage* (arbitration committees) average 10 referrals per month to a lawyer in civil matters and 15 referrals per month in criminal. They average 10 cases per month which are resolved by the commissions without the need to refer them to the lawyer. They have a *protocol de collaboration* (co-operation agreement) with the military who call them up to assist in cases.

Both NGO and church group keep their costs down by recruiting and training local people. The 'consideration' for the local person is the prestige s/he derives from providing the service in the community. In common with the more established advice centres elsewhere (eg in South Africa), serious or complex cases are referred up the chain to a lawyer.

In Bangladesh, the primary distinction between the traditional *salish* (traditional dispute resolution mechanism at the village level involving village headmen or elders) and NGO-co-ordinated *salish* is that the former relies on arbitration while the latter is a mediated process. In the one, parties are bound by the decision of the officiating individuals, while in the second, the NGO training enables the decision-makers to actively engage both parties in settling the dispute, with the goal of reaching a mutually agreed solution. The process is highly participatory and results are usually complied with because a) they have been accepted by both sides; and b) the maximum participation of villagers and the role played by the local mediators further vests ownership in them to ensure compliance between the parties (ie societal pressure).

The leading NGO who has specialized in this field is the Madaripur Legal Aid Association (MLAA) who have developed over years the Madaripur Mediation Model (MMM). NGOs from all over the country and outside Bangladesh send staff to the Training and Resource Centre in Madaripur for training on the model where it has earned wide acclaim both in Bangladesh and abroad.

In essence the MMM works in the following way: MLAA identify local contact persons to disseminate information on mediation as a viable alternative to the court system in the project area.<sup>16</sup> MLAA then establishes CBOs (formerly called 'mediation committees') and train the members in human rights, law and mediation process. All members of these CBOs are volunteers and receive no remuneration at all. MLAA has noted that

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<sup>15</sup> 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.

<sup>16</sup> Madaripur, Shariatpur and Ghopalganj districts

given the reality that women were subject to greater social and economic injustice in rural areas than men, the preferred selection of women has taken on heightened importance.

The mediation CBOs exist at the two lowest local levels of local government: the village (comprising 7-10 members) and the *Union Parishad* (UP - with nine CBOs for each UP and 8-15 members each).

A MLAA mediation worker provides dedicated support to each UP CBO. Their tasks are to:

- receive applications for mediation
- send letters to the parties concerned
- arrange mediation sessions
- supervise mediation sessions
- follow-up and monitor the solution agreed at and report to head office

At the *thana* level (representing between 5-15 UPs), a *thana* mediation supervisor is responsible for supporting and supervising all UP mediation workers. In turn, they are co-ordinated by a district co-ordinator who works with the central office co-ordinator to ensure consistency in the application of mediation support. A MLAA monitoring, evaluation and research cell maintains updated information on mediation procedures and data on sessions and outcomes.

NGO administered *salish* is generally regarded as more equitable, especially where women are concerned as they are encouraged to speak and put their side. Another characteristic of NGO *salish* is that NGO staff, as well as local members of CBOs (villagers) follow up the settlements reached to determine if they are being carried out by all parties concerned and either bring the parties back for further mediation or apply societal pressure to encourage compliance. Where the differences are irreconcilable or one party is not complying with the terms of the settlement, the community is made aware of the failure and/or the matter is taken up for adjudication in the formal system.

Some observers expressed concern that mediated settlements could not be the answer in every case; that certain matters could not be subject to a compromise between parties but require adjudication and enforcement of judgment. The example of rape was raised.

While MLAA do not disagree with the principle of a 'cut-off' point, they temper principle with the practice they find on the ground – namely, that in approximately 50% of rape cases filed the case has been filed by the parents after the daughter fell pregnant by the lover, or the daughter was caught in compromising circumstances, ie contact was consensual. The point is that cultural practices proscribe pre-marital sexual contact and the criminal law is invoked to save face and family honour (with devastating consequences for the lover). MLAA argues that mediation should not be ruled out in such cases *simpliciter*.

## Settlement through cross referral

Bangladesh

Contact: Bangladesh- MLAA as above

### Summary

In Bangladesh, the Village Court is an institution where the local government and village representatives resolve petty civil and criminal cases. It was designed less to determine right or wrong and punish the wrongdoers, but rather to find an amicable settlement of the disputes. Although it was designed to be a responsive and easy system of conflict resolution for the rural population of Bangladesh, the Village Court has remained ineffective, if not non-existent, for the last three decades.

The Village Court consists of five members - the Chairman of the Union Parishad, two Union Parishad members and two villagers (each party selects one member and one representative leader). The cost of filing a complaint is nominal. At a designated time and place, the Court sits with both parties and resolves the case. The sanctions of the Village Court are limited to small sums. Examples of cases that come to the Village Court are thefts, conflicts over land, minor acts of violence etc.

MLAA has been working to revive the Village Court through training in three districts.<sup>17</sup> MLAA found that the Village Court are not functioning in any of these districts in practice. The option for ordinary people was either to go to the formal courts or to seek a remedy through traditional *Salish*. The first were inaccessible (distance, high costs, slow process, manipulated proceedings, general fear and distrust) and the second while easier and cheaper, was often found to resolve conflicts in favour of the more influential parties. Furthermore, the weak, especially women, were found not to receive fair resolutions from a male dominated institution.

In a period of less than 12 months, from a zero base, MLAA recorded almost 6,000 settlements by the Village Court in the 91 courts they have reactivated. Monitoring of activities is continuous (through training of members of Community Based Organisations (CBOs): 40% are marked good, 30% marked fair and the remainder are not functioning very well owing to lack of interest by the local Chairman and his staff. From the moment the petition is submitted to the UP Chairman to resolution of the matter takes on average 3 months.

MLAA sees its role as a 'catalyst' and by building partnerships with UP officers, they are able to hand ownership over within a short period of time. MLAA workers are attached to each court to assist with the administration of justice (ie: documentation, service and filing).

The revival of the Village Court with MLAA has been well received according to user surveys. All the Village Courts in the UP project area report a marked increase in the number of cases every week and resolution is fast, fair and inexpensive. The strengths of the Village Court are given as follows:

- It is held within the community, and the villagers do not have to spend money on transport
- It is cheap. There is no scope for bribes to members

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<sup>17</sup> Madaripur, Shariatpur and Ghopalganj

- It is fast. Parties have to respond to the Chairman's notice within 72 hours, and cases are resolved usually within 30 days.
- It is fair. Since the participants all belong to the community, there is little scope of lying or using false witnesses. The judicial panel of five consists of equal representation from both parties.
- Women participation is encouraged. Women are invited to participate in the Village Court, to ensure a safe and fair space for them to speak.

These 'courts' exist as informal arbitration fora in many countries in Africa. What is distinct about the Bangladesh practise above is the role civil society is playing in supporting such fora.

<p><b>Parent and surety tracing</b> Malawi</p>
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**Summary**

In the absence of external assistance, young persons in conflict with the law and prisoners remanded in custody face enormous obstacles in contacting their families. In Malawi, paralegals gained entry to the police station by offering to trace parents of the juvenile in police custody. In Kenya, paralegals trace sureties for those on remand to facilitate their applications for bail.

Both these initiatives are time consuming and relatively costly. In Malawi, the Paralegal Advisory Service joined with the Catholic Commission for Justice and Peace (CCJP) in two pilot districts to facilitate parent tracing and identify sureties of adults in custody.

As in many countries, the CCJP has an established network of community-based paralegals throughout the country. They are volunteers and receive basic training. By linking up with these paralegals, PAS and CCJP members are able to enhance service delivery and facilitate communications for the benefit of both family members and accused.

## II. AT THE POLICE STATION

It is generally accepted that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, access to a lawyer/paralegal during this period is a fundamental safeguard against ill-treatment.

In many countries, the police are viewed by poor people as predators.<sup>18</sup> Yet most police officers are not brutal people. They are often brutalized by the prevailing culture of the police (as a 'force' rather than a service) and poorly trained; or they are brutalized by the abysmal terms and conditions of service most junior police officers work under. Where these factors are being addressed, partnerships stand a good chance of working. Even where they are not being addressed by governments, many junior police officers welcome the opportunity of working with outside partners where the leadership permits it.

### Developing partnerships

Where criminal justice agencies profess a rights-based approach, civil society actors need to adapt their response accordingly. Confrontation needs to be jettisoned in favour of a more collegiate approach. To work alongside a police or prison officer on a daily basis in close proximity while maintaining a professional distance is not easy; to suggest furthermore that one can sustain the other person's trust ventures into the realm of the improbable.

However this is the balance the paralegals in Benin, Malawi, Kenya and Uganda seek to strike (below): a professional relationship based on trust and mutual respect. If the paralegals are dependent on the good will of the prison/police authorities for them to work inside the prisons/police stations, they are at the same time independent observers of the situation that prevails inside.

Partnership goes both ways. Human rights NGOs cannot condone torture, or cruel, inhuman or degrading treatment or punishment. At issue is whether NGOs can apply to senior police and prison officers to take the necessary action (failing which refer matters to the constitutional watchdogs – such as Human Rights Commission, Ombudsperson, Inspectorate of Prisons), rather than whistle-blow to the media; and whether the authorities do take the action required on the evidence presented.

### Entry points

One of the observations made by NGOs when reading about, listening to or watching a film on a good practice elsewhere is 'ah, but this could not happen here, the circumstances do not allow it'.

Circumstances can and do change; and small steps can be more effective in bringing about change rather than one big leap. A **low-key approach** to the police, for instance, offering a discreet and focused 'intervention' on a **'soft' target** can break down mistrust, build coalitions of interest and lead to more ambitious interventions down the road. Two illustrations are given below.

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<sup>18</sup> pp249-255, Voices of the Poor: 'Can Anyone Hear us?' World Bank, OUP, 2000

The first from Malawi, demonstrates how paralegals gained entry into the police stations targeting **juvenile** offenders. The second in Bangladesh, shows how a NGO gained permission to sit outside the police station where they assist **victims** of acid attacks and domestic violence.

In both countries, police have come to appreciate the value of both these schemes and have invited the NGOs involved to expand their activities to new police stations. Again, in both countries, the impact has gone far beyond the narrow parameters of the pilot scheme. The presence of trained outsiders has deterred abuse inside the police stations and raised the professional standards of the police. Furthermore, both schemes have started to change attitudes within the police from being a force to a service in which both police and NGO act as partners in the protection and defence of individual rights.

Two other more legalistic approaches are included: the role of young recently qualified lawyers in Angola under a scheme managed by the Law Society; and the role of 'legal executives' (paralegals by any other name) working in law firms in the UK.

### **Assisting women and children at the police station (Bangladesh)**

Contact: Bangladesh Society for the Enforcement of Human Rights (BSEHR). Contact: Alena Khan, Ex Director; Albert Prosad Bashu, Project Director on e: [bsehrs@fastmail.fm](mailto:bsehrs@fastmail.fm)

#### **Summary**

Women (and children) in Bangladesh are reluctant to report domestic violence or even acid throwing to the police. The police are poorly equipped to record the victim's statement and lack adequate numbers of women police officers.

Since March 2004, BSEHR has conducted a scheme in 30 police stations throughout the country whereby two trained individuals sit outside the police station from 0900-2400 (midnight) each day. Police officers refer all cases of domestic violence and acid throwing to the team from BSEHR who counsel them and assist the police take a statement.

After initial reluctance, the teams are reported to be working well. Police have asked BSEHR to extend the scheme and to accompany police officers when they visit the community to talk about domestic violence. BSEHR have noted that in the police stations they cover, the numbers of beatings by police have reduced. They have also noted that the police use the presence of the NGO as a foil against powerful local interests who seek to influence the outcome of a case.

### **Diverting juveniles at the police station (Malawi)**

Contact: Clifford Msiska, PAS National Co-ordinator, [cmsiska@penalreform.org](mailto:cmsiska@penalreform.org). Materials are available from [prililongwe@penalreform.org](mailto:prililongwe@penalreform.org)

#### **Summary**

Many of the children in police custody are locked up with adult offenders (due to lack of space). They are a nuisance for police officers to process as they are not many in number and (like women) do not fit in with the male environment of the police station (or

prison). It is easier for the police officer if the young person passes himself off as an adult so he can be processed more simply.

Paralegals approached the police in the four central police stations in the country in 2003 to conduct a pilot scheme over a 12 month period to assist the police with these young people. As a first step, paralegals agreed a Code of Conduct with the police. They traced the parents of the young person in the police station to inform them of the whereabouts of their child. They linked up with social services. They 'screened' the young person using a form agreed with the police and judicial authorities.

In 2004, over a 12 month period, they screened 246 young persons – of whom 116 were released on bail, 36 sent to an approved school, 52 released to their parents and 42 remanded in custody.

In the same year, the scheme was evaluated by a joint team of police and paralegals in each station. As a result, the paralegals were invited to extend their services to adults during interview in all police stations throughout the country.

<p style="text-align: center;"><b>Assistance at Police interview (1)</b> <b>(Angola, England and Wales)</b></p>
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Ordem dos Advogados (Bar Association): [ordemadvogadosangola@netangola.com](mailto:ordemadvogadosangola@netangola.com); [www.oaang.org](http://www.oaang.org).  
Co-ordinator of the Human and Rights and Access to Justice Commission, Dr Manuel Vicente Ingles Pinto:  
t: 326330 ; t/f : 322777 ; cell : 091 506758; [inglespinto@snet.co.ao](mailto:inglespinto@snet.co.ao)

### **Summary**

The Bar Association of Angola (OAA) has developed a programme of assistance to suspects in police custody in 11 police stations in Luanda district whereby graduate lawyers attend police stations with public prosecutors to advise an accused person at interview. In the period, October-December 2002, the OAA project assisted at 1409 interviews and filed 69 actions requesting the release of illegally detained persons. The project focuses on poor people at the initial stage of the investigative process where most abuses take place in police stations in the Luanda area. It involves young lawyers (*estagiarios*) fresh out of law school interacting with police officers and prosecutors. They are paid a stipend for each interview they attend.

In the UK, 'legal executives' are employed by solicitors to carry out a range of activities that require an introductory legal knowledge. One of these activities is to attend on clients on arrest at the police station during interview. The legal executives (often young men and women in their late teens or early 20s) attend the police station as representatives of their law firms and sit with the client of the firm during his/her interview.

**Assistance at Police interview (2)**  
**PAS (Malawi)**

Clifford Msiska as above. Senior Superintendent of Police, Peter Mangani – tel: 265 8393028

**Summary**

The Paralegal Advisory Service in Malawi approached the police to request training in 'investigative interviewing skills'. These short courses were provided to all investigating officers. The purpose was for all paralegals to learn the necessary skills and so be able to identify the line between aggressive and oppressive interviewing techniques; and demonstrate to police officers that they had received the same training they had and so could attend at interview without impeding the investigation.

Paralegals are developing a roster system with central police stations so that during interviews (the majority of which are conducted on Mondays and Tuesdays each week), a paralegal is on call to assist at the interview and ensure the constitutional guarantees of the accused are protected. This scheme is in its infancy at present.

### III. AT COURT

Legal aid is usually granted by a judge or magistrate sitting in a court. It is rarely available when an accused is presented to court on his/her first appearance and when the question of his/her liberty is determined pending trial of the issue.

The reasons most commonly given for the delay in providing legal aid (ie representation by a lawyer) are

- a) a determination that the matter is serious and therefore in the interests of justice to make a legal aid order; and
- b) a determination that the accused lacks the means to retain a lawyer

The delay can be lengthy. In the meantime, the accused languishes in prison.

As concerns the first, there is caselaw that sets a very low threshold of seriousness.<sup>19</sup> In essence, where there is a risk of imprisonment, a legal aid order should be made.

As concerns the second, the Chilean government have taken a robust approach to a bureaucratic creation by stating a principle of 'unlimited eligibility' for all those in conflict with the criminal law. The basic assumption is that anyone who has the means will retain a lawyer.<sup>20</sup>

The court is the domain of the lawyer. How lawyers are employed is explored creatively in South Africa and the development of the Justice Centre (below). Non-lawyers (students and paralegals) can provide useful complementary services in the precincts of the court by offering general advice and assistance to members of the public, witnesses and accused. They can negotiate with prosecutors and clerks. They can observe proceedings to inform policy development and wider reforms.

The role of law students through University law clinics is reviewed below and illustrates how in the USA, students play a key role in correcting injustices, while in Africa they are increasingly providing an effective legal aid service.

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<sup>19</sup> 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, decision of 23 April 1991, Series A no 205). In Benham v UK, 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. (decision of 10 June 1996, Reports 1996-III). Source: Public Interest Law Initiative, Columbia University School of Law, NY2001, [www.conectasur.org/in/item3a.php](http://www.conectasur.org/in/item3a.php) and 'Pursuing the Public Interest, a Handbook for Legal Professionals' in Chapter 6: 'Access to Justice: Legal Aid for the Under-represented.' At: [www.pili.org/publications/PPI/pili\\_handbook-ch/206/pdf](http://www.pili.org/publications/PPI/pili_handbook-ch/206/pdf)

<sup>20</sup> For further reading see: Open Society Justice Initiatives of the Open Society Institute: 'Legal Aid Reform and Access to Justice' 2003 – [info@justiceinitiative.org](mailto:info@justiceinitiative.org); [www.justiceinitiative.org](http://www.justiceinitiative.org)

## Justice Centres (South Africa)

Contact: Patrick Hundermark, National Operations Executive, South African Legal Aid Board: [patrickH@legal-aid.co.za](mailto:patrickH@legal-aid.co.za)

### Summary

The most effective legal aid services models for consumers are those that provide them with a “one stop shop” instead of being sent from pillar to post to obtain assistance. In South Africa this is provided by “Justice Centres”.<sup>21</sup>

In South Africa, Justice Centres are similar to legal aid specialist law firms that have developed elsewhere, except that they are fully State-funded and staffed by salaried lawyers and administrative staff in the employ of the Legal Aid Board. The Centres bring together under one roof legal aid officers, public defenders, law clinic intern public defenders, professional assistants, supervising attorneys, paralegals, administrative assistants and administrative clerks.

Public defenders deal with criminal cases in the regional courts and high courts.<sup>22</sup> Law clinic interns do both civil and criminal work in the district courts.<sup>23</sup> 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. Administrative assistants and clerks provide the necessary administrative back up, and private lawyers are only used if the justice centre cannot handle a case.

The Justice Centres 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, another model, such as cooperative agreements between the Legal Aid Board and rural law firms, public interest law firms, the independent law clinics and paralegal advice offices may be more feasible.

The South African experience is that Justice Centres 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 once the initial start up costs have been spent.<sup>24</sup>

### **Illustration: the Durban Justice Centre (2003)**

The Durban Justice Centre has 15 ‘candidate attorneys’ (lawyers newly graduated from university) who are themselves supervised by 16 ‘professional assistants’ (practicing lawyers) under two principal attorneys; support staff comprises two paralegals, supported by 17 administrative staff. The Centre covers the Durban metropolitan area consisting of 38 courts and Westville prison (averaging between 11-12,000 prisoners).

When a person steps in off the street, s/he is processed as follows:

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<sup>21</sup> Extracted from McQuoid Mason's paper to the Lilongwe Conference supra

<sup>22</sup> Regional courts can impose fines of up to R300 000 (about \$46 000) and imprisonment of up to 25 years (Magistrates' Courts Act 32 of 1944).

<sup>23</sup> District courts can impose fines of up to R100 000 (about \$15 333) and imprisonment of up to 3 years (Magistrates' Courts Act 32 of 1944).

<sup>24</sup> See McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 126- S 127. For instance, the South African Legal Aid Board has calculated that during 2002 after establishing 26 justice centres 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* (2003) 10.

Step 1: fill out application form

Step 2: means test

Step 3: interview with a paralegal who reviews the merits of the case and

- keeps the matter in-house; or
- refers it out; or
- decides there is no case in which event the applicant can
  - appeal to the Principal and if he refuses the application
  - appeal to the Legal Aid Board
- opens a file
- distributes file among candidate attorneys

On average, the candidate attorney in the DJC will expect to deal with 25-30 cases a day in the district court and as many as four trials a day in the regional court. Candidate attorneys do not visit the prison – instructions are taken at court in the holding cells. Those on bail come to the DJC for a conference. They do not visit police stations either as legal aid is only granted at the first court appearance.

Salaries are considered competitive. The position is respected and lawyers in the DJC enjoy good status in society – most candidate attorneys stay on and become professional assistants.

By the end of 2004, the Justice Centres in South Africa had achieved 78% coverage of the criminal justice system with 58 Justice Centres and 27 Satellite offices operational in the country.<sup>25</sup>

### Campus law clinics and Law School Clinical Programs

University of Natal: [www.cslls.org.za](http://www.cslls.org.za); Association of University Based Legal Aid Institutions (AULAI); Legal aid clinic, Uganda: [lac@infocom.co.ug](mailto:lac@infocom.co.ug); National Community-Based Paralegal Association (NCBPA) of South Africa: Mdu Shabangu, National Cluster Co-ordinator: [mshabangu@webmail.co.za](mailto:mshabangu@webmail.co.za); National Paralegal Institute of South Africa (NPI-SA): Motlai Mashiloane, Programme Manager: [program@npisa.org.za](mailto:program@npisa.org.za)  
Centre on Wrongful Convictions, Law dept., Northwestern University, Chicago, Illinois: [www.law.northwestern.edu](http://www.law.northwestern.edu);

#### Summary

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.<sup>26</sup>

Law school clinics are a component of legal education through which law students, under the supervision of a law professor or a practicing lawyer or both, work on real cases. Law school clinics provide practical, hands-on training for law students and they provide services to disadvantaged clients. In the United States, because law school clinics have education of law students as their primary goal, they are not high volume

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<sup>25</sup> Patrick Hundermark, Legal Aid Board South Africa, '10 Years of Democracy and Access to Justice in South Africa' presentation to the Lilongwe Conference supra.

<sup>26</sup> Extracted from presentation to the Lilongwe Conference supra: 'Access to Justice: Challenges, Models, and the Participation of Non-Lawyers in Justice Delivery' Tom Geraghty

service providers. However, in many developing countries law school clinics have service delivery as a distinct goal.<sup>27</sup>

The growth of law school clinical programs accelerated in the 1960s in the United States, 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. Since then, nearly every law school in the United States has a clinical program that involves students in the representation of indigent clients in civil and criminal cases. 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..."<sup>28</sup> As a result, virtually all U.S. law schools have implemented clinical programs.

The American Bar Association reports that 53 of the 147 law school clinical programs provide legal services in the area of criminal defense. One example is the Center on Wrongful Convictions at Northwestern University School of Law, where students and faculty involvement was instrumental in 12 of the 18 death penalty exonerations in Illinois.<sup>29</sup> The Innocence Clinic at Cardozo Law School has been instrumental in freeing many wrongfully convicted defendants, focusing on the use of forensic evidence, such as DNA, to free innocent prisoners.<sup>30</sup>

In Africa, law school clinics are relied on extensively in South Africa as a means of providing low cost and/or free legal services. South African law school legal clinics have focused on service delivery, attempting to make legal aid available to as many clients as possible. They currently operate more than 20 clinics in the country and are part of the "wider national system of legal aid delivery."<sup>31</sup>

Students in these clinics assist with legal research and in counseling clients. They assist in the defense of indigent defendants. 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. Moreover, many of the law school clinics were set up at "historically black universities, servicing areas (often rural) where there are currently no justice centres or in places where justice centres may never be established."<sup>32</sup>

Law school legal clinics are also service providers in other African countries. Many African nations have established, or are currently establishing, legal aid clinics

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<sup>27</sup> See, Combining Learning and Legal Aid: Clinic in Africa, Report on the First All-African Colloquium on Clinical Legal Education, 23-28 June, 2003, organized by the Association of University Legal Aid Institutions of South Africa, the Open Society Justice Initiative and the University of Natal, available at [www.justiceinitiative.org/activities/lcd/cle/](http://www.justiceinitiative.org/activities/lcd/cle/).

<sup>28</sup> 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/chapter\\_3.html](http://www.abanet.org/legaled/standards/chapter_3.html)

<sup>29</sup> CENTER ON WRONGFUL CONVICTIONS, ILLINOIS DEATH PENALTY EXONERATIONS, at [www.law.northwestern.edu/depts/clinic/wrongful/deathpenalty.htm](http://www.law.northwestern.edu/depts/clinic/wrongful/deathpenalty.htm)

<sup>30</sup> Other innocence projects include the Innocence Project Northwest at the University of Washington Law School ([www.law.washington.edu/ipnw/](http://www.law.washington.edu/ipnw/)), the Wisconsin Innocence Project at the University of Wisconsin Law School ([www.law.wisc.edu/fjr/innocence/index.htm](http://www.law.wisc.edu/fjr/innocence/index.htm)), the Northern California Innocence Project at the Santa Clara University School of Law ([www.scu.edu/law/socialjustice/ncip\\_home.html](http://www.scu.edu/law/socialjustice/ncip_home.html)), and the New England Innocence Project ([www.newenglandinnocence.org/](http://www.newenglandinnocence.org/)).

<sup>31</sup> OPEN SOCIETY JUSTICE INITIATIVE, COMBINING LEARNING AND LEGAL AID: CLEIN AFRICA, available at [www.justiceinitiative.org/activities/lcd/cle/](http://www.justiceinitiative.org/activities/lcd/cle/) durban2003

<sup>32</sup> Indicator – The University of Natal, Vol. 19, No. 3 (Dec. 2002), available at [http://www.ukzn.ac.za/indicator/Vol19No3/19.3\\_feature.htm](http://www.ukzn.ac.za/indicator/Vol19No3/19.3_feature.htm)

associated with law schools. Currently there are clinics in Kenya, Lesotho, Tanzania, and Zimbabwe, and Botswana. There is also a legal clinic in Sierra Leone. Law school associated clinics also exist or are soon to open in Ethiopia, Uganda, Malawi, and Nigeria. In Ghana, a legal clinic in Accra's Nima district provides opportunities for law students to work in a clinical setting.

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, student practice rules are being drafted for consideration by governments and bar associations (*note: in Chile, 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*).

<p style="text-align: center;"><b>Assisting the accused, witnesses, members of the public and follow up</b> (Malawi)</p>
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Contact: PAS as above

### **Summary**

Paralegals started working in the four central courts of Malawi in 2003. They provide advice and assistance and follow up cases from prison.

**Advice and assistance:** the court-based paralegals offer general advice and assistance to the accused, relatives and sureties for the accused, defence witnesses and members of the public to orient them at court on where to go, what to do and what is going to happen. They do not advise anyone individually on the merits or not of their case.

**Follow up from prison:** in Malawi the PAS has agreed 'bail forms' with the police and judiciary which in simple/minor cases has proved useful in expediting bail for those unnecessarily remanded in prison. The paralegals at court ensure bail forms from prison are submitted promptly to the registry and followed up (see Tools at Chapter 6 below).

**At court,** the paralegals meet with the court clerk, magistrates, prosecutors and any other criminal justice agencies (eg Social Services) and acquaint them with their presence and seek the necessary permission to meet with people in custody. They follow up any matters from the previous day or week – especially bail forms, release orders, old caselists.

**As concerns orientating members of the public:** they direct them where to go; explain the lay-out of the court and introduce them to the court clerk; they explain the procedure (first hearing, bail, G/NG pleas, adjournment for trial); and they follow up at the end of the case with advice on what to do if the case is not ready for hearing; they are in the wrong court; if the name of the accused person has not been traced in the court clerk's registry.

**As concerns (defence) witnesses:** they check the summons s/he brings along to court (containing his/her particulars, the signature of the prosecutor handling the case); the court and case; explain lay-out of the court and introduce them to the court clerk; explain the role of a witness, meaning of the oath and procedure (first hearing, bail, G/NG pleas,

adjournment for trial). They follow up at the end of the case and advise what to do if the matter has failed to take place or has been adjourned

As concerns the accused in custody: they check the daily court record, identify numbers of remand prisoners and status of their case. Then they seek permission to visit the accused and ask if s/he is expecting a lawyer or witnesses to attend or persons to stand surety for him/her. They follow up outside with these witnesses and establish if they are present. They check that the accused is familiar with the process and offer any last minute advice. They follow up at the end of the court hearing with a courtesy call. If the accused has any messages to communicate from witnesses/relatives or from accused and check with the police if they agree to communicating them or any supplies (eg food, tobacco).

As concerns the accused on bail: they check the daily court record, identify the accused and check whether it is his/her first appearance and whether s/he is familiar with the court lay-out and procedure.

As concerns follow up from prison: the paralegals at court collect the bail forms from the paralegals working in the prisons and lodge them with the registry clerk or magistrate (depending on the local arrangement). They meet with the prosecutor and go over the forms and focus on those which the police may not object to. They identify those where police ask for a surety and inform the accused accordingly and facilitate contact (through telephone). Where a person is granted bail, they communicate with their team member in prison so that s/he can follow up for prompt release. Where a person has been refused bail ie due to absence of a surety, they inform their team member in prison so that the accused can be advised to contact his family to organize a surety.

Over a 10 month period (Jan-Oct 2005), the paralegals assisted over 3600 accused at court and over 700 witnesses.

<b>Linking with prosecutors, magistrates and prisons</b> (Malawi)
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Contact: PAS as above

### **Summary**

The court-based paralegal plays a key linking role both with prisons and police. They identify those cases that are dragging through the system. They draw the clerk/magistrate's attention to those cases where the remand warrant has expired. At regular intervals they liaise with the court to organize a Camp Court in prison (see Index of Good Practices in Reducing Pre-trial Detention) or Court User Committee meeting (see below) to discuss problems that appear to be common and seek solutions at the local level.

#### IV. IN PRISON

The one thought that dominates life in prison is 'getting out'. People on remand think of bail, people awaiting trial think of their trial date, people who have been convicted and sentenced think of their appeal or date of release. They think of these things all the time.

On the other hand, the preoccupation of the prison authorities is the containment and management of ever-increasing numbers of prisoners with limited space and on an ever-shrinking budget.

In the first index on reducing pre-trial detention, a range of practices were highlighted (holding of **'camp courts'** in prison to screen the remand caseload; greater use of **bail**; regular judicial visits; use of **case management committees** or court user committees as they are also known involving all criminal justice agencies etc) that taken together and used systematically could go some way to reducing pre-trial populations and, at the least, ensuring that those who need not be detained in custody awaiting trial are released.

The reality in many prison services is that people detained inside the prison walls do not have access to legal advice or assistance. As discussed above, the lawyers rarely visit the prison and so those in prison wait passively until they are produced at court, when the matter (if serious) will often be adjourned again. In this way, people may wait years for their case to come to trial.

This section examines the role paralegals have played in Malawi, Kenya and Uganda to empower those in prison to access the law. It is a role that law students could also play, especially in accompanying lawyers on legal aid days as practiced in Kenya below.

<p style="text-align: center;"><b>Empowering prisoners to understand the law and apply it in their own case: Paralegal Aid Clinics (PLCs) (Malawi, Kenya, Uganda)</b></p>
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Contact: PAS and KPPP as above; Nanzikambe: [info@nanzikambe.org](mailto:info@nanzikambe.org); [nanzikambe@africaonline.net](mailto:nanzikambe@africaonline.net); [www.nanzikambe.org](http://www.nanzikambe.org)

#### Summary

The Paralegal Clinics (PLCs) constitute the basic, daily work of the PAS. The PLC is the means of **educating** prisoners on the law, **explaining** how they have got into the situation they find themselves and show them how they can **apply the law** to alleviate their own situation.

The PLCs apply forum theatre skills (see section 6 below) which have been developed and adapted to suit the prison environment. The PAS has produced a PLC training manual which incorporates participatory learning skills and games that bring the content alive.

Between January-October 2005, paralegals in Malawi conducted 805 PLCs in 13 prisons containing 84% of the prison population reaching 21,562 prisoners.

Between January-May 2005, the paralegals in the KPPP conducted 178 PLCs reaching 5179 prisoners.<sup>33</sup>

Two films produced by PRI ('Path to Justice', Kogan, 2004, 13' and 'Freedom Inside the Walls', Kogan, 2005, 53') demonstrate the PLCs in action and include powerful testimony from prisoners as to their usefulness in enabling them to access the law.

### Legal aid days (Kenya)

Contact: Rhoda Igweta, [rigweta@lrkkenya.org](mailto:rigweta@lrkkenya.org)

#### Summary

In Kenya, in the course of their daily work, the paralegals identify a range of cases that call for expert legal advice. They draw up a list of these cases and organize with lawyers a day when they can visit the prison and sit with the people on the list and advise them on their case. The lawyers offer their services for free.

The paralegals sit with the lawyers and supply the background to the case and the particular difficulty/complexity they have identified. The individual benefits and the paralegal learns from the legal advice rendered.

These legal aid days are prepared in advance by paralegals so that the lawyer(s) maximize the use of their time in prison. In addition, time is set aside for prison officers to consult with the lawyers on any matter they seek advice on.

### Informing the right plea to the right charge (Malawi)

Contact: Clifford Msiska PRI (Lilongwe): [cmsiska@penalreform.org](mailto:cmsiska@penalreform.org); or [prililongwe@penalreform.org](mailto:prililongwe@penalreform.org)

#### Summary

One of the problems facing court administrators, especially in common law countries operating a jury system, is that the majority of criminal cases prove either 'ineffective' (cannot proceed for a range of reasons) or collapse when they finally come to court. The defendant is produced, witnesses are summonsed and jurors convened - all at great expense - only for the accused to enter a plea at the last minute or request an adjournment; or for the prosecution to offer no evidence or request an adjournment.

In the United Kingdom, the procedure of listing cases for 'Pleas and Directions' was initiated to assist relieve this problem, ie a preliminary hearing to establish the status of the case and particularly to see if a trial of the issue was really necessary (*see Index on Reducing Pre-trial Detention*).

Police in many jurisdictions routinely charge 'murder' on arrest whether or not the facts support the charge. A state prosecutor seldom reviews the charge in the file and considers the weight of the evidence in support and likelihood of obtaining a conviction before the matter is listed for trial.

<sup>33</sup> PAS Newsletter No 9, September 2005: [prililongwe@penalreform.org](mailto:prililongwe@penalreform.org)

Trial observations of 91 capital cases in Malawi (2001) found that 45 ended in pleas to manslaughter and a further 16 were ineffective (failure of witnesses to appear). In other words, 61 cases out of 91 did not proceed to trial – or over 60%. These figures represent costs thrown away.

Following paralegal aid clinics in prisons (PLCs) conducted by the PAS teams, prisoners in one prison approached the paralegals in October 2003 and indicated they wished to enter pleas to manslaughter. The PAS team drew up a list of 33 prisoners and informed the court. These were listed and 29 pleaded guilty at court and were sentenced (two were not produced at court and two pleaded not guilty). This resulted in savings to the judiciary of some GBP18,000.

In 2004, paralegals found that following PLCs in the prisons, accused in over 50% of the homicide backlog of cases (in excess of 800 cases) were willing to enter a plea to manslaughter. Legal Aid lawyers were informed and invited to visit the defendants and advise them on the law and on their individual cases.

The list was referred to the Director of Public Prosecutions whose lawyers then reviewed the files. In one prison where 190 accused indicated their willingness to plead to the lesser charge (murder still carries the death penalty in Malawi, though there have been no executions since 1992), the DPP accepted pleas to manslaughter for some 60 accused.

The benefits of this exercise include: 1) speedier hearing of cases and reduced hardship to accused and their victims' relatives; 2) improved case management; 3) reduction of the backlog and breaking down the remainder into manageable numbers; 4) and substantial savings to the judiciary in terms of judge days spent trying the matters and in terms of costs .

<b>Developing forms to speed up the caseload</b> (Malawi)
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Contact: Clifford Msiska, above

### **Summary**

Where there are logistical difficulties in producing accused persons at court or getting cases listed for hearing, standardized forms can assist process such matters as bail or appeal against sentence, to cite two examples.

These forms need not be legally recognized, ie be 'sworn' (as an affidavit for instance); or legislated for. They are administrative tools that convey information recognized as accurate and valid by the authorities concerned and on which they can take administrative action without the need for a full hearing. They are discussed and illustrated further below in Chapter 6.

<p style="text-align: center;"><b>Linking with the community</b> (Kenya and Malawi)</p>
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Contact: Rhoda Igweta or Clifford Msiska as above

**Summary**

In both Kenya and Malawi, paralegals are linking up with community-based paralegals to trace relatives of those in prison.

In one pilot district in Malawi, the PAS has supplied community-based paralegals with bicycles to facilitate the tracing exercise. The purpose of the pilot is to establish an effective means of communication with the village(s) that will open the way to diversion schemes (victim offender mediation), court-village referrals (ie to mediate a settlement rather than impose a punishment in appropriate cases) and facilitate the reintegration of the ex-offender back into the community.

## V. MONITORING AND EVALUATION

*The Commission reached three major conclusions when it analysed the record:*

- *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.*<sup>34</sup>

The media provide the most common source for monitoring the justice process in a country. Many newspapers have dedicated court or crime reporters. However journalists will sometimes portray a less than full account in the interests of a good story and sensation.

Aside from commissioning detailed research into the workings of the justice system, trial observations can provide a useful glimpse from time to time of how the system is working.

The practices set out in this index have emerged to address problems identified in the formal justice system. The work of paralegals in Central and Eastern Africa is one innovative example - and because it is new, importance is given:

- a) to close monitoring to ensure that the advice and assistance they provide is both accurate and effective; and
- b) evaluation of their work in terms of impact and cost.

The monitoring is achieved by a range of mechanisms: clear workplans, weekly team meetings; monthly reports to a fixed template; monthly co-ordination meetings; and monthly tours of each team by the co-ordinating unit. There are registers the teams complete for prison visits, police and court attendance. There are logbooks for the PLCs and motor-cycles they use – the effect is of a service that is professional in approach as well as being transparent and accountable in its delivery.

Formal evaluations are conducted every two years in Malawi but daily evaluation is ongoing. For instance, how is the impact of the PLCs in prison to be monitored? Do they really empower people to represent themselves at court? The numbers of persons attending the clinics may indicate the absence of other distractions in the prison at the time. The number of people who secure their release may have been released in any event.

Interviews with magistrates and former prisoners conducted at intervals provide some reasonably sound assessment of the impact obtained, but more needs to be doing to gauge impact on a regular basis. Consequently, the paralegals conduct court observations to 'spot check' for themselves how those from the prison who attended the PLCs conduct themselves at court.

Since 'cost' is given as the main reason why legal aid schemes fail, close attention needs to be given to this area. The Justice Centres in South Africa are cheaper than the

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<sup>34</sup>American Bar Association: Commission on Non-Lawyer Practice. August 1995. Minority Reports

former judicare scheme, but concern has been expressed that the costs appear to be mounting with the passing of each year as recruitment focuses more on lawyers (and less on using trained non-lawyers). One paralegal in Malawi costs less than US\$450 to field each month.

### Trial observations

Reference: Fair Trials Manual, Amnesty International ([www.amnesty.org](http://www.amnesty.org)); and guidelines issued by the International Commission of Jurists. <http://www.geneva.ch/f/ICJ.htm>

#### Summary

It may be that backlogs are reduced and x number of cases disposed of in a certain period – ie the system becomes more efficient. But then what of the quality of the justice rendered and the fairness of the proceedings?

Did those awaiting trial have ‘adequate opportunities’ to consult with a lawyer<sup>35</sup>; or access to a lawyer ‘of experience and competence commensurate with the nature of the offence’<sup>36</sup>? Did the ‘opportunities’ ensure that time was available for counsel to canvas a plea or reduce the charge?

Trial observations are useful in providing a snapshot of the workings of the criminal justice system and the fairness of that system and in informing the judiciary on some priority measures.

Between 2000 and 2001, paralegals in Malawi observed 91 capital trials in the High Court sitting on circuit around the country. Their observations disclosed the following:

- limited consultation period with lawyers: in almost every case legal aid lawyers first met the accused at court. This obviates the possibility of tracing witnesses (crucial when running a defence of alibi) and generally falls short of *UN Safeguards guaranteeing protection of the rights of those facing the death penalty 1984* and *UN Basic Principles on the Role of Lawyers 1990*
- lack of resources available to legal aid lawyers, their lack of experience and seniority
- trial judges’ lack of familiarity with jury trials
- questionable standards observed by police during investigation
- inconsistency by state prosecutors in reducing the charge of murder to manslaughter<sup>37</sup>

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<sup>35</sup> Annex para 8 UN Basic Principles of the Role of Lawyers 1990

<sup>36</sup> *ibid* para 6

<sup>37</sup> Report of trial observations of capital cases carried out between June 2000 – February 2001. Paralegal Advisory Service (Malawi). PRI. September 2001. Available from [prililongwe@penalreform.org](mailto:prililongwe@penalreform.org)

## **Court observations**

(Malawi)

Contact: Clifford Msiska as above

### **Summary**

The purpose is to assess the impact of the PLCs in court. It is not scientific but can be used in support of claims that PLCs have facilitated proceedings and especially success in bail applications

Aside from noting the details of the court, date, accused and name of magistrate, paralegals note the nature of the proceedings (summary trial, plea in mitigation, bail application) and the result. The paralegal then rates the accused (very good, good, fair, poor) according to his/her a) appearance; b) voice; c) style; d) overall impact. S/he then adds any comments of the magistrate.

## **Access to Justice, Case Management and Court User Committees**

(Kenya, Uganda and Malawi)

Contact: Rhoda Igweta (Kenya), Clifford Msiska (Malawi) as above; and [A2J-Advisor@hrdpdanida.org](mailto:A2J-Advisor@hrdpdanida.org) (Uganda)

### **Summary**

The Caseflow Management Committee is also known as a 'Court Users Committee' (CUCs - Malawi) and 'Access to Justice Committee' (Kenya). These committees operate at the local, regional/provincial and national levels to identify problems and come up with local solutions. They meet regularly at the local level (monthly), quarterly at the regional/provincial level and annually at the national level. They have proved effective in improving communication, co-ordination and communication between criminal justice agencies and settling local crises.

The work of the paralegals directly informs these committees since they provide impartial and upto date information on the situation in the local criminal justice system. In Malawi, paralegals minute the meetings and act as secretariat for the CUCs.

## **Steering and advisory committees**

(Benin, Kenya, Uganda and Malawi)

### **Summary**

In all the four countries operating a paralegal advisory service in the criminal justice system, each has a supervisory committee which advises and supports the programme. The members are all senior members of the judiciary, prisons, police and law society.

Their purpose is to promote the development of the work of the paralegals and advise those charged with implementing the programme where difficulties arise.

## 6. TOOLS

### **Posters**

People in prison and police stations need simple guides setting out their situation in law. Visually accessible aids not only inform those in conflict with the law but also serve to remind law enforcement officers and the public of how the law operates.

Bail for instance is greatly misunderstood in many countries: the villagers who capture a thief and walk him often many miles to a police post do not take lightly to seeing the same person back in the village a day later. Consequently, bail is underused in the pre-trial stages with the result that many people are needlessly remanded in prison awaiting trial.

> *Insert 'what is bail' poster*

The PAS design their visual aids in consultation with the users and the criminal justice agencies. The result is that they are posted in every police station, court and prison in the country.

*Additional visual aids include: 10 steps from arrest to appeal; court handout*

### **Films**

The visual image communicates the reality with an immediacy words often fail to attain. It brings existing conditions to a wider audience (the public, politicians, donor agencies) who would otherwise not be aware of the nature nor urgency of the problems. It demonstrates what can be done and - where reform programmes are underway – maps the progress made (conditions then and conditions now).

*PRI has produced a series of films on prison conditions in Africa, the application of community service orders and the work of paralegals in prisons, police and at court.. (>insert the film covers)*

### **Handbooks and Manuals**

There are a wide range of handbooks and manuals available. Those of particular relevance to those engaged in police stations, prisons and at court are set down below.

- **Making Standards Work**, an international handbook on good prison practice. PRI. Second edition 2001 ([www.penalreform.org](http://www.penalreform.org))
- **To Serve and Protect** – Human rights and humanitarian law for police and security forces. ICRC. 1998 ([www.icrc.org](http://www.icrc.org))
- **Fair Trials Manual** – Amnesty International, 1998 ([www.amnesty.org](http://www.amnesty.org))
- **The Torture Reporting Handbook**. Camille Giffard. The Human Rights Centre, Essex University, 2000 - [hrc@essex.ac.uk](mailto:hrc@essex.ac.uk); [www2.essex.ac.uk/human\\_rights\\_centre/](http://www2.essex.ac.uk/human_rights_centre/)
- **The Human Rights Handbook** – a practical guide to monitoring human rights. English and Stapleton. Juta and Co, South Africa, 1997

- **Monitoring places of detention:** a practical guide for NGOs. Association for the Prevention of Torture (APT), 2002 ([www.apr.ch](http://www.apr.ch))
- **The PLC Manual – a manual for paralegals conducting paralegal aid clinics (PLCs) in prison.** PRI. Second edition, 2006 ([prililongwe@penalreform.org](mailto:prililongwe@penalreform.org); [www.penalreform.org](http://www.penalreform.org))
- **Games for Actors and Non-Actors,** Augusto Boal. Routledge, Second edition, 2003

### ***Fast track forms***

As discussed above, forms pre-agreed with criminal justice agencies can assist the defendant in accelerating his/her case through the system.

Two such forms are illustrated below. The one is a bail form and the second is a screening form – both applied in courts, prisons and police stations in Malawi. Other forms are used dealing with appeal (against sentence) and ‘confirmation’ of sentence. All forms have been agreed in advance with all criminal justice actors.

#### *The Bail form*

The form is aimed at assisting police, prisons and judiciary screen out and remove people from prison who need not be there while they await a trial date. While they may be filled out by any one who so wishes they are not really designed for the person charged with a serious offence (as s/he, or his/her lawyer, will need to attend court and argue for bail). It is primarily aimed at the person charged with a non-serious offence, where the facts are not in issue and where the constitutional presumption in favour of bail should operate unless the police show good cause why it should not.

It was drawn up in recognition of the problem the authorities had with bringing large numbers of remand prisoners to court on each due date. The magistrate in chambers can read the form, note the accuracy of the contents (endorsed by a prison stamp) and any comments of the police (‘no objection’). It does **not** constitute a release warrant which will have to be issued separately but does remove the need for a hearing in **uncontested** matters.

The substance of the form is reproduced below.

1. **Personal details** are self explanatory, they set out who the person is and where s/he is from
2. **Case details** are vital and set out a short case history. The facts must be endorsed by a prison officer as accurate (with a stamp or signature) so that the police and magistrate need not waste time in verifying them
3. **Arguments in support of bail** are pertinent matters the magistrate/senior police officer will take account of in reaching his/her decision whether or not to grant/object to bail.
4. **Observations** these boxes allow police or magistrate to make any observations they so wish.

In Malawi, the paralegal assists the person on remand complete the form. The paralegal fills in the reference number, copies the form and places one in the file in the paralegal office while providing the paralegal at court with two additional copies for processing with police and magistrates.

IN THE .....MAGISTRATE COURT

MISCELLANEOUS CRIMINAL APPLICATION NO: OF:

..... v REPUBLIC

### STATEMENT IN SUPPORT OF BAIL APPLICATION

#### 1. PERSONAL DETAILS

Name:

Age:

Sex:

Village:

TA:

District:

---

#### 2. CASE DETAILS

Charged with:

Held at:

Date of remand:

Date first produced at court:

Number of adjournments:

Prison confirmation that facts check with file:

Prison Officer:

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#### 3. ARGUMENTS IN SUPPORT OF BAIL

- First offender
- Family person with dependants
- In employment (*Name of employer and address, position held and nature of work*)
  
- In school (*Name and address of school, class*)

Residential address:

- Time spent in custody awaiting trial is excessive
- Numerous adjournments through no fault or omission on my part (*list dates*):
- Poor health (*supported by a medical report*)
- Other reasons

Circumstances surrounding the offence:

- No act of violence
- Small amounts involved
- No profit motive
- Property recovered
- Other (*state them*):

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WHERE OBJECTIONS ARE RAISED

- I have an address I can stay at far from any witnesses in the matter (*name of house owner and address*):
- I can provide the court with a surety for my next appearance at court (*name of surety*):
- Other

SIGNED:

Date:

WITNESSED:

(print name)

APPLICANT

PARALEGAL

---

OBSERVATIONS

Police:

Signature:

Date:

Magistrate:

Ref No: PAS/BF/Z/No

### *Screening form*

The PAS employ three screening forms for police, court and prisons for young persons in conflict with the law. The second screening form for young persons in police custody is set out below.

The purpose of this form is to enable police to divert a young person out of the criminal justice system as swiftly as possible. In many countries, social welfare/services and probation officers are in short supply. The paralegal on duty in the police station in Malawi takes the role of these personnel when they are not available.

This form has been signally successful in diverting young persons out of police custody in the first instance and ensuring they are granted bail or remanded to the care of a proper institution (rather than prison). Since the programme was piloted in 2003, over 600 juveniles have been screened in this way.

### **SCREENING FORM 2: YOUNG PERSONS IN POLICE CUSTODY**

Date:

File number:

PD No.:

Police station:

Charge:

Name of investigating officer:

#### **Details of child**

- |  |              |
|--|--------------|
| 1. Surname:                              | Other names: |
| 2. Age:                                  |              |
| 3. Estimated age:                        | 4. Sex:      |
| 5. Current residence:                    |              |
| 6. Place of alleged offence:             |              |
| 7. Who first detained you:               |              |
| 8. Place you were first taken to:        |              |
| 9. Name of arresting officer:            |              |
| 10. Police station where taken to first: |              |
| 11. Date of arrest:                      |              |
| 12. Time of arrest:                      |              |
| 13. Where were you taken after arrest:   |              |
| 14. Time spent at police cell:           |              |
| 15. Were parents informed of arrest:     |              |
| 16. If yes, when:                        |              |
| 17. Do you understand the charge:        |              |

18. How were you treated on arrest:

19. By whom:

20. If you were abused, describe what happened:

21. What action did you take:

22. Were you mixed or transported with adult offenders:

23. Were you abused, assaulted or harassed by fellow detainees:

24. Do you have legal representation:

25. Do you feel that you have been treated fairly by,

- ◆ Police:
- ◆ The victim:
- ◆ People who arrested you:

26. Briefly, describe your experience:

27. Do you intend to admit or deny the police version of events:

28. Do you have anyone to be your surety if you are granted bail:

29. If so, what are their names, address and relationship:

**Home circumstances**

30. Do you have parents/guardians looking after you:

31. If not, who looks after you:

32. If parents/guardians are available, explain the home situation (in terms of food, finances, housing, alcohol and drug abuse, other)

33. Action recommended by screener: \_\_\_\_\_

- Diversion (caution, release to parents)
- Remand to approved school
- Bail not recommended
- Bail recommended
- Normal trial
- Normal trial with legal representation
- Further investigation

34. Police comments on the recommendations of the screener

**Parent/guardian information**

Parent/guardian present:

Name of parent/guardian:

Contact address:

Occupation:

**Personal information of screener**

Surname:

Other names

Profession:

Organisation:

Contact address:

Telephone(s):

## **Forum theatre techniques**

Contact: Nanzikambe, Malawi – [info@nanzikambe.org](mailto:info@nanzikambe.org); [nanzikambe@africa-online.net](mailto:nanzikambe@africa-online.net); [www.nanzikambe.org](http://www.nanzikambe.org)

Forum theatre was developed in Latin America as a means of working popularly in community settings to tackle the overriding problems of the lives of ordinary people. Working with groups of workers and peasants in literacy campaigns initially, and then more widely, Augusto Boal, a Brazilian dramatist, applied the pedagogical theories of Paulo Freire to create a form in which 'the oppressed becomes the artist: the passive spectator becomes active creator.' Over forty years of work in different parts of the world, Boal developed the techniques of the Theatre of the Oppressed. These techniques form the basis of many progressive educational methods employed in both developed and developing countries.

Boal begins with the principle that theatre, like language, can be appropriate to anybody so long as the methods are passed on to them. It is this teaching role that Theatre of the Oppressed sets out to achieve. Through a series of exercises, games, techniques and drama forms (of which Forum Theatre is the most commonly used), the aim is for individuals to actively engage in their social reality and fully realise and enact their power to change it. As in the 'Pedagogy of the Oppressed' of Paulo Freire, in Theatre of the Oppressed, empowerment and transformation can only take place through dialogue, critical thinking and taking action.

A typical session begins with exercises and games aimed at activating the five senses, applying emotions and critical thinking to the topic, and engendering an atmosphere of fun and creativity. The objective of the session is to evolve a piece, or several pieces of theatre derived from the experiences of the participants of which an oppression or a problem is the focus. Participants then 'learn-in-action' how to negotiate the issue: this is the 'rehearsal for reality'.

The Malawian arts organisation, *Nanzikambe* worked with paralegals in Malawi and Kenya to develop their approach to conducting Paralegal Aid Clinics (PLCs) in prisons. *Nanzikambe* has designed a tailor-made training course and rewritten the PLC Manual (see above under Manuals) to integrate forum theatre and interactive learning methodologies.

The impact of this educational framework applied to the prison setting has been dramatic. The clinics are conducted on a daily basis in the main prisons where hundreds of people attend to learn how to apply the law in their own cause. For example, legal concepts and principles of justice are physicalised and made clear through the use of image, and participants develop the necessary skills for appearing in court, in a safe performance environment. In Malawi, over 45,000 people have benefited from the PLCs which have contributed to the release of more than 2,500 people. They are applied in Kenya and Uganda.

## ENDNOTES

1. Paragraph 2, **The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa** 2004

2. **Universal Declaration of Human Rights** 1948, Art.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”

**International Covenant on Civil and Political Rights** 1966, Art.14.3 “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:[...] to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] 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”

**African Charter on Human and Peoples’ Rights** 1987, Art. 3 and Art. 7 “Every individual shall have the right to have his cause heard. This comprises: [...] the right to defence, including the right to be defended by counsel of his choice”

**United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment** 1988 Art 11 “[...] A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law” (and art. 17 and 18).

**Convention on the Rights of the Child** 1989, Art. 40 “[...] b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [...] to have legal or other appropriate assistance in the preparation and presentation of his or her defence.

**African Commission on Human and Peoples' Rights African Charter on the Rights and Welfare of the Child** 1990, Art.17.2 States Parties to the present Charter shall in particular: 3) ensure that every child accused in infringing the penal law: [...] shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

**Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** 2001 H d) An accused person [...] 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[...]

3. **Malawi Constitution** 1995 Art 42

4. **South Africa Constitution** 1994 Art 35

5. **The Basic Principles on the Role of Lawyers**, adopted by the 8<sup>o</sup> United Nations Congress on the prevention of Crime and the treatment of offenders, Havana, Cuba, 1990, provide:

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 subjects to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin[...], economic or others status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor [...]. Professional associations of lawyers shall cooperate in the organization and provision of services [...].

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

[...] persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

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 [...] shall have prompt access to a lawyer [...].

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time, facilities to be visited by and communicate and consult with a lawyer [...].

**Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**  
(ACHPR Doc/OS(XXX)247, 2001)

H. 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.
- [...]

(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.

**Resolution on the Right to a Fair Trial and Legal Assistance in Africa  
(The 'Dakar Declaration')**

*Adopted by the African Commission on Human and Peoples' Rights  
at its 26<sup>th</sup> Ordinary Session, in Kigali, Rwanda, from 1-15 November 1999  
ACHPR Res 41 (XXVI) 99*

The African Commission on Human and Peoples' Rights meeting at its 26<sup>th</sup> 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 11<sup>th</sup> 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 19<sup>th</sup> 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 and Interights, 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 27<sup>th</sup> 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 27<sup>th</sup> Ordinary Session of the Commission and for comments and observations by the Members of the Commission during the period between the 27<sup>th</sup> and the 28<sup>th</sup> Sessions;
5. **FURTHER REQUESTS** the Working Group to report to the 28<sup>th</sup> 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 and Interights organised 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 do 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**

Para-legals, 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 wellbeing 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, victims of crime, 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.

**State 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 para-legals 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 para-legals 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 para-legal 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.

## **The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004)**

### **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**

128 delegates from 26 countries including 21 African countries met between 22-24 November 2004 in Lilongwe, Malawi, to discuss legal aid services in the criminal justice systems in Africa. Ministers of State, judges, lawyers, prison commissioners, academics, international, regional, and national non-governmental organizations attended the conference. The three days of deliberations produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (set forth below), which 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, and the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok in April, 2005, 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;

Recognising 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 recognising 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, 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 November 2004, hereby declare the importance of:*

#### **1. Recognising and supporting the right to legal aid in criminal justice**

All governments have the primary responsibility to recognise 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 are encouraged to 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 para-legal, 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. Recognising 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. Recognising 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 recognise 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 programmes, justice centres, law clinics - as well as partnerships with civil society and faith-based organizations. Whatever options are chosen, they should be structured and funded in a way that preserves their independence and commitment to those populations most in need. Appropriate coordinating mechanisms should be established.

## **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 recognised 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, para-legals, and legal assistants. These para-legals 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 para-legals and legal assistants.

## **8. *Encouraging pro-bono provision of legal aid by lawyers***

It is universally recognised 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 recognised 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, 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 programmes 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 and 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 eg: legal aid board/commission that is accountable to parliament.
- Diversify legal aid service providers, adopting an inclusive approach, and enter into agreements with the Law Society 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 minimum quality standards for legal aid services and clarify the role of paralegals and other service providers by:
  - developing standardized training programmes
  - monitoring and evaluating the work of paralegals and other service providers
  - requiring all paralegals operating in the criminal justice system to submit to a code of conduct
  - 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.
- Sensitise the public and justice agencies on the broadened definition of legal aid and the role all service providers have to play (through TV, 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.
- Enact legislation to establish an independent national legal aid institution accountable to Parliament and protected from executive interference.
- Enact legislation to ensure the provision of legal aid at all stages of the criminal justice process.
- Enact legislation to recognize the role of non-lawyers and paralegals and to clarify their duties.
- Enact legislation to recognize customary law and the role non State justice fora can play in appropriate cases (ie 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 should be 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 moneys 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 (eg tax exemptions / 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 Society 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 Service, the Law Society, university law clinics and NGOs. These services might include:
  - providing general advice and assistance at the police station to victims of crime as well as 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 at police interview
  - screening juveniles for possible diversion programmes
  - contacting / tracing parents / guardians / sureties
  - assisting with bail from the police station.
- Require the police to co-operate 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 Society and provide services free of charge.
- Encourage the judiciary to take a more pro-active role in ensuring the defendant is provided with legal aid and able to put 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, petty cases and 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 that they are held appropriately.
- Prison officers, judicial officers, lawyers, paralegals and non-lawyers conduct 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 case
  - 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 and 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, defence lawyers, police and prison officers in peace-keeping operations and programmes of national reconstruction.
- Include the services of national NGOs, CBOs and faith-based groups in the re-establishment 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.