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# Improving Pretrial Justice: The Roles of Lawyers and Paralegals

A Global Campaign for Pretrial Justice Report



Improving Pretrial Justice:  
The Roles of Lawyers and Paralegals



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On the cover: Pretrial detention facility in Bishkek, Kyrgyzstan.

# About the Global Campaign for Pretrial Justice

Excessive and arbitrary pretrial detention<sup>1</sup> is an overlooked form of human rights abuse that affects millions of people each year, causing and deepening poverty, stunting economic development, spreading disease, and undermining the rule of law. Pretrial detainees may lose their jobs and homes, contract and spread disease, be asked to pay bribes to secure release or better conditions of detention, and suffer physical and psychological damage that lasts long after their detention ends. In view of the magnitude of this worldwide problem, the Open Society Justice Initiative, together with partner organizations, is engaging in a Global Campaign for Pretrial Justice. Its principal purpose is to reduce unnecessary pretrial detention and demonstrate how this can be accomplished effectively at little or no risk to the community.

Current activities of the Global Campaign include collecting empirical evidence to document the scale and gravity of arbitrary and unnecessary pretrial detention; building communities of practice and expertise among NGOs, practitioners, researchers, and policy makers; and piloting innovative practices and methodologies aimed at finding effective, low cost solutions. In addition, the campaign strives to establish linkages with associated fields such as broader rule of law and access to justice initiatives and programs.

The goal of this paper is to demonstrate the positive impact that early intervention by lawyers and paralegals can have in reducing the abuses and other negative effects

of pretrial detention, and to provide a guide to establishing pretrial justice schemes. Although this paper makes reference to specific situations and countries, it is important to note that excessive pretrial detention is a global issue affecting developing and developed countries alike.

This paper is part of a series of papers examining pretrial justice as part of the Global Campaign for Pretrial Justice. In addition to this report on early intervention by lawyers and paralegals, the papers in the series look at the intersection of pretrial detention and economic development, health, torture, and corruption.

More information about the Global Campaign for Pretrial Justice is available at <http://www.soros.org/initiatives/justice/focus/pretrial-justice>.

The other papers in this series are available as follows:

- *The Socioeconomic Impact of Pretrial Detention*  
[http://www.soros.org/initiatives/justice/articles\\_publications/publications/socio-economic-impact-detention-20110201](http://www.soros.org/initiatives/justice/articles_publications/publications/socio-economic-impact-detention-20110201);
- *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*  
[http://www.soros.org/initiatives/justice/articles\\_publications/publications/pre-trial-detention-and-torture-20110624](http://www.soros.org/initiatives/justice/articles_publications/publications/pre-trial-detention-and-torture-20110624);
- *Pretrial Detention and Health: Unintended Consequences, Deadly Results*  
[http://www.soros.org/initiatives/justice/articles\\_publications/publications/pretrial-detention-health](http://www.soros.org/initiatives/justice/articles_publications/publications/pretrial-detention-health);
- *Pretrial Detention and Corruption* (summary)  
[http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409).



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The Open Society Justice Initiative bears sole responsibility for any errors or misrepresentations contained in this report.



# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
UNCRC	United Nations Convention on the Rights of the Child



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# Executive Summary and Recommendations

On any given day, some three million people are held in pretrial detention around the world. Countless millions are unnecessarily arrested and detained by law enforcement agencies annually. Those in pretrial detention are often held in conditions and subject to treatment that is far worse than that experienced by sentenced prisoners. Pretrial detainees—who have not been tried or found guilty—can languish behind bars for years. Some detainees may literally be lost in the system.

Early intervention by lawyers and paralegals can have a positive impact on pretrial justice in general and pretrial detention in particular. Examples from across the globe show that early intervention schemes can reduce the use of pretrial detention, improve the performance of criminal justice personnel, lead to more rational and effective decision-making, and increase accountability and respect for the rule of law.

Lawyers and paralegals have a central role to play in advising, assisting, and representing individuals at the pretrial stage of the criminal process. Ensuring legal assistance is available at the earliest possible time allows for the most effective use of resources, as cases are dealt with at the front end of the criminal justice system. Helping to ensure that appropriate decisions regarding pretrial detention and release are made early on can reduce the use of pretrial detention. This does not just benefit the individual suspect: there are wider benefits for the administration of justice and the efficiency and effectiveness of the criminal justice system as a whole. Early intervention

can play a key role in educating the public about their rights, and improving transparency, accountability, and confidence in the criminal justice system.

International law requires the provision of state funding for legal advice and representation where this is in the interests of justice and the suspect or defendant does not have sufficient means to pay for it. Legal assistance at the early stages of the criminal process is not only an important right for individuals but, when effectively implemented, also produces significant benefits for criminal justice systems and for social integration: it can save money and resources, reduce the use of pretrial detention, encourage diversion from formal criminal justice processes, reduce torture and corruption, improve the functioning of the criminal justice system, and increase transparency and foster confidence in the rule of law.

Fortunately, there are replicable models—from developed and developing countries alike—of effective early intervention schemes involving lawyers and paralegals.

### **Recommendations for governments:**

- Make available sufficient resources to comply with international and national obligations for the provision of legal advice and assistance at the early stages of the criminal process, in particular for those who do not have sufficient means to pay for it.
- Develop structures and mechanisms to make the right to legal advice and assistance practical and effective. In particular, establish a legal aid institution that is independent of government and responsible for making the right to legal advice and assistance practical and effective—particularly at the early stages of the criminal process.
- Review and update existing laws and procedures concerning: the right to legal advice and assistance at the early stages of the criminal process; access by lawyers and paralegals to police stations, police interviews, and pretrial detention and prison facilities; the recording of police interviews of suspects and witnesses; representation by paralegals where appropriate; the circumstances in which a defendant should be entitled to pretrial release; maximum periods of detention in police custody and pretrial detention; the maximum length of criminal proceedings and maximum number of adjournments; diversion from formal criminal proceedings; and mechanisms for enforcing them.
- Ensure that reliable statistical information is routinely collected on critical aspects of the criminal justice system, including: the number of and reasons for arrests, the numbers of people charged and the nature of the charges, the numbers of people in pretrial detention, the length of detention, and the number of people receiving legal advice and representation.



**Recommendations for legal aid management organizations, NGOs, and professional legal bodies:**

- Seek to ensure that governments implement the recommendations set out above.
- Identify existing mechanisms and resources for providing legal advice and assistance to suspects and defendants, especially at the early stages of the criminal process, including at police stations. Work with existing stakeholders, including bar associations, NGOs, the judiciary, and other criminal justice personnel, to identify the interventions that are most needed and how they may best be provided.
- Map existing and potential sources of funding for the provision of legal advice and assistance and seek to match them with schemes designed to have the greatest impact on pretrial detention and pretrial justice generally.
- Recognize the range of functions that can be performed through lawyer and para-legal schemes, including: advice, assistance, and representation to individuals; education and training for suspects, defendants, prisoners, communities, and criminal justice personnel; reform of systems, processes, and criminal justice policies. Consider which functions are likely to be the most effective given the local context.
- Consider establishing pilot schemes to test the most appropriate structures and mechanisms for providing legal advice and assistance, with a view to evaluating the costs and demonstrating the financial and other benefits.
- Document and disseminate promising practices and information about the financial and other benefits of early intervention by lawyers and paralegals.



# 1. Introduction

Excessive and arbitrary pretrial detention is both a cause and a result of human rights violations. On any particular day, around three million people are being held in pretrial detention, and during the course of a year an estimated 10 million people pass through pretrial detention. In addition, countless millions of people are arrested and/or detained by the police and other law enforcement agencies annually. While international law regulates the circumstances in which people can be arrested and detained, establishes minimum standards, and gives rights to those who are arrested and detained, the reality is that millions of people each year are unnecessarily arrested and detained, subjected to ill-treatment and inhumane conditions, and denied basic rights and human dignity.

Unnecessary arrest and detention have a significant adverse impact on the individuals detained, their families, and their communities. Many of those arrested will never be charged or, if charged, will have charges withdrawn through lack of evidence. Many of those who should be released are detained because they cannot pay a bribe, cannot afford bail, or cannot arrange a surety. While in detention they are at risk of physical and psychological abuse, and sometimes torture. If they have employment they are likely to lose it, resulting in economic hardship for them and their dependants. They are more likely to become ill, and in the case of HIV/AIDS and tuberculosis in particular, such diseases may spread not only to their families and communities, but also to those responsible for detaining them and their families and communities. If and when a trial does take place, it will be more difficult for them to establish their innocence, and a consequence of detention is that they are more likely to receive a

custodial sentence. Experience of arbitrary and unlawful treatment will undermine trust and social cohesiveness, and is likely to increase disrespect for the law and encourage criminal conduct.

The longer someone remains in pretrial detention, the more likely he is to experience the negative outcomes listed above—which is why early intervention is so critical.

The causes of unnecessary arrest and detention, unlawful and inhumane treatment, and unjust trials and inappropriate sentences do not simply rest with individual police officers, prosecutors, judges, and jailers. In addition to the low levels of pay received by criminal justice officials in many countries, they often experience pressures resulting from lack of resources which impede investigation, delay the production of defendants in court, and prevent court hearings from proceeding on time. Training is often inadequate or non-existent, resulting in ignorance of and non-compliance with the law. Systems are often not in place, so that those in pretrial detention become lost in the system or are not brought to court on the right day at the right time, and witnesses are not notified of court hearings. Most suspects and defendants are too poor to pay for legal advice or representation and, in the absence of viable or effective legal aid systems, go without legal advice and are unrepresented throughout the entire criminal proceedings. They are often unaware of their legal rights, and frequently lack the education and skills to prepare and present their cases. The special needs of some pretrial detainees—including children, alcohol and drug abusers, and those with mental illness or disabilities—often go unrecognized.

The purpose of this paper is to demonstrate the positive impact that early intervention by lawyers and paralegals can have on pretrial justice generally—and on the use of pretrial detention in particular—and to provide a guide to the ways in which lawyer and paralegal schemes can be established. It sets out to demonstrate the benefits of such schemes for the individuals who are advised and assisted, for the efficiency and effectiveness of criminal justice systems, and for communities and societies more generally.

This report begins by examining relevant international law and human rights norms concerning pretrial justice, pretrial detention, and legal assistance. It then looks at the problems and challenges leading to rights violations at the pretrial stage of criminal proceedings, including the causes of excessive pretrial detention and other problems such as inappropriate professional practices and cultures, lack of transparency and accountability, and lack of engagement in the process by suspects and defendants. Using examples from around the world, the report then goes on to examine the potential positive impact that intervention by lawyers and paralegals can have on individual suspects and defendants, and the overall functioning of criminal justice systems. These examples demonstrate that early intervention schemes staffed by lawyers and paralegals can reduce the use of pretrial detention, improve the performance of criminal jus-

tice personnel, lead to more rational and more efficient decision-making, and increase accountability and respect for the rule of law.

Finally, using examples from schemes operating in a range of countries, the paper lays out how early intervention schemes can be established and sustained, especially in countries where there are inadequate financial resources or insufficient numbers of lawyers willing and able to provide the kind of services that are needed by, especially, poorer people at the early stages of the criminal process. While focusing on the contribution that lawyers and paralegals can make to pretrial justice in general, and specifically to reducing pretrial detention, it is recognized that in any particular country legal assistance will provide only one element of a range of strategies that are necessary to bring about significant and lasting improvement.

In recognition of the fact that paralegals play a crucial role in legal advice and assistance schemes in many countries, the following terms and definitions are used throughout this book:

- *Lawyer* denotes a professional who is qualified as such in any particular jurisdiction and who is registered with the relevant bar association or law society;
- *Paralegal* denotes a non-lawyer who has the necessary skills and training to carry out some of the functions of a lawyer, and who may specialize in working with suspects, defendants, and those who have been convicted of a criminal offense, or in providing broadly defined justice services.<sup>2</sup>

It is important to note that while there can be significant areas of overlap between the tasks performed by lawyers and those done by paralegals, there are also important distinctions between the two professions. In many countries, both lawyers and paralegals can give legal advice, provide legal assistance, and look after the interests and welfare of their clients. Some tasks—including providing court advocacy for clients and taking appropriate legal action where warranted—require a high level of legal knowledge and should only be undertaken by appropriately trained professional lawyers. But many legal tasks do not require particularly advanced knowledge or skills and can be done by paralegals, provided they are appropriately trained and supervised—and provided they do not exceed the boundaries placed on their profession by the law in their particular jurisdiction. It is also worth noting that paralegals are usually less costly to the client or state, may often have greater knowledge of the community in which they work, and can engage in mediation, which many lawyers do not do.



## 2. Criminal Justice Standards and the Right to Legal Assistance

1. *We recognize that an effective, fair and humane criminal justice system is based on the commitment to uphold the protection of human rights in the administration of justice and the prevention and control of crime.*
2. *We also recognize that it is the responsibility of each Member State to update, where appropriate, and maintain an effective, fair, accountable and humane crime prevention and criminal justice system.*

—Salvador Declaration on Comprehensive Strategies for Global Challenges:  
Crime Prevention and Criminal Justice Systems and  
Their Development in a Changing World<sup>3</sup>

Globally, millions of people each year come face-to-face with criminal justice systems because they are suspected or accused of crime. Many will be arrested and detained at a police station or other law enforcement facility. Some will be released without further action, and their experience of the system will be confined to their arrest and detention by the police. However, many others will be made the subject of formal criminal proceedings, and a significant proportion of them will be held in custody pending determination of guilt or innocence. Pretrial detention may last for months, and in some

cases years, and a minority of detainees may literally be lost in the system. This has a disproportionate effect on poor and vulnerable sections of the community because they are more likely to be subject to law enforcement action, cannot afford to pay bail bonds or bribes, and cannot afford the assistance of a lawyer.<sup>4</sup>

## 2.1 International Fair Trial Rights

As the Salvador Declaration recognizes, it is the responsibility of all member states to establish and maintain fair and humane criminal justice systems, which are a “prerequisite for combating crime and for building societies based on the rule of law”. A fair and humane criminal justice system must, at a minimum, satisfy the requirements of established international norms concerning criminal justice and fair trial processes. The pretrial stage of the criminal justice process raises particular challenges both from a human rights perspective and as a practical matter. Arrest, detention, and investigation are normally the responsibility of the police or other law enforcement agents who frequently have minimal, if any, relevant training, are often under-paid and under-resourced, and who are subjected to a number of external pressures that can result in arbitrary arrests and detention. Gathering evidence in order that just and rational decisions about guilt or innocence may be made is often difficult, resource-intensive, and time-consuming. In addition to crime investigation, the police frequently also have responsibility for maintaining public order, and these responsibilities and the priorities accorded to them often conflict. All cases, if resulting in a prosecution, will normally be initially dealt with by a local court where magistrates or judges may be under-trained and under-resourced. If a defendant is kept in pretrial detention the jail or prison in which he is held may struggle with similar deficits in training and resources.

The presumption of innocence is universal: regardless of the crime charged or the country in which it was allegedly committed, the accused is innocent until proven guilty. Not only do the accused have a right to be treated as being innocent until found guilty, they also have a right to be dealt with fairly and expeditiously throughout the process. There is substantial international agreement about these and other rights and standards that are applicable at the pretrial stages of the criminal justice process, the most important of which are as follows.

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.<sup>5</sup>
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for their arrest and shall be promptly informed of any charges against them.<sup>6</sup>



- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.<sup>7</sup>
- Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.<sup>8</sup>
- In the determination of any criminal charge against them, everyone shall be entitled to be tried without undue delay.<sup>9</sup>
- In the determination of any criminal charge against them, everyone shall be entitled to have adequate time and facilities for the preparation of their defense.<sup>10</sup>
- In the determination of any criminal charge against them, everyone shall be entitled to defend themselves in person or through legal assistance of their own choosing, and to have legal assistance assigned to them, in any case where the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.<sup>11</sup>

## 2.2 The Right to Legal Assistance

The European Union, which in 2010 adopted a “roadmap” for implementing procedural rights in criminal proceedings, including the right to legal assistance,<sup>12</sup> has long recognized the central importance of legal advice and assistance in guaranteeing fair trial:

The [European] Commission concluded that whilst all the rights that make up the concept of “fair trial rights” were important, some rights were so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights.<sup>13</sup>

The right to legal assistance set out in the ICCPR and other regional and international conventions is reiterated in the *United Nations Basic Principles on the Role of Lawyers*, which makes it clear that the right applies at *all stages* of criminal proceedings. Furthermore, the *Basic Principles* require governments to ensure that effective mechanisms are in place to ensure that legal assistance is available, and that funding is in

place to ensure that legal assistance is accessible to those who do not have the means to pay for it.

### **UN Basic Principles on the Role of Lawyers**

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.<sup>14</sup>

Similar obligations are recognized in the Rome Statute regarding proceedings before the International Criminal Court, which provides that a person suspected of a crime within the jurisdiction of the court has a right to a lawyer of his choice, without payment if he does not have sufficient means to pay, and to be questioned only in the presence of his lawyer (unless he waives his rights).<sup>15</sup> Such obligations are also likely to be incorporated into the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* which, following the adoption of UN resolution 2007/24 on International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems particularly in Africa, are being developed by the UN Office on Drugs and Crime (UNODC) with the objective of improving access to legal aid in criminal justice systems.

Three key questions arise in respect of the international obligations regarding the right to legal advice, assistance, and representation in criminal proceedings: (1) at what stages of the criminal process does the right to legal assistance apply; (2) in what

circumstances should governments provide financial and other support for legal assistance; and (3) what procedures and mechanisms are required to ensure access to legal assistance? These questions are addressed below.

### **At what stages of the criminal process does the right to legal assistance apply?**

It is clear that the right to legal assistance applies once formal criminal proceedings have commenced, which will therefore encompass almost all court hearings including those concerning pretrial detention. However, the question of whether the right to legal assistance applies at the pretrial, investigative stage—and particularly while a person is detained at a police station—is open to some interpretation. The ICCPR and some regional conventions such as the ECHR refer to the right to legal assistance arising where a criminal charge is to be determined or where a person has been charged with a criminal offense.<sup>16</sup> However, it has increasingly been recognized that the investigative stage is an integral part of criminal proceedings, that it is at this stage that those suspected of crime are most at risk, and that those arrested and detained by the police should have access to a lawyer at that stage.

The European Committee for the Prevention of Torture has described access to a lawyer for those detained by the police as one of the “three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned.”<sup>17</sup> The UN Basic Principles on the Role of Lawyers provides that governments must “ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention” (Principle 7).

The ECtHR has for many years taken the view that the right to legal assistance arises immediately on arrest, and has decided more recently that it applies as soon as a person is made aware by the authorities that he or she is suspected of having committed a criminal offense, which could be even before an arrest takes place. Access to a lawyer may only be restricted in exceptional circumstances where there are compelling reasons to do so. Even in such exceptional circumstances, the use of evidence obtained from the suspect in the absence of legal advice is likely to breach fair trial rights.<sup>18</sup> Furthermore, the ECtHR has determined that a suspect has a right to legal assistance during police interrogation, and that failure to permit this may irretrievably affect his right to fair trial.<sup>19</sup> A right to legal assistance during police interrogation is provided for in respect of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,<sup>20</sup> and the European Union is also planning to introduce a right to legal assistance during police interrogation as part of its “roadmap” of procedural rights.<sup>21</sup>

The ACHR, while guaranteeing the right to legal assistance in criminal proceedings,<sup>22</sup> does not specify when the right to legal assistance arises. The Inter-American Commission on Human Rights has observed that the presence of a lawyer is an important safeguard against self-incrimination,<sup>23</sup> and that the right to a lawyer applies from the time that a person is first interrogated by the police.<sup>24</sup> The position under the ACHPR is similar to that under the ACHR.<sup>25</sup> However, the African Commission on Human and Peoples Rights' *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provides that the right to legal assistance applies to a person who has been arrested or detained, who must be told of the right, and given the facilities necessary to communicate with his lawyer. An arrested or detained person must also be given prompt access to a lawyer (unless this is waived in writing), and shall not be obliged to answer any questions or be obliged to participate in any interrogation without a lawyer present.<sup>26</sup>

### **In what circumstances should governments provide financial support for legal assistance?**

International instruments provide, in general, that the right to legal assistance—including at the police station—is absolute, and is not subject to limitation. However, they normally provide that government is only required to support the right to a lawyer where the interests of justice require and the suspect or accused does not have sufficient means to pay. The *UN Basic Principles on the Role of Lawyers*, Principle 2, implies that those who do not have sufficient means to pay for a lawyer should not be in a worse position than those who can afford to pay for one.<sup>27</sup> However, there is a lack of clarity, and a lack of international consensus, as to what is meant by the terms “interests of justice” and “insufficient means to pay.”

The ECtHR has held that the right to state funded legal assistance applies whenever the deprivation of liberty is at stake, although this interpretation is regarded by some as too narrow and as being at odds with the court's rationale for the right to legal assistance.<sup>28</sup> There is significant variation across European jurisdictions both as to the circumstances in which legal assistance is provided free of charge and in terms of the mechanisms for providing state aided legal assistance.<sup>29</sup> However, the European Union's plans for legislation on the right to legal assistance in criminal proceedings<sup>30</sup> may include minimum provisions regarding the appropriate tests for determining the interests of justice and financial eligibility.

The ACHR does not provide guarantees in terms of state aid when an accused person cannot afford to pay for legal assistance. The African Commission on Human and Peoples Rights' *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provides for a right of all accused persons to a lawyer of their choosing.<sup>31</sup> Further, it provides that an accused has the “right to have legal assistance assigned to

him or her in any case where the interests of justice so require, and without payment by the accused... if he or she does not have sufficient means to pay for it.”<sup>32</sup> The resolution does not provide guidance on what is meant by “sufficient means to pay,” but it does provide that in considering the interests of justice, consideration should be given to the seriousness of the offense and the severity of the potential sentence.<sup>33</sup>

**What procedures and mechanisms are required to ensure access to legal assistance?**

The *UN Basic Principles on the Role of Lawyers* provides that governments must “ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers” are provided for all persons irrespective of race, ethnic origin, gender, and financial circumstances. It also contains provisions guaranteeing the independence of lawyers and requires that they must not be identified with their clients or their clients’ causes.<sup>34</sup> However, beyond this, international covenants and conventions provide little guidance on the standards to be adopted in ensuring that access to legal assistance is available. The general approach of the ECtHR is that rights under the European Convention must be “practical and effective” and not “theoretical and illusory,”<sup>35</sup> but it gives member states a wide margin of appreciation in terms of how the right to legal assistance should be given effect.

As the preceding discussion of international standards for fair trial rights and the right to legal assistance makes clear, the standards are well intentioned but the application can be problematic. This often leads to challenges and difficulties at the pretrial stage, explored in the next chapter. Chapter Five then provides examples from around the world of how legal assistance is provided, especially at the early stages of the criminal process.



### 3. Problems and Challenges at the Pretrial Stage of Criminal Proceedings

The international norms that apply at the pretrial stage of the criminal process are inevitably broadly framed, and this means that there is scope for legitimate disagreement as to precisely what is meant by terms such as “arrest,” “charge,” “promptly,” “without undue delay,” or “adequate time and facilities,” and as to whether rights are respected and standards met in any particular factual situation.<sup>36</sup> However, as demonstrated in this section there is evidence from around the world that the internationally recognized standards that apply to the pretrial stage are frequently not met in practice. The purpose here is not to explore either the problems or the causes in detail, but to identify some of the major issues that early intervention by lawyers and paralegals may be able to address.

#### 3.1 Excessive Use of Pretrial Detention

Pretrial detention should be used only rarely. As noted in Chapter Two, the international standard is that detention in custody prior to trial should not be the norm. In other words, an accused person should normally be released while waiting for his trial,

although that release may be conditional. This is reinforced by the Tokyo Rules which provide that pretrial detention is to be used as a means of last resort.<sup>37</sup> Most of the available international data on pretrial detention concerns detention in custody once formal criminal proceedings have been commenced, but the term “pretrial detention” in this paper includes any person deprived of his liberty, from the moment of arrest, through police custody, before and after judicial review, in remand detention, and until he has been formally tried by a court and convicted or acquitted and released.<sup>38</sup> International law is not silent on this point—a person who has been arrested or detained on a criminal charge must be “promptly” brought before a judge or other judicial officer. However, there is almost no available data on detention prior to formal commencement of proceedings.

While statistics on the number and percentage of persons formally accused of crime who are detained in custody pending trial are problematic,<sup>39</sup> available evidence suggests that in practice, pretrial detention is far from being the “exception to the rule” that international law demands. In many countries the international standards are not observed. Globally, at any time, just under one third of people in prison are being held in pretrial detention.<sup>40</sup> In Asia, the proportion is 47.8 percent, for Africa 35.2 percent, in the Americas it is 25.2 percent, and in Europe it is 20.5 percent. It has been reliably estimated that about three million people are in pretrial detention at any given time.<sup>41</sup> That figure provides a snapshot of the pretrial detention population, and in any one year a far higher number of people are placed in custody without having been tried. It has been estimated that in a typical year 10 million people enter pretrial detention.<sup>42</sup>

The regional figures hide wide variations among countries.<sup>43</sup> In Malawi, 18.5 percent of the prison population in 2009<sup>44</sup> was in pretrial detention, whereas in Nigeria over two-thirds of all persons in prison have yet to be tried.<sup>45</sup> In Africa generally, the proportion of the prison population that is in pretrial detention ranges from just over five percent in Namibia to over 97 percent in Liberia. Within Europe, the figures are similarly variable, although the range is not as great as in Africa. In Iceland, for example, just over 10 percent of the prison population in July 2007 was in pretrial detention, whereas in Italy the equivalent figure was nearer 60 percent.<sup>46</sup> In Latin America, the proportion of the prison population on remand ranges from just over 21 percent in Nicaragua to 75 percent in Bolivia. Statistics for India show that in 2005 nearly 70 percent of prisoners were pretrial, and the figure for Bangladesh in 2006 was nearly 68 percent.

Data on the time spent in pretrial detention is generally limited, and is not available for most countries. In 2003 a European Commission investigation found that the average length of pretrial detention in 19 of the then 25 members of the European Union was 5.5 months. In Italy, the average length of the criminal process from arrest to final disposal is 4.3 years and given the high proportion of the prison population that is in pretrial detention, it is likely that many of those in pretrial detention are detained



for lengthy periods of time.<sup>47</sup> The EU average is similar to that for South Africa at the turn of the century.<sup>48</sup> Globally, the average length of pretrial detention is likely to be significantly longer. It has been reported that in Nigeria periods of pretrial detention in excess of 10 years are not unusual.<sup>49</sup> In the Philippines, notwithstanding Speedy Trial legislation providing for a maximum of 11 months between arrest and promulgation of the decision of the court, the average wait for trial is measured in years, not months.<sup>50</sup>

## 3.2 The Causes of Excessive Pretrial Detention

The impact of excessive pretrial detention, both systemically and on the individuals detained, their families and communities, and its inter-relationship with other unsatisfactory aspects of criminal justice systems, are documented elsewhere.<sup>51</sup> However, a brief account of the causes of the excessive use of pretrial detention is necessary in order to establish its inter-relationship with other features of criminal justice systems, and to provide a basis for demonstrating how the involvement of defense lawyers and paralegals at the early stages of the criminal justice process can have an impact on its use.

### **Legal frameworks that do not reflect international norms**

Although international law makes clear that an arrested or detained person must be produced before a judge “promptly,” this is inadequately reflected in the laws, legal frameworks, and practices of many countries. The definition of “promptly” is, of course, open to interpretation but the ECtHR, for example, while being unwilling to establish a strict limit, has consistently held that four days should be regarded as a maximum.<sup>52</sup> International standards also require that detention in custody prior to trial should be a last resort. However, as with the requirement of prompt production, the requirement that pretrial release be the norm is often not reflected in legal frameworks and practices.

In many countries the law does limit the time between arrest or initial detention and production before a judge or court, although there is a wide range of maximum periods. For example: in Nepal it is 24 hours; in England and Wales it is 36 hours;<sup>53</sup> in Germany, Italy, and Nigeria it is 48 hours; and in Sierra Leone it ranges between three and ten days depending on the seriousness of the suspected crime. It is often longer where the detention is justified by reference to terrorism or national security. In Malaysia, for example, the Internal Security Act 1960 permits the police to arrest a person without a judicial warrant and to detain him for up to 60 days without being taken before a court or other judicial authority.<sup>54</sup> In some jurisdictions the law defines arrest in such a way that a person who has been arrested *de facto* is nevertheless not regarded as arrested *de jure*. This can have the effect of prolonging the period for which a person may be detained by police without being produced before a court. For example, Polish

law makes a distinction between a “suspected person” and a “suspect.” A suspected person may be arrested and detained by police for up to 48 hours, but in some circumstances this can be extended by a further 24 hours without production before a court. Furthermore, a suspected person does not have the full rights accorded to a suspect and thus, for example, does not have to be informed of his right to silence.<sup>55</sup>

With regard to detention following the commencement of formal legal proceedings and prior to trial, the laws of some countries do not meet the basic standard that detention be the exception. ECtHR jurisprudence, which in terms of international law is probably the most developed in this respect, provides that pretrial detention requires continued reasonable suspicion that the person has committed an offense, and that after a certain lapse of time, further detention can only be justified by reference to a well-founded fear that the accused will not turn up in court, will re-offend, or will interfere with the investigation or with evidence.<sup>56</sup> The seriousness of the alleged offense, while a legitimate consideration, should not be an absolute bar to release, certainly after the accused has been in detention for a certain period of time. In most countries that are signatories to the ECHR, domestic law (although not necessarily practice) reflects the standards required by ECtHR jurisprudence, but this is not the case in all. In Austria, for example, someone accused of a crime that carries a minimum penalty of 10 years or more must be held in pretrial detention unless certain exceptions apply.<sup>57</sup> In Turkey there is no law regulating pretrial release.<sup>58</sup>

In some other countries, the law provides for pretrial release but does not clearly set out the purposes for which detention can be ordered, or does so in a way that contradicts the international norms. In Nepal, for example, pretrial detention is mandatory for persons charged with a range of “grave” crimes,<sup>59</sup> and the law grants judges wide-ranging discretion to order detention, unconstrained by reference to defined risks such as absconding or committing further offenses.<sup>60</sup> In a number of countries in Latin America, recent legislative changes require judges to pay increased attention to the seriousness of the alleged offense and the defendant’s record. Thus a judge in Chile considering pretrial detention must give “special consideration” to factors not directly related to those recognized in international law.<sup>61</sup> In Venezuela, pretrial detention *must* be ordered if there is a risk of absconding and the person is accused of a crime carrying a maximum sentence of 10 years custody or more.<sup>62</sup>

Just as the practice of ordering pretrial detention often fails to meet international standards, so too do practices regarding non-custodial alternatives to pretrial detention (also known as conditional release). In some countries, such as Belgium,<sup>63</sup> the circumstances in which conditional release can be ordered are not clearly set out in legislation and are simply left to the discretion of the judge. A recent study, *Pretrial Detention in the European Union*, finds, “... even in countries where alternative measures are explicitly mentioned in law, in some cases, the law itself does not give an explicit objective of

these alternatives... even the conditions under which they might be applied are lacking.”<sup>64</sup> The result is that even though conditional release can be ordered, judges are frequently reluctant to do so. This may be exacerbated by inappropriate judicial cultures that emphasize being tough on crime, as well as lack of information about provisions supporting conditional release.<sup>65</sup>

### **Laws that are not enforced or are unenforceable**

Even where the law does place appropriate limits on the period of pretrial detention, or provides for release pending trial, evidence from a range of countries indicates that such provisions are rarely observed or enforced.

Often the law is unenforceable, either because the police or other agencies adopt strategies to avoid its obligations, or because there are no effective enforcement mechanisms. In Nigeria, persons arrested may in practice be kept in custody whilst the police seek a prosecution decision from the Director of Public Prosecutions (DPP), and it is reported that delays of more than five years are not infrequent.<sup>66</sup> In Nepal, a survey showed that between June 2008 and May 2009 nearly 50 per cent of people detained by the police were not taken before a court within the time limit established by law.<sup>67</sup> In Sierra Leone, the police may simply exceed the time limit because of the time taken to carry out the investigation, and may even transfer the suspect to a different police station in order to circumvent the time limit.<sup>68</sup> In Uganda it is reported that the police may “mislays” the case file, requiring the accused to be remanded for lengthy periods in custody.<sup>69</sup> Time limits may also be exceeded because there is no court sitting within the required time.<sup>70</sup> In Malaysia, although initial police detention is limited to 24 hours, there is evidence that magistrates routinely authorize detention for up to a further two weeks.<sup>71</sup>

The lack of clear, enforceable time limits is also a factor in high rates of pretrial detention following the commencement of formal criminal proceedings. The international standard is that a person is entitled to be tried within a reasonable time, and this applies whether or not the accused is in pretrial detention. This allows for a wide degree of latitude,<sup>72</sup> particularly because it is not clear whether the relevant period is defined by the commencement of the trial stage or the conclusion of the trial stage. Many countries do not define how long is a “reasonable” wait for a trial. A recent EU study found that the majority of countries do not have legally specified maximum periods for the commencement of the trial stage. Where maximum periods are specified in law they are often very lengthy: up to four years in the Czech Republic and France, and six years in Italy. Furthermore, in most jurisdictions which do have a statutory maximum it is not absolute, and can be extended in certain circumstances.<sup>73</sup> The position is not dissimilar in other regions.<sup>74</sup> Even where there are absolute statutory time limits, they may not be complied with in practice, nor be enforceable. In the Philippines, notwithstanding

statutory mandatory time limits, the courts fail to dismiss cases that exceed the time limits, choosing to adopt a “pragmatic” stance whereby delays are accepted as part of a system that is overloaded and where the supply of legal services is inadequate to meet demand.<sup>75</sup>

### **Inefficient and counter-productive pretrial procedures**

In many countries, a range of procedural factors militate against proper consideration of pretrial release, making detention the default position. This is exacerbated by the fact that in many jurisdictions, once a decision is made to keep a person in pretrial custody there is no adequate review of that decision. Such factors are often made worse by lack of resources, both for the criminal justice system and for the individual suspect or defendant. Court procedures may be such that no adequate consideration is given to the alternatives to custody. In many districts in the United States, for example, initial remand hearings are conducted remotely by video link. It has been found that the consequent lack of personal contact between the judge and the accused encourages the processing of cases without consideration of individual circumstances. A study in Cook County, Illinois found that on one particular occasion the judge processed 101 cases in 75 minutes. According to the study, “[t]he Cook County Bond Court is not a legal system. It is a machine. Its mantra is efficiency over justice. Mechanized administration over individual rights.”<sup>76</sup> In many countries that have an inquisitorial legal tradition, the norm has been that proceedings are conducted without an oral hearing, meaning pretrial detention is considered only on the basis of papers, mostly supplied by the police or prosecutor. A report on pretrial detention in Latin America found that “the introduction of oral procedures during pretrial stages is one of the factors that have the greatest impact on the transformation of old practices in the area of pretrial detention.”<sup>77</sup> In India and Bangladesh pretrial detention is routinely extended without the accused appearing in person before a judge.<sup>78</sup> In addition, lack of resources leads to court backlogs which result in cases not being called, or not being given adequate consideration.<sup>79</sup>

In order for judges to make rational and appropriate decisions regarding pretrial detention that accord with international norms, they not only need information about the suspected offense(s), but also about the accused, their circumstances, potential sureties, and conditional release facilities.<sup>80</sup> A poor and/or unrepresented person is unlikely to have the knowledge or resources to ensure that such information is put before the court. Even if conditional release facilities are available, the accused is unlikely to know of their existence or whether such a facility would be available and appropriate for his circumstances.

Lack of coordination between criminal justice agencies, often exacerbated by a lack of resources, may result in accused persons not being placed before a court or, once in pretrial detention, not being returned to the court for a review of their deten-

tion. Such problems are concisely set out by researchers examining the criminal justice process in Sierra Leone:

Obstacles to efficient court processing arise at this point. For a detainee's case to be heard at the given date requires six things to perfectly coincide. First, the Magistrate must arrive to town on the pre-determined date. Second, the complainant/plaintiff must be present. Third, relevant witnesses must be [present]. Fourth, the prosecuting police officer must be present. Fifth, the detainee must be present. And sixth, the preceding court cases must not take longer than anticipated. However, the requirements needed for a case to proceed are infrequently met. Often, a lack of fuel, backed up court cases at another site, and unforeseen logistical problems arise and cause an absence. Witnesses rarely come to court as the costs associated with going to court are high and in many cases insurmountable (basic travel costs, etc). Prosecuting officers often do not show up. Interviews with officials at [X] Prison suggest that prisoners are not always transferred to court on the day of their hearing. Moreover, court cases often take longer than expected and the queue of cases is never quite finished.<sup>81</sup>

Similar problems have been reported in India and Nigeria, and are likely to be found in many other jurisdictions.<sup>82</sup> Once a person is detained in custody, lack of recording and/or tracking systems may mean that he is literally lost in the system. In Nigeria, a presidential committee found in 2005 that nearly four percent of pretrial detainees were in prison because their case files were missing.<sup>83</sup> In Malawi, a review of 800 homicide cases by the British Council in 2000 found that in 58 cases the police dockets were missing; that is, the court, police, and prosecution had no record of the accused awaiting trial in prison.<sup>84</sup>

### 3.3 Other Problems at the Pretrial Stage

In addition to the factors outlined above that contribute to the overuse of pretrial detention, other common problems at the pretrial stage of the criminal process are found in countries around the world. Some of these factors also contribute to high rates of pretrial detention while others, although not directly contributing to pretrial detention rates, are problematic in themselves because they undermine international fair procedure and trial requirements.

## Professional cultures and practices

In any jurisdiction, the various criminal justice personnel are subject to their own pressures, requirements, and obligations, and develop distinct cultures that affect the work that they do. Police officers in many countries are under-paid, and bribe-taking is often a serious problem or even endemic. Thus decisions made about arrest, investigation, charge, and detention may often be best understood as means to generate income.<sup>85</sup> The police are also subject, in many countries, to political pressures (from governments, influential individuals, local communities) that may affect the decisions that they make in relation to any particular individual. The problems created by corrupt criminal justice systems may include the following:

- Carrying out arrests other than on the basis of reasonable suspicion that the person concerned has committed a criminal offense, and other than for the purpose of bringing them before a court or other judicial officer—for example, to exact a bribe, to meet arrest quotas, or to harass sections of the community.<sup>86</sup>
- Overcharging (that is, charging a person with an offense that is more serious than that warranted by the evidence). This is done for a variety of purposes including inducing a person to confess and plead guilty to a lesser charge, or simply in order to hold a person for lengthy periods of time.<sup>87</sup>
- Using detention, or the threat of it, both before and after charge, to obtain a confession and/or guilty plea.<sup>88</sup>
- The use of torture, sometimes for the purpose of inducing confessions. The risk of torture is highest during the period of police detention prior to production in court, and in many countries torture remains a routine part of police work to extract confessions or other information from suspects.<sup>89</sup>
- Lack of recording, and other accountability and transparency mechanisms and procedures, in particular in relation to police detention. In many jurisdictions the police do not keep adequate records of arrest and detention, and are not held accountable for their actions, and police stations are closed to outsiders.<sup>90</sup>

There are also judicial cultures and practices that are both problematic in themselves, and which contribute to high pretrial detention rates. These include:

- Paying insufficient attention to the legal criteria governing pretrial detention, and failing to apply them to the individual circumstances of the case.<sup>91</sup>
- Setting unrealistic bail/bond/surety conditions. This is really a particular facet of the previous factor, but in some countries it is quite frequently the case that bail is formally granted, but the bond or surety is set at such a level that the person remains in pretrial detention.<sup>92</sup>

- A conservative judicial attitude to pretrial release and reluctance to consider conditional release. Sometimes this may result from concerns that being seen as “soft on crime” will affect career aspirations, or from perceived pressure from the media and/or the public.<sup>93</sup>

Such attitudes and practices may be encouraged or reinforced by attitudes in the wider society. For example, the public’s lack of understanding of the criminal process can result in release on bail being regarded as an “acquittal,” and may lead to vigilante violence.<sup>94</sup>

### **Lack of full engagement by suspects and defendants**

Internationally recognized criminal justice rights apply to all persons who are arrested or detained, and/or who face trial. Each individual is entitled to know why he has been arrested and what he is charged with. He has the right to be presumed innocent, to be tried without delay, and to have adequate time and facilities to prepare his defense. He has the right to defend himself, or to have legal assistance, free of charge if the interests of justice so require. In reality, most suspects and defendants do not have the education, knowledge, or skills necessary to realize these rights. They are unable to argue for pretrial release because they do not know the relevant legal criteria. They do not have the means, resources, or social networks to obtain and arrange sureties. They cannot prepare their cases because even if they do know the basis of the accusation or charge, they do not necessarily understand what is required in order to defend themselves, or do not have the ability (or often their liberty) that would enable them to trace and interview witnesses, scrutinize the evidence against them, study the relevant law, and prepare their defense.

If they do have sufficient resources to pay for legal representation, they may be able to instruct a lawyer, although in many less developed countries there may be few, if any, lawyers available outside of major towns and cities. If they do not have sufficient resources, as is the case for the majority of suspects and defendants, then in most countries they will not be provided with legal assistance free of charge, or at all. While this is not the case in all countries, this description reflects the reality in most countries, especially during the early stages of the criminal process.

The region that probably has the most developed legal aid provisions is Europe, and yet in many EU jurisdictions “a variety of factors prevent access to competent legal assistance at all stages of the criminal process”, and legal aid provision is “inadequate.”<sup>95</sup> Although legal assistance following arrest is provided for by law in most, if not all, EU member states, the law in many of them does not provide for a right to legal assistance immediately following arrest and in some of them the lawyer is not allowed

to be present during police interrogations.<sup>96</sup> In the Netherlands, for example, despite recent developments in response to the ECtHR decision in *Salduz v Turkey*,<sup>97</sup> there is still generally no right to legal assistance during police interrogations.<sup>98</sup> Even where the law does provide for a right to legal assistance at the early stages of the criminal process, a variety of practices and procedures often means that access to legal assistance is not available in practice, especially to those who cannot afford to pay privately.

### Legal Assistance in Poland

A suspect has the legal right to be assisted by a lawyer at all stages of criminal proceedings. However, in practice, a lawyer is rarely involved in the early stages of proceedings. This results from several circumstances. There is no right to free legal assistance in the first phase of proceedings immediately after arrest. Even if the suspect is able to pay privately, suspects are often informed that they have the right to only one telephone call, in which case they may prefer to contact a family member or friend. If the suspect does not know of a lawyer, there is no duty lawyer scheme for ordinary criminal proceedings, and the police are under no obligation to help him find a lawyer. Even if the suspect can find a lawyer, the lawyer is not officially recognized as acting in the case until the suspect has been charged, and under the criminal procedure code some procedural rights only apply to lawyers who are officially recognized as acting in the case. The decision regarding free legal assistance is taken by a judge, who is not involved until at least the first court appearance. The judge has wide discretionary power to grant, or withhold, legal aid. There is no clear means test, no standard application form, and if the judge does grant legal aid, the cost comes out of his or her “rather limited” budget.<sup>99</sup>

In other parts of the world, the problems of accessing legal assistance at the early stages of the criminal process are often insuperable. In many African countries there are relatively few lawyers and they are usually concentrated in cities, while the majority of the population lives in rural areas. Spending on legal aid is minimal in most countries, and legal aid is not generally available at police stations, and often not in the lower courts or in prisons.<sup>100</sup> In Nepal, eligibility for legal aid is so limited that many people living below the poverty line are not eligible, and the system of court appointed lawyers is inadequate.<sup>101</sup> In the United States. “[o]nly eight states and the District of Columbia



uniformly protect an indigent person’s need for counsel at the bail stage,” and “eighteen states refuse to provide lawyers at [the bail stage] anywhere within their borders.”<sup>102</sup> In the Philippines, public defenders are not allowed to enter police stations because they are regarded as being “too dangerous.”<sup>103</sup>

### **Lack of transparency and accountability**

A transparent process and accountability for decisions are necessary for a criminal justice system to have legitimacy. Legitimacy is a key factor in determining whether people believe that the law works for them and, ultimately, in determining whether they obey the law.<sup>104</sup> Unfortunately, in many countries there is limited transparency and accountability, and a lack of confidence that the criminal justice system is either fair or legitimate.

Transparency can be improved and accountability can be provided in a number of ways, including:

- Requiring the police, judges, and other criminal justice agencies to provide explanations for actions or decisions made, such as arrests, charge decisions, and bail decisions.
- Creating reliable methods for recording decisions made (arrests, charges, pretrial detention) and actions taken (police interviews, detention in prison).
- Permitting third parties to observe and inspect the institutions of the criminal justice system (including police stations, courts, and detention facilities).
- Requiring the authorities to communicate the whereabouts of a detained person to family members or other interested persons.

International norms require that an arrested person be informed of the reason for his arrest, and of any charges against him. The EU is planning to require member states to introduce legislation that gives suspects and defendants a right to such information (and information about their procedural rights), and ensure that it is done in practice.<sup>105</sup> Evidence from jurisdictions worldwide suggests that suspects are frequently not given such information even where the law requires it. In Turkey, although the law requires that a person is told the grounds for his arrest and informed of any charges, this obligation is routinely ignored.<sup>106</sup> In Nepal, it is reported that the police “routinely falsify arrest records or fail to keep an appropriately detailed arrest record.”<sup>107</sup> In Nigeria, “[m]any detainees do not have records of their arrest and are uncertain of the criminal charges pending against them.”<sup>108</sup>

The importance of recording police interviews and inspecting police stations and other detention facilities, has been recognized by the European Committee for the Pre-

vention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its CPT Standards.

### **CPT Standards 2009**

[T]he inspection of police establishments by an independent authority can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits by such an authority should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights ....<sup>109</sup>

Although evidence is limited, in many countries police interviews are either not recorded at all, or the record is made up from notes and/or from memory of what was said during the course of the interview.<sup>110</sup> Electronic recording of police interviews is the exception rather than the norm. Furthermore, most police stations and prison detention facilities are largely beyond the view of interested third parties, and are subject to limited inspection.

The problems and challenges enumerated in this chapter are many and varied, but the net result is common: lack of justice for suspects and detainees, and an over-reliance on pretrial detention. Fortunately, solutions are available, as the next two chapters demonstrate.

## 4. The Impact of Early Intervention by Lawyers and Paralegals

### 4.1 The Role of Defense Lawyers and Paralegals

The international laws and conventions referred to in Chapter Two are mostly framed in terms of the rights of those arrested, detained, and prosecuted, and generally do not specify the role of lawyers in criminal proceedings. The major exception is the *UN Basic Principles on the Role of Lawyers*, which specifically addresses this.

There is evidence from around the world that intervention by lawyers or paralegals in the early stages of the criminal process can have positive benefits not only for those they advise and assist, and for their families and communities, but also for the efficiency and efficacy of criminal justice systems and the wider society. This section examines the role of lawyers and paralegals in advising and assisting individuals suspected or accused of crime, especially at the early stages of the criminal process; and, using examples from around the world, it examines the evidence for the positive benefits that intervention by lawyers or paralegals can have for the administration of justice, the efficiency of criminal justice systems, and respect for the rule of law.

### UN Basic Principles on the Role of Lawyers

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
  - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
  - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
  - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
15. Lawyers shall always loyally respect the interests of their clients.<sup>111</sup>

## 4.2 Effective Legal Assistance for Individuals

Lawyers have a role to play in advising, assisting, and representing individuals at three stages of the criminal justice process: the investigative stage, the trial stage, and the appeal stage. Decisions about pretrial detention or release may be made at the investigative stage or following the commencement of formal criminal proceedings and lawyers and paralegals can have a significant impact by identifying, advising, and representing those who may be eligible and suitable for pretrial release. Helping to ensure that appropriate decisions regarding pretrial detention and release are made at the earliest possible time has the potential to reduce the use of pretrial detention, to the benefit both of the individual concerned and to the wider community. Ensuring that legal assistance is available at these early stages is the most efficient use of resources because it has the potential to reduce the social and economic costs of high rates of pretrial detention. Dealing with cases as they enter the criminal justice system means that problems are tackled from the outset, preventing them multiplying and becoming more complex as

they progress through the system, at great cost to the individuals concerned, criminal justice institutions, and the community as a whole.

Particularly in countries where legal processes do not work efficiently and effectively, lawyers and paralegals have the potential to make a positive contribution in other ways and at other stages of the criminal justice process. For example, in countries where the proportion of prisoners who are in pretrial detention is high, intervention by legal advisors after pretrial detention decisions have been made can have a significant impact by identifying those people in pretrial detention who are eligible and suitable for release and helping them seek their release and push for their rights. Interventions between the different stages of the criminal process—for example, during the period between charge and trial—can help to ensure that relevant procedural steps are taken (such as the transfer of case materials from police to prosecutor), and that they are taken in a timely fashion.

The intervention of a lawyer or paralegal at the investigative stage of the criminal justice process is essential to realizing one's rights. As identified in Chapter Two, it is during the early stages of police detention that a person is most at risk of torture and ill-treatment. Even if the suspect is not at risk in this way, this is the point when police will want to interview him, and decisions will be taken about the investigation, whether to initiate formal legal proceedings, and whether to keep the person in detention. Actions taken and decisions made at this stage will have a major effect on the subsequent course of events.<sup>112</sup>

Ensuring access to effective legal assistance at the investigative stage of the criminal process involves particular demands, and requires:

- an effective mechanism for ensuring that suspects are informed of their right to legal assistance at this stage;<sup>113</sup>
- a transparent and accountable mechanism for ensuring that a suspect can make an informed choice in legal representation, free from undue influence;<sup>114</sup>
- an effective mechanism for contacting a suitably qualified lawyer or paralegal without delay;
- a method of funding legal assistance that ensures that access to legal assistance is not delayed while a decision regarding eligibility is made;
- legal services that are structured and managed so that legal assistance can be provided:
  - without delay
  - when it is required
  - by a suitably qualified adviser
  - by a method (for example, by telephone or in person) that is appropriate given the seriousness and complexity of the alleged offense, the circum-

stances of the suspect (for example, whether he is a child or otherwise vulnerable), and the context (for example, whether it is related to major public disorder or is politically sensitive);

- ready access by lawyers and paralegals to suspects in police detention;
- facilities for lawyers and paralegals to consult with suspects in private;
- mechanisms for ensuring that relevant information is passed on to any lawyer or paralegal who advises or assists the suspect at later stages of the criminal process;
- appropriate training and accreditation, and systems of monitoring, to ensure that lawyers and paralegals have the necessary knowledge and skills.

## 4.3 Effective Legal Assistance and the Criminal Justice System

In addition to the actions that lawyers and paralegals can take for the direct benefit of individuals, they can also play an important role in relation to the criminal justice system as a whole. Broadly, such work may be described as fulfilling two inter-related functions: assisting with the administration of justice and improving the efficiency of the criminal justice system. The focus of the first is to improve the quality of justice in substantive terms by, for example, identifying and preventing unlawful conduct, identifying those who are in need of special attention (such as those with healthcare needs), and identifying those who are suitable for diversion out of the criminal justice system. The focus of the second—improving the efficiency of the criminal justice system—is on helping to ensure that criminal justice processes are carried out effectively, efficiently, and expeditiously. To this can be added a third function, of working to educate individuals, criminal justice professionals, and communities about their rights and responsibilities in relation to criminal justice, and improving the transparency and accountability of criminal justice processes and institutions.

## 4.4 Assisting with the Administration of Justice

### **Identifying persons who are suitable for release or who are illegally detained**

Using their knowledge of the law and the circumstances of their client, lawyers and paralegals can identify individuals who are eligible and suitable for release from the police station or from pretrial detention, and can assist them accordingly. In doing so

they can gather and provide information to the police and the court about whether the client fulfills legal criteria for release. There are many examples of such activity from a range of jurisdictions, where duty lawyer and paralegal schemes at police stations and courts facilitate appropriate decision-making by police and the judiciary.<sup>115</sup> One such scheme was established in Nigeria.

### **The Police-Duty Solicitor Scheme in Nigeria**

In 2005, under an agreement between the National Police Force, the Legal Aid Council, and the Open Society Justice Initiative, a police-duty solicitor scheme was established in the major police precincts of four states in Nigeria: Imo, Kaduna, Ondo, and Sokoto. Under the scheme, duty solicitors attended designated police stations on a 24 hour duty schedule, and the police were obliged to ensure that suspects were given access to them. The duty solicitors advised suspects and detainees and advocated on their behalf, applied for bail or discharge from detention, and made applications under the Fundamental Human Rights (Enforcement Procedure) Rules. At the end of the first eight months, scheme lawyers had secured the release of 611 detainees from prison custody and 644 persons from police custody, and the average period in pretrial detention was reduced from 609 days to 171 days.<sup>116</sup>

Legal advice and assistance at remand hearings can have a significant impact on the pretrial detention population, both in terms of the number of people in pretrial detention and the time spent in pretrial detention. This is demonstrated by a project in the United States. Defendants in Baltimore, Maryland who were given legal representation were required to provide about a third less bail security than those who were unrepresented, were significantly more likely to be released on their own recognisance (that is, without providing financial security), and spent significantly less time in prison before final disposition of their cases.<sup>117</sup>

Similarly, an example from England and Wales shows how legal representation can easily rectify an error, resulting in the release of a defendant from pretrial detention. A defendant's conviction was recorded in error on the Police National Computer, resulting in his being held in pretrial detention for a month. As soon as his lawyer brought this mistake to the attention of the court, the defendant was released on bail.<sup>118</sup>

Reductions in pretrial detention resulting from legal intervention schemes have also been demonstrated in India: in the three states where prison visitor schemes oper-

ated, the proportion of the prison population who were “under-trial” (i.e., not yet tried) was significantly lower than in states where there were no such schemes.<sup>119</sup>

Not all interventions require lawyers. Paralegal schemes have had a significant, measurable impact on pretrial detention populations in a range of countries. In Bangladesh, a paralegal program operating in three prisons resulted in the release of 700 unnecessarily detained prisoners in just one year.<sup>120</sup> In Malawi, over a seven-year period the Paralegal Advisory Service contributed to a fall in the proportion of prisoners held pretrial from 35 percent to 17 percent.<sup>121</sup> In Sierra Leone, paralegals operating in one prison reduced the pretrial population by 50 percent in one four-month period in 2009.<sup>122</sup> Similar results have been reported in a number of other countries, including Kenya and Uganda.

Where lawyers or paralegals can gain access to people held in pretrial detention, whether in police stations or prisons, they can identify those who are unlawfully detained, and make appropriate arrangements for them to be taken before a court so that an application for release may be made. An example of this form of intervention is provided by the Paralegal Advisory Service (PAS) in Malawi. Paralegals working for PAS reviewed all remand warrants to ensure that people were lawfully detained. As a result, the number of illegal remand warrants fell from hundreds to a few dozen.<sup>123</sup> Similar projects have operated successfully in a range of countries including Uganda, Kenya, Sierra Leone, Benin, Niger, and Bangladesh.<sup>124</sup>

### **Identifying and preventing unlawful actions by police**

There is evidence from a wide range of jurisdictions that police engage in unlawful conduct ranging from bribe-taking to physical abuse and torture. Bribe-taking and corruption often mean that poor people are arrested and detained by the police, and may then be prosecuted, because they cannot afford to pay their way out. Once in pretrial detention, they may be forced to pay for access to food, water, services, contact with family, and medical treatment to which they are, in fact, entitled under national laws. Sometimes, the threat of or actual physical violence, or even torture, is used to exact bribes.<sup>125</sup> Torture and other forms of ill-treatment may be used at the time of arrest, during police custody or during pretrial detention. Torture in police custody was found to be widespread in 11 of the 15 countries visited by the UN Special Rapporteur on Torture between 2005 and 2009.<sup>126</sup> Those in pretrial detention are often held in conditions and subject to treatment that is far worse than that experienced by sentenced prisoners.<sup>127</sup>

It is widely agreed that early intervention by lawyers and paralegals in the criminal process is one of the best ways of deterring such conduct.<sup>128</sup> The reasoning is set out by the European Committee for the Prevention of Torture:



The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.<sup>129</sup>

### **Identifying those who are in need of medical attention**

People in detention—including pretrial detention—have the right to the same “health services available in the country without discrimination on the grounds of their legal situation,”<sup>130</sup> the evidence demonstrates that those in police custody and pretrial detention are at particular risk to their health, and that this has grave implications for those working in police stations and detention facilities, and for the wider community. Police stations and pretrial detention facilities are not designed for lengthy detention, and those detained often live in filthy and overcrowded conditions, without access to fresh air, essential sanitation facilities, and health services. Health needs often go undiagnosed, the “mixing bowl effect” of putting HIV-positive and HIV-negative people together contributes to the spread of HIV/AIDS, and the risks of contracting and spreading tuberculosis are increased.<sup>131</sup> Furthermore, those suffering from mental illness may go undiagnosed, and the experience of being detained may well contribute to the deterioration of their condition.<sup>132</sup>

Police, prison guards, and other criminal justice officials often lack the skills, resources, or incentives to identify those who are in need of medical attention, or to ensure that medical treatment is secured. Lawyers and paralegals, whose focus is on individual suspects and defendants, can identify those who are in need of medical services and can seek to ensure that appropriate medical attention is obtained and, where appropriate, that the detained person is transferred to a medical facility.

### **Identifying children and other vulnerable suspects and defendants**

International conventions require that children in conflict with the law are accorded special treatment. The United Nations Convention on the Rights of the Child (UNCRC), which defines “child” as including all persons under the age of 18 years, requires that public institutions and courts give primary consideration to the best interests of the child (Article 3). A child who is temporarily or permanently deprived of his family environment has a right to special protection and assistance provided by the state (Article 20). The arrest, detention, or imprisonment of a child must be in conformity with the law and must be used only as a measure of last resort and for the shortest appropriate period of time. Where a child is deprived of his liberty, he must be separated from adults

(unless it is considered in the child's best interest not to be) and allowed to have contact with his family. Furthermore, child detainees have the right to be treated in a manner which takes into account the needs of persons of their age; the right to prompt access to legal and other appropriate assistance; the right to challenge the legality of their deprivation of liberty before a court or other competent, independent, and impartial authority; and the right to a prompt decision on any such action (Article 37). Conversely, those who are vulnerable through old age, infirmity, mental illness or disorder, although not covered by similar convention rights, should also be treated with special consideration.<sup>133</sup>

Identifying children and those who are otherwise vulnerable is not necessarily straightforward, and is often beyond the capacity of the police, other criminal justice agencies, and the courts. Even where they are properly identified, fulfilling the requirements of UNCRC and other laws and conventions can be a difficult and complex task.

Lawyers and paralegals can play an important role in identifying such vulnerable children and adults, and in assisting in the measures that should be taken for them, as the following example from Malawi shows.

### **Determining the Age of Young Suspects in Malawi**

Determining the age of children who came into contact with the criminal justice system was often difficult because of the absence of a birth certificate. Paralegals were able to work with the police and other agencies to devise mechanisms for screening young people—in terms of their family circumstances, the alleged offense, and other factors—with a view, where appropriate, to diverting them from the criminal process. As a result, in 2004 paralegals in Malawi were instrumental in diverting 77 percent of juveniles who came into contact with the law from the criminal justice system.<sup>134</sup>

### **Assisting with diversion from formal criminal proceedings**

In some jurisdictions, diversionary mechanisms represent a major part of the criminal justice system, and are used in a large proportion of cases. For example, England and Wales have a comparatively high number of arrests: about 1.4 million per year. But of those against whom some form of formal criminal action is taken, nearly as many people are dealt with by formal diversion (such as formal cautions and fixed penalty notices) as are sentenced by the courts.<sup>135</sup> Diversion from the criminal justice system can have many systemic benefits. It can save police and court time and resources, reduce the pretrial detention population, and instill greater confidence in the criminal justice process. The

evidence from Malawi, referred to in the preceding section, shows that paralegals can assist in the appropriate diversion of young suspects away from the criminal courts.

Diversion schemes may be national, government-sponsored schemes, as in England and Wales, but in many jurisdictions there are various forms of local schemes directed at the settlement of disputes. In Namibia and South Africa, community “pay-back” schemes enable young people to be diverted from court proceedings on the basis that they admit the offense and work in a community organization for a certain number of hours.<sup>136</sup> The Supreme Court in the Philippines is increasingly using alternative dispute resolution to settle the civil component in a crime (such as restoration or compensation in cases of theft). In Sudan, legislation provides that an “injured or interested party” may give up his right to a criminal proceeding in favor of a pardon or conciliation.<sup>137</sup> Lawyers and paralegals in Sudan are able to use this provision for the benefit of individuals and the community. Lawyers and NGOs regularly employ the “pardon or reconciliation” provisions of the Criminal Procedure Act 1991, which are available even in cases of homicide. They communicate the regret of the offender to the victim and their family, offer compensation, and ask for forgiveness. In this way many prisoners waiting for trial are released from detention.<sup>138</sup>

## 4.5 Improving the Efficiency of the Criminal Justice System

International legal standards require criminal processes to be prompt and efficient so persons who are arrested or detained may be promptly produced before a judge and any trial takes place within a reasonable time.<sup>139</sup> However, in many jurisdictions compliance with these obligations is hampered by insufficient criminal justice personnel, resources, and facilities. In addition to the lack of resources, procedures are often inadequate, resulting in lack of coordination between criminal justice agencies and personnel, and this is frequently exacerbated by lack of appropriate training.

Lawyers and paralegals can directly contribute to improving the efficiency of criminal justice. The actions described below can assist in ensuring that the various stages of the criminal process are completed more quickly, that time limits are met, that adjournments are kept to a minimum and, in so doing, can also contribute to the quality of decision-making and the overall efficacy of the system.

### **Providing information to police/prosecutors/courts**

In order to make timely and appropriate decisions, criminal justice personnel such as police, prosecutors, and judges require access to a wide range of information that may come from disparate sources. This includes:

- information about the suspected offense (for example, the identity and location of relevant witnesses, and other forms of evidence);
- information from and about the suspect or defendant (for example, their version of events, their personal circumstances, whether they have previous experience of the criminal law, potential sureties);
- information about relevant law and policies (for example, as to detention time limits, re-trial release, diversion);
- information about relevant facilities (for example, conditional release facilities in the locality, diversion schemes, conditions in detention facilities).

The police in many countries, and to a certain extent prosecutors and judges, often do not have the time, skills or resources to seek such information or to interview potential witnesses or sureties. They may lack knowledge of relevant laws and may not have the training that would enable them to access such knowledge and apply it appropriately.

Lawyers and paralegals acting for suspects and defendants can assist in providing and interpreting such information and, where appropriate, make contact with relevant third parties. In Malawi for example, staff working for the Paralegal Advisory Service are able to assist the police by tracing the parents or guardians of arrested juveniles.<sup>140</sup> Similar work is carried out by paralegals in schemes in Kenya, Malawi, and Uganda who trace “sureties” to appear at court on behalf of the accused. Sureties are persons who know the accused and stand as a guarantor that the accused will attend trial by providing a deposit to the court. The paralegals inform the sureties of the court date and assist them when they attend at court.

### **Ensuring that court hearings are effective**

As noted in above, for a defendant’s case to be heard on the given date requires the presence of and coordination of a number of people, including the judge or magistrate, the relevant police officer and prosecutor, the accused, and any relevant witnesses and sureties. There are many factors that potentially inhibit the presence of all parties at the right place and at the right time, including lack of information or misunderstanding about the court date, transport difficulties, reluctance on the part of witnesses and sureties. In addition, for court hearings to be effective, information relevant to the hearing must be available, including information about the accusation, the evidence, potential sureties, and conditional release facilities. Lawyers and paralegals can assist in ensuring that the appropriate people are at court at the right time, and that necessary information is available and presented to the court.

A further function to be performed by lawyers and paralegals in this regard is ensuring that the accused understands the purpose of the hearing and understands that, where appropriate, it may be in his interest to plead guilty to the alleged offense(s). It is sometimes argued that lawyers and paralegals advising and assisting defendants are likely to inhibit the timely and efficient processing of cases by inappropriately advising clients to plead not guilty. While this may be the case on some occasions, it is normally in the interests of a defendant that hearings are effective and the case moves forward efficiently. This is particularly the case where the defendant is at risk of, or likely to be held in, pretrial detention. An accused person may not be willing to plead guilty for a variety of reasons, including not understanding the process or the consequences of pleading guilty. Lawyers and paralegals can play an important role in providing such information to defendants so that they can make an informed decision to plead guilty, where this is appropriate, at an early hearing. This will help ensure that the time spent in custody is kept to a minimum and that credit may be given for the purpose of sentencing.

Thus involvement of a lawyer or paralegal at an early stage will not necessarily make the process more difficult, complex, or attenuated. In fact, the early involvement of lawyers and paralegals can reduce the number of people held in pretrial detention, the time spent in pretrial detention, the number of custodial sentences imposed, the length of custodial sentences, the impact of the court process on victims and witnesses, and the amount of time and resources required of criminal justice agencies.

An example of the impact that early involvement by lawyers or paralegals can have is provided by the Paralegal Advisory Service in Malawi. It should be noted that this scheme involved providing information and advice to persons who were already in pretrial detention. The effect could have been even greater if such information and advice had been available from the time defendants were first arrested by police.

### **Paralegals and Guilty Pleas in Malawi**

After paralegals led clinics for pretrial detainees on homicide law and pleas, prisoners were more likely to enter informed pleas to their charges, saving considerable court time and expenses. In 2003, 33 homicide remandees indicated to paralegals they were ready to plead guilty to manslaughter, at which point they were referred to the Ministry of Justice's Department of Legal Aid. After consultation with one of the seven lawyers in the department, 29 defendants entered guilty pleas and were sentenced. The financial savings for the judiciary was US \$33,000.<sup>141</sup>

## Improving procedures

Working collectively and in cooperation with the police, prosecutors, and court personnel, lawyers can assist in improving procedures so that cases are dealt with more efficiently and effectively. Examples from Malawi include designing a bail application form and providing training in its use, working with the police to enable minor cases to be listed more quickly, and forming partnerships with other criminal justice agencies.<sup>142</sup> Examples from Nigeria include helping to develop a casefile management system for use by criminal justice agencies to ensure the smooth processing of cases within agencies and between agencies, and persuading the senior judiciary to issue practice directions requiring periodic review of those kept in pretrial detention.<sup>143</sup> In the Philippines, “Detainee Notebooks” have been developed to enable prisoners to chart the progress of their case in the courts and alert jail officers of their next court appearance or when they have missed a court appearance. A further example is taken from Bangladesh.

### Case Coordination Committees in Bangladesh

Every month the MLAA (Madaripur Legal Aid Association) participates in a case coordination committee meeting designed to manage cases efficiently, thus reducing backlogs and prison overcrowding. At the meeting, the paralegals present the committee with cases that need immediate attention. Problems resolved to date have included prisoners not having trial dates set, under-trial periods exceeding 10 years, and prisoners not knowing how to pay their fines to avoid extending their prison stays. The committee works together to provide quick and practical solutions to the problems. Each meeting begins with an update on the status of previous cases and ends with a plan for resolving pending problems.<sup>144</sup>

## 4.6 Education and Policy Improvement

Lawyers and paralegals, particularly working collectively (for example, through public defender offices, NGOs, or bar associations), can play a key role in educating clients, witnesses, and others involved in criminal proceedings, and also in identifying and seeking to remedy systemic problems in criminal justice systems. Legal representation can, in itself, improve understanding of the process. For example, a study in England and Wales demonstrated that defendants appearing in court without

legal representation had less understanding of what was happening than those who had representation.<sup>145</sup>

### **Educating clients, their families, friends, and community**

In addition to individual casework, lawyers and paralegals can engage in a range of educational activities. Educating suspects and defendants can help identify those who are unlawfully detained, enable them to prepare their own cases and represent themselves before courts, and help them feel more confident in their ability to manage their circumstances. In practice, this is done in a variety of ways, including educating clients individually, publicity campaigns involving placing posters in police stations, and using interactive drama techniques. From a wider perspective, educating the families of suspects and defendants, as well as local communities, can enhance their role in and increase their appreciation of criminal justice processes.<sup>146</sup> An example of an education campaign can be found in Sierra Leone, where Advocaid and the Sierra Leone Court Monitoring Programme, with the support of the Special Court for Sierra Leone, prepared a booklet titled “After you’ve been arrested: What next.” The booklet contains photographs and visual aids in the Krio language and is designed to help explain the criminal justice process to persons who have been arrested, so they can understand their rights and pass on their knowledge to others.

### **Identifying systemic problems and developing solutions**

Although it is usual to refer to criminal justice *systems* as if the various parts worked together towards common objectives, the practical operation of all criminal justice systems is significantly affected by the needs, objectives, and cultures of the various institutions and personnel that make up the system. In addition, there is often a bureaucratic inertia that renders the system and its component parts resistant to change. Fortunately, the cumulative knowledge and experience gained from working for individual suspects and defendants put lawyers and paralegals in an excellent position to identify systemic problems, and also to identify the sources of and solutions to those problems. Paralegals in Malawi “discovered a need to go backward in the penal chain, because many problems stemmed in large part from detention or charging decisions by the police and the courts.”<sup>147</sup>

Having identified systemic problems, lawyers and paralegals can tackle them in a variety of ways, including through public interest litigation. This is a well-established mechanism in the United States, and has been used successfully in a range of other jurisdictions.<sup>148</sup> One example of using public interest litigation comes from efforts to tackle police ill-treatment of Roma people in Bulgaria.

### **Using Public Interest Litigation to Stop Ill Treatment by Police**

Concerned about police ill-treatment of Roma people in Bulgaria, lawyers took a case involving a 14 year old boy to the European Court of Human Rights. In its decision in *Assenov v Bulgaria* the court found that the state was in breach of Article 3 of the ECHR (protection from torture, inhuman or degrading treatment). The court also held that Article 3 not only prohibits certain forms of misconduct, but also “requires by implication that there should be an effective official investigation,” adding that the obligation on states “should be capable of leading to the identification and punishment of those responsible.”<sup>149</sup>

Litigation is, of course, not the only way of dealing with systemic problems and may be used in conjunction with other approaches or even as a last resort when other methods have failed. Such problems, having been identified, may be pursued by public defender offices or bar associations, working with NGOs, or working directly with relevant government ministries or relevant institutions. In Japan, for example, where lengthy detention of suspects and ill-treatment by the police was routine, the bar associations worked together to introduce a police station duty lawyer scheme and to press the police to allow lawyers into police stations. In India, an NGO, the Commonwealth Human Rights Initiative, working through regional workshops attended by a wide range of criminal justice personnel, raised a series of fundamental questions about the working of the criminal justice system, prompting participants to examine their practices and procedures and leading them to realize “that many problems were remediable and could be dealt with at the local level.”<sup>150</sup>

### **Improving the knowledge of criminal justice personnel**

Governments have primary responsibility for ensuring that criminal justice personnel, including the police, prosecutors, and judges, are properly trained and resourced—but, as noted earlier, in many countries they are both under-trained and under-resourced. Furthermore, a lack of understanding and appreciation of roles and functions of other criminal justice personnel can inhibit the efficient working of criminal justice processes. Lawyers and paralegals, especially where working collectively, can use their knowledge and experience to help improve the knowledge and skill levels of others working in the criminal justice system. This can take a variety of forms, including running training courses, conducting joint training, developing training materials, and helping to estab-



lish and participate in local criminal justice practitioners' committees.<sup>151</sup> Such committees can be used not only to educate and train, but also to improve coordination and tackle local problems. A good example is support given by the Paralegal Advisory Service (PAS) to court users' committees in Malawi.

### **Court Users' Committees in Malawi**

The committees operate at the local, regional, and national levels to identify problems in the criminal justice system and come up with local solutions. The PAS team leader in a magisterial district convenes and financially supports the monthly local committee meetings, which include prison officials, police chiefs, and judicial officers. The committees have been effective in improving communication and coordination between criminal justice agencies, and in addressing local problems. For example, in one district PAS paralegals, supported by prison officers, alerted the committee to the high level of overcrowding in the local prison. As a result, the chief magistrate visited the prison the following day together with three other magistrates, prosecutors, and court clerks, and released a number of prisoners awaiting trial.<sup>152</sup>

## **4.7 Improving Transparency, Accountability, and Confidence in the Criminal Justice System**

It was noted in Chapter Three that transparency and accountability are key factors in determining whether people have confidence in the legitimacy of the criminal justice system and in whether they obey the law. Legal advisors can have a positive impact on both accountability and confidence in a number of ways.

First, the presence of lawyers and paralegals in police stations and detention facilities means that they are not closed institutions in which the police and detention officers have a free hand to do what they want. The “presence of external professionals... increases the openness and transparency of the system.”<sup>153</sup> The Association for the Prevention of Torture states that:

The function of the right of access to a lawyer for detainees is not only to prepare the defence in criminal cases, but also to provide an independent presence dur-

ing detention and questioning (whether or not associated with criminal proceedings). The presence of a lawyer can help to ensure the detained persons' rights to safety and dignity are respected, and that the authorities do not exceed their legal powers.<sup>154</sup>

Second, as explained earlier in this chapter, lawyers and paralegals can identify unlawful conduct and poor practice and take appropriate action, including bringing it to the attention of the authorities and, where necessary and possible, by initiating legal proceedings.

Third, there is good evidence to suggest that suspects and defendants are more satisfied with both their treatment and outcomes (that is, pretrial release/detention decisions, conviction/acquittal decisions, and sentence), if they are legally advised and represented. If they are more satisfied, they are more likely to have confidence in the system, and it is likely that this will also have an impact on the attitudes of their families and friends. A study in the United States demonstrated the significant impact that legal representation has on satisfaction with and confidence in legal authorities by defendants.

### **The Impact of Legal Representation on Confidence and Satisfaction**

Defendants represented by counsel were... queried about how fairly they thought they were treated and how satisfied they were with the [court] procedures. In virtually every dimension investigated, defendants who had lawyers were more satisfied with the manner in which they were treated. For example, while 32.1 percent of defendants with lawyers thought that they were treated better at the bail review hearing than expected, only 24.2 percent of the unrepresented thought they were treated better than expected. Nearly twice as many defendants without lawyers (40.3 percent v. 20.5 percent) thought that they were treated worse than they expected. Sixty percent of the defendants with lawyers thought that the hearing officer devoted the right amount of time to the bail review hearing, compared to only 48.4 percent of those without lawyers. Defendants without lawyers were almost twice as likely to state that the bail review hearing officer failed to devote enough time to their bail review (41.9 percent v. 28.2 percent).<sup>155</sup>

Finally, confidence in the police, and thus the criminal justice system, is likely to be enhanced if confessions to the police are seen to be voluntary and reliable as a result of being given in the presence of a legal adviser. This is also in the interests of the police because it is likely to result in fewer challenges to, and retractions of, confessions at subsequent stages of the criminal process.<sup>156</sup>



## 5. Mechanisms for Providing Legal Assistance at the Early Stages of the Criminal Justice Process

The previous chapter demonstrated the impact lawyers and paralegals can have on individual suspects and defendants, and also in relation to the criminal justice system as a whole. It also showed that this can be achieved through a range of interventions, some of which reflect more traditional approaches to legal advice and assistance, while others involve more innovative responses to conditions in less wealthy and post-conflict countries. This chapter will examine the range of mechanisms for delivering legal assistance at the early stages of the criminal process.<sup>157</sup> The aim is to provide a brief account of the approaches employed in countries with widely different socioeconomic environments, rather than exploring particular approaches or schemes in detail.

### 5.1 Lawyers and Paralegals

In countries with well-developed criminal justice systems and processes, legal advice, assistance, and representation is normally carried out by professionally qualified

lawyers, although in some such countries extensive use is made of paralegals for certain functions or at certain stages of the process. Providing legal services exclusively by means of fully qualified lawyers is expensive, and even in well-developed systems funding for legal aid is often so inadequate that many suspects and defendants do not receive competent legal advice, assistance, and representation.<sup>158</sup> In many countries, lack of adequate funding for legal assistance is compounded by the dearth of lawyers willing to provide legal assistance when and where it is needed.<sup>159</sup>

Using paralegals to perform some of the functions of lawyers can provide effective solutions to these challenges and, in particular, can provide a cost-effective means of legal intervention. But paralegals are more than simply a cheaper alternative to fully qualified lawyers. Provided they are suitably trained and supervised, they are often better placed than lawyers to perform a range of functions associated with legal advice and assistance—closer to the communities they serve, more flexible, and possessing a range of skills that allows innovative delivery of legal services. In order to demonstrate this, the next two sections identify the functions that paralegals can fulfill.

### **Working for individuals**

The *UN Basic Principles on the Role of Lawyers* requires lawyers acting for persons suspected or accused of crime to “loyally respect the interests of their clients.”<sup>160</sup> Fulfilling this obligation may involve any or all of the following.

- *Giving legal advice:* taking instructions from the client, obtaining information from the police, providing information to the client, and giving the client legal advice.
- *Providing legal assistance:* contacting potential sureties (where relevant); exploring whether conditional release facilities are available; inquiring into the case and (where relevant) contacting and interviewing potential witnesses; securing and preserving relevant evidence; representing, negotiating, and advocating on behalf of the client; seeking to ensure that the client is dealt with fairly, expeditiously, and in accordance with the law; seeking to ensure that court decisions are carried out; maintaining contact with the client if he is kept in pretrial detention, and seeking to ensure that he is produced in court at further hearings; and taking appropriate action where a client’s treatment violates relevant laws and procedures.
- *Looking after the welfare of the client:* checking on the physical and mental state of the client and, where appropriate, seeking medical examination; contacting the client’s family, employer, and others (subject to the client’s instructions); checking on the conditions in which the client is being held and, if necessary, making representations or taking other action in respect of those conditions.

Some of the functions listed require a high level of legal knowledge and skills and should normally only be carried out by appropriately trained and experienced professional lawyers. The most important of these skills are giving legal advice, providing court advocacy, and taking legal action where a person is or has been dealt with unlawfully. Many of the functions, however, do not require sophisticated levels of legal knowledge and skills, and can be carried out by paralegals. With appropriate training and supervision, and provided that the law in any particular jurisdiction permits paralegals access to persons in police or prison custody, paralegals can carry out all of the welfare functions, many of the legal advice functions (including giving legal advice in less serious or complex cases), and most of the legal assistance functions—other than representation, advocacy (and associated acts), and any function specifically reserved to lawyers in the particular jurisdiction.

### **Improving efficiency and effectiveness**

Much of the work of assisting with the administration of justice and improving the efficiency of the criminal justice system, described in Chapter Four, can be carried out by paralegals. In fact, while individual lawyers and bar associations may be actively involved in improving the administration of justice and efficiency of criminal justice systems, paralegals and NGOs may be better placed to carry out such work. For example, it is easier and more practical for public defender services or NGOs—which often make significant use of paralegals—rather than private practice lawyers, to collect data regarding the operation of the criminal justice system, and to devise and implement responses to the problems identified.

## **5.2 Essential Requirements for Effective Early Intervention Schemes**

Providing effective legal assistance for those suspected or accused of committing crime requires effective mechanisms and institutions to ensure that legal assistance is available in the locations, and at the times, that it is required. Ensuring that legal assistance is available requires, in turn, that it is available either free of charge or at a cost that is affordable to those who need it, and that procedures exist to enable any decisions about eligibility for assistance to be made quickly and at the appropriate time. Furthermore, it requires that suspects and defendants are informed of their right to legal assistance, and that access to them by lawyers and paralegals is both permitted and facilitated by those who have custody of them.

Experience from a large number of jurisdictions indicates that three factors play a major role in enabling legal services to be delivered on a sustainable basis:

- a legal aid authority with strategic and administrative responsibilities;
- schemes for the delivery of legal advice and assistance to persons detained at police stations;
- legal recognition of paralegals.

### **A legal aid authority**

Whichever model for the delivery of legal services is adopted in a particular jurisdiction, an independent executive authority responsible for those services is an important structural mechanism for ensuring that they will be effective. A legal aid authority may operate at a national or federal level, depending on the structure of governance in any particular jurisdiction. It is important that a legal aid authority be politically independent because of the conflicts inherent in providing state funded legal services for those who are suspected or accused of committing criminal offenses. Independence from bar associations and lawyers is important because of the potential conflicts arising from the use of public money for legal services.

A legal aid authority should have both strategic and administrative responsibilities. The strategic functions of a legal aid authority include:

- determining the need for legal services and the appropriate mechanisms for meeting that need;
- establishing appropriate criteria for determining eligibility for legal services;
- establishing appropriate standards for the delivery of legal services, and monitoring those standards;
- accounting for public money spent on legal services; and
- contributing to the development of appropriate laws and criminal justice policies by using information derived from its activities to work with governments, criminal justice agencies, and other system actors.

Administrative functions of a legal aid authority include:

- determining eligibility for legal assistance according to established criteria;
- managing legal aid centers or agencies;
- distributing funds for the delivery of legal services according to established criteria;
- ensuring that quality standards are met.



Legal aid authorities exist in a wide range of jurisdictions, as seen in the following examples.

### **Legal Aid Board, South Africa**

The Legal Aid Board was first established in 1969, with representatives from the judiciary, lawyers, government departments, and independent experts. The board has responsibility for determining how legal assistance is provided to indigent people and has established a set of working rules for this purpose. It established eligibility criteria for the receipt of legal services, and has piloted various methods of delivering legal services.<sup>161</sup>

### **Legal Aid Services, Georgia**

Legal Aid Services, Georgia, was founded in 2008 in order to meet Georgia's acute need for improved legal services. It is a quasi-independent agency established under the auspices of the Ministry of Justice, with responsibility for administering the legal aid budget, managing contracts with legal aid providers, assuring quality of legal services, and formulating proposals for the improvement of legal aid policies.

### **National Legal Aid Bureau, Bulgaria**

The National Legal Aid Bureau is an independent public authority, led by three members appointed by the Supreme Bar Council and two members nominated by the minister of justice and appointed by the Council of Ministers. The bureau has responsibility for the overall implementation and evaluation of legal aid policies, and for managing the legal aid budget.

### **Police station advice schemes**

The availability of a legal adviser at short notice is a key requirement for legal assistance at the investigative stage of the criminal process. Police investigations are often prompted by an unplanned arrest, and are governed by legal and organizational imperatives such as custody time-limits and resources. As a result, the demand for legal assistance in these circumstances is difficult to predict, and requires a speedy response. Ad hoc arrangements for providing legal assistance are unlikely to be effective.

Effective legal assistance at the investigative stage of the criminal process requires:

- an effective and accountable mechanism for ensuring that suspects are informed of their right to legal assistance, and for contacting a lawyer or paralegal, without delay;
- a method of funding legal assistance that ensures that access to assistance is not delayed while a decision on eligibility is made;
- legal services that are structured and managed so that legal assistance can be provided: without delay, when it is required, by a suitably qualified adviser, and by a method (for example, by telephone or in person) that is appropriate given the seriousness and complexity of the alleged offense and the circumstances of the suspect.

To meet these demands, a range of police station advice and assistance schemes—using a mixture of private lawyers, public defenders, and paralegals—has been established in several countries. Below are examples of different models of provision.

#### **Police Station Advice Scheme in England and Wales**

Suspects who have been arrested and detained by the police are entitled to state funded legal advice and assistance irrespective of their financial circumstances. Police station advice is provided by lawyers in law firms that have a contract with the Legal Services Commission (LSC) to deliver the service. The contract requires them to have the staff available and procedures in place to ensure that a lawyer or paralegal is always available at short notice. Legal advice is provided by lawyers or paralegals working under the supervision of a lawyer. There is a similar duty lawyer scheme for pretrial detention hearings.<sup>162</sup>

### **Public Defender Offices in Ukraine**

There are three Public Defender Offices in Ukraine, which were established by the International Renaissance Foundation to pilot new models of legal aid in criminal cases. Together, they employ about 26 defense lawyers. They provide legal advice and assistance to suspects detained by the police. Each office operates a duty lawyer scheme, which ensures that a lawyer is always on duty and is available to provide assistance to a suspect at short notice. Public defenders also represent clients at pretrial detention hearings.<sup>163</sup>

### **Paralegals in Sierra Leone**

Paralegal services are provided by an NGO, Timap, founded in 2003. In 2009, Timap established a pilot criminal justice service with one lawyer and six paralegals operating in three rural areas. The paralegals visit the police stations in their area on a regular basis and speak to everyone in custody, informing them of their rights. Their primary role is to secure release on bail for those detainees under lawful arrest, and to secure the release of those unlawfully arrested or unnecessarily detained. Where necessary and possible, they arrange for legal representation at pretrial detention hearings.<sup>164</sup>

### **Legal recognition of paralegals**

In some countries, the use of paralegals is inhibited by a lack of legal recognition, often exacerbated by the attitude of professional bar associations that resist the use of paralegals because of concerns over lost status or income. Where paralegals are not recognized, changes in the law may be necessary so that paralegals are officially allowed access to people in police or prison custody.

An example of the legal recognition of paralegals is provided by England and Wales. Suspects arrested and detained by the police have a statutory right to consult a lawyer. It has long been accepted that a lawyer may send a paralegal to a police station to provide advice and assistance on his behalf. A statutory code of practice requires the police to allow paralegals access to suspects in their custody, and to treat them in most

respects as if they were a fully qualified lawyer. Concerns about quality standards have been addressed by a contractual requirement that the paralegal be supervised by a qualified lawyer, and also by the introduction of an accreditation scheme.<sup>165</sup>

In order to become accredited, a paralegal must pass a number of tests designed to assess his knowledge of criminal law and procedure, and his skills in providing advice and assistance in this context.<sup>166</sup> Although not directly regulated by a professional body, as employees of solicitors<sup>167</sup> paralegals are indirectly regulated by the solicitors' professional body (the Law Society). Research has shown that accredited representatives are capable of providing competent advice and assistance, and also that the introduction of the accreditation scheme led to an improvement in the standards of the solicitors who employed them.<sup>168</sup>

### 5.3 Models of Delivering Legal Services

This section sets out the primary models for delivering legal services at the early stages of the criminal process, referring to examples from various countries. Many jurisdictions have adopted mixed models of legal advice, assistance, and representation that combine different service providers, including lawyers, paralegals, and law students. One survey of schemes in Africa found that most countries surveyed, apart from South Africa, “mix and match” different models of provision.<sup>169</sup> In particular, paralegal schemes often operate in conjunction with public defender and private practice (particularly contract) schemes. This is also true in respect of law student schemes which normally operate alongside, or in cooperation with, other schemes for delivering legal services.

Many public defender schemes also use private practice lawyers, in particular to provide legal assistance or representation where there may be a conflict of interest. Examples of such mixed models may be found, for example, in, the United States, Chile, Israel,<sup>170</sup> Moldova, and Ukraine. Such arrangements are also used to relieve pressure on public defenders by enabling them to pass excess work to other lawyers.<sup>171</sup> In some jurisdictions, such as New Zealand and England and Wales, suspects and defendants have a choice as to whether to use a public defender or a lawyer from private practice.<sup>172</sup> In many mixed-model schemes, private lawyers have to satisfy standards established by the public defender scheme or by the legal aid authority.<sup>173</sup>

#### **Public defender schemes**

In this model, legal services are provided by lawyers (often supported by paralegals)<sup>174</sup> who work in specialist offices, directly or indirectly funded by national or federal governments, or NGOs. In some countries, such as Chile<sup>175</sup> and Georgia, there is a national

public defender service with offices throughout the country. In many countries where there are public defender services, the schemes are more localized and do not purport to provide a national service. This is sometimes the result of the federal nature of the jurisdiction, as in the United States, or the lack of a national policy on legal services in the field of criminal justice. Frequently, it occurs because public defender offices are established as pilot projects promoted and funded by NGOs, either exclusively or together with governments. Examples of such schemes are found in a wide range of countries, including Ukraine,<sup>176</sup> Moldova, Afghanistan, the United States,<sup>177</sup> Nigeria, England and Wales,<sup>178</sup> Scotland,<sup>179</sup> Brazil, Zambia, China, New Zealand,<sup>180</sup> Bangladesh, and India.

Public defender schemes have a number of advantages over other models. A public defender office is likely to be in a better position to meet the demands of providing legal assistance at the early stages of the criminal process, whereas lawyers in private practice may not be as nimble. A public defender office is also likely to be in a better position than lawyers working under a private practice model to undertake work that is not directly related to existing individual clients. Furthermore, a public defender scheme may be better placed to provide high quality specialist criminal defenders, staff training, career progression for its staff, and an effective approach to quality assurance. As a specialist criminal defense agency, public defender schemes are often at the forefront of developing a “zealous defense” culture which is often missing among private lawyers. Finally, public defender schemes may be less expensive than private practice models.<sup>181</sup>

The experience of public defender schemes in a number of countries shows that particular attention must be paid to resources and independence. Although public defender schemes may be less expensive than the private practice model, this may simply be the result of inadequate funding. Funding, of course, has implications for the quality of work because financial pressures may mean public defenders have to handle a large volume of cases. As some observers have noted, “[t]he most significant problem plaguing countries that rely on the public defender model is that caseloads are often so large that the quality of representation suffers.”<sup>182</sup> The JUSTICE study of public defender schemes in the United States, conducted at the turn of the century, found that nearly all of the schemes examined were under-resourced and suffered from case overload.<sup>183</sup> Underfunding is also likely to limit the community level functions described in Chapter Four. If caseloads are already high, a public defender office is unlikely to be willing to increase its workload by, for example, monitoring those already in pretrial detention.

Public defender schemes are sometimes perceived as lacking independence. International norms recognize that defense lawyers are not only important as legal technicians—providing legal expertise to those that do not have it—but are also important in providing a buffer between the individual and the state. Independence is clearly

crucial in both functions.<sup>184</sup> However, the problem of independence can be overstated and can be adequately addressed by suitable funding and other mechanisms, including agreements on who is eligible for public defender services, what services are covered, what level of work is required, and maximum caseloads. The independence of any lawyer who relies on funding from a source other than an individual client is at risk of being compromised by the source of funding, and this is true whether the lawyer is employed by a public defender service or is a private lawyer engaged in publicly funded work. For example, a study of criminal defense in Europe found that there were significant concerns in a number of countries about the independence, and competence, of private lawyers appointed *ex officio*.<sup>185</sup> In fact, provided that public defender schemes are independent of the government they may be better placed to resist inappropriate pressure than a private lawyer who is dependent on *ex officio* appointment by a local court.

### Private lawyers

There is a wide range of schemes under which lawyers in private practice provide criminal defense services to those who cannot afford to pay for them. They operate in different ways, but the main varieties are contract schemes, *ex officio* appointment schemes, and *pro bono* schemes. Although the schemes vary considerably, there are typically limits on the stages of the criminal process which are covered by the schemes, and the amount of work that may be carried out in any particular case, and eligibility is restricted by reference to the financial means of the suspect or defendant.

In broad terms, private lawyers may provide criminal defense services to those who cannot afford to pay for them in the following ways.

- In *contract* schemes, lawyers, or law firms are contracted to provide criminal defense services in individual cases. Different approaches to payment can be found: payment by the hour or per “item” of work, fixed fees for work relating to different stages of the criminal process, fixed fees per case, or a contractual fee for conducting all cases that arise in a fixed period or in a certain location. Fee levels may be imposed by the funder, agreed between the funder and lawyers (or bar associations), or may result from a tendering process. All have advantages and disadvantages. For example, fixed fees may give the funder a significant degree of control over expenditure, but also constrain lawyers’ actions. On the other hand, using hourly fees may be regarded as more equitable but it may be more difficult to control spending. A tendering process may produce a low price for criminal defense services, but it is difficult to ensure minimum levels of quality and such arrangements can lead to dependence by the funder on a limited number of contract suppliers, leading to upward pressure on price over time.<sup>186</sup> These disadvantages are compounded in poorer countries where the justice system is

under-resourced and there are systemic incentives to adjourn cases rather than dispose of them.

- In *ex officio* schemes, individual lawyers are appointed to act in specific cases, normally by a prosecutor or judge who is dealing with a particular suspect or defendant. Fee levels may be set locally, or be subject to national regulation or agreement. Such schemes allow defense lawyers to be appointed as and when required, but they suffer from some significant disadvantages. First, the decision on appointment is made by an official who has a direct interest in the decision he is making, and this is particularly important where the appointment is made by a prosecutor or law enforcement officer. As a result, it is difficult to ensure that decisions are made according to relevant and appropriate criteria, and to ensure that decision-making is consistent across jurisdictions. Further, where decisions are made by judges, it is difficult if not impossible for appointments to be made for stages prior to the first court hearing and, in particular, for the police station stage. These problems are exacerbated where funding comes from court budgets, as in Poland and Uganda, because decisions on appointing a lawyer will inevitably be affected by the size of the local budget.<sup>187</sup> Another problem encountered in a number of countries is that of the independence and quality of the lawyers appointed. There is evidence of inappropriate relationships between lawyers and those who appoint them, and of incompetent lawyers receiving *ex officio* appointments.<sup>188</sup>
- *Pro bono* schemes exist in a variety of forms. In some countries lawyers have a professional obligation to undertake a number of unpaid cases per annum, and in others trainee lawyers are obliged to undertake a number of such cases during their training period. In relation to criminal defense work, *pro bono* schemes are the least satisfactory. It is difficult, if not impossible, to ensure that lawyers appointed have sufficient knowledge, skill, and expertise to conduct criminal defense work, and this is particularly true for schemes using trainee lawyers. Furthermore, an obligation to provide *pro bono* services often leaves lawyers insufficiently motivated to provide a high, or even competent, level of service. Evidence from a range of countries, including the United States, Belgium, Kenya, Lesotho, and Nigeria shows that *pro bono* schemes—while they may encourage lawyers to engage in public service—suffer from fundamental problems which mean that, at best, they are only appropriate as a supplement to other methods of delivering criminal defense services.<sup>189</sup>

Private lawyer schemes do have some potential advantages. Lawyers (or law firms) who undertake legal aid work also do privately funded work so that, in principle, they

may apply the same standards to both forms of work. Bar associations can provide the same support, and expect the same standards, for both privately and publicly funded work.<sup>190</sup> Independence may be enhanced as a result of the public/private mix, and by the power of the legal profession. The private practice model can secure a high degree of flexibility in the provision of criminal defense services. The demand for criminal defense services is not necessarily consistent over time or predictable, and the use of private lawyers can avoid the costs of maintaining public defender offices, which tend to have fixed costs regardless of demand. Where private lawyers are well established and geographically spread, they can also provide a cost-effective service in areas where demand for criminal defense services is low, such as in small towns and rural areas. In addition, as noted earlier, where mainstream provision of criminal defense services is through public defender offices, private lawyers can be used in cases of conflict of interests or at times of high demand for public defender services.<sup>191</sup>

However, the support of bar associations for publicly funded work, and for high professional standards, is by no means universal and there are factors that limit independence in respect of publicly funded work. Providing publicly funded criminal defense services through a private association requires the existence, or the development, of a sufficient number of private lawyers who are willing and able to provide criminal defense services in locations where such services are required. In many countries, especially less developed ones, lawyers are concentrated in major cities and are unable or unwilling to provide services elsewhere. Attracting private practice lawyers to provide legally-aided criminal defense services is difficult in many places, especially where legal aid remuneration rates are low compared to private fees. Criminal defense work is often regarded by lawyers as less attractive than other kinds of work, and lack of specialization makes it difficult to ensure that lawyers have the necessary knowledge and skills to be effective at it. In addition, the structure of the legal profession—in many countries lawyers often practice either alone or in the context of small firms or partnerships—makes it difficult to implement quality assurance schemes. The small size of many lawyers' practices makes it difficult to provide on demand service 24-hours a day.

The most significant disadvantage of the private practice model is cost: the private practice model is usually more expensive than the alternatives. This generalization should be treated with some caution because it is difficult to accurately assess comparative costs and most of the cost studies of private practice models have been conducted in relatively wealthy countries.<sup>192</sup>

### **Paralegals**

In many countries paralegals fulfill a range of functions relating to criminal defense. In some schemes, paralegals work for organizations, such as public defender offices, private law firms, or NGOs, where the majority of legal advisors are fully qualified law-



yers. In others, they work for organizations where paralegals make up the majority of the advisors. In some schemes, such as those in England and Wales, paralegals perform functions that lawyers would otherwise provide. In others, they do work that lawyers would not otherwise do, or work for which they are better qualified or suited than lawyers. The Bronx Defenders in New York, for example, employs investigators, social workers, parents' advocates, and community organizers in order to provide "holistic defense to fight both the causes and consequences of involvement in the criminal justice system."<sup>193</sup> The Paralegal Advisory Service in Malawi uses a "functional" approach to determine "which services lawyers alone can best provide, which services non-lawyers alone can best provide, and which services lawyers and non-lawyers working together can best provide."<sup>194</sup> Similar schemes have been adopted in Bangladesh, and in other African countries such as Sierra Leone, Kenya, South Sudan, and Uganda. Under any scheme, access to and supervision by lawyers, appropriate training, and, ideally some form of certification and quality assurance mechanism, are essential features.<sup>195</sup>

Paralegals may be better suited than lawyers to carry out the more innovative tasks associated with criminal defense work. They are likely to be closer to the communities they serve—in terms of up-bringing, culture, and economic and social status—and thus more effective than lawyers in securing diversion from the formal criminal justice system, providing advice in a form that may be readily understood by clients, and in identifying and securing the cooperation of sureties and witnesses. The costs of paralegal schemes—including costs associated with training and employment—are almost always significantly less than the costs of lawyer-based schemes.

Paralegal schemes do require careful planning and management. The specific functions paralegals are to perform need to be identified and assessed to ensure that their knowledge and skills are matched to the work they are required to do. Any legal or other limitations on access to people in detention, or on functions paralegals can perform, must be taken into account. Attention must be paid to ensure that those advised by paralegals are not disadvantaged compared to those represented by lawyers. However, such challenges are not insurmountable provided that there is the political will to give legal recognition to paralegals, and appropriate mechanisms are in place for supervision, training, and certification.

### **Law students**

Law students can, with appropriate training, supervision, and organization, perform some of the same functions as paralegals, especially in monitoring, facilitating, and improving criminal justice processes. Law school clinics are relatively inexpensive to establish and many are fully supported by the relevant university. While the focus of law school clinics is to educate law students, they can provide services to those who otherwise would not receive legal advice or assistance, and also introduce students to

the unmet legal needs of the disadvantaged and the injustices of the criminal justice system. This can help to inculcate a public service ethos in prospective lawyers and motivate them to provide legal services to the disadvantaged throughout their careers—or at least support other lawyers who carry out public interest work.

In some countries, the involvement of law students in criminal cases is well developed. Criminal defense clinics have been established, for example, at universities in Nigeria, China, Georgia, Afghanistan, and Ethiopia, among other countries. Over a third of the 147 law school clinical programs in the United States provide legal services in the area of criminal defense.<sup>196</sup> In addition to providing direct legal services to criminal defendants, the work done by student clinical programs ranges from reviewing death penalty cases,<sup>197</sup> to working with lawyers and NGOs abroad on public interest litigation,<sup>198</sup> and producing tools to enable community members and persons in conflict with the law to navigate the justice system prior to trial.<sup>199</sup> While only the United States and a few other countries allow law students working with law school legal clinics to represent clients in court, with appropriate training and supervision law students can perform many other tasks relating to legal representation of suspects and defendants, including interviewing and counselling clients, investigating facts and gathering evidence, conducting legal research, and drafting documents. Moreover, in countries where criminal cases can be resolved through informal mechanisms, law students are able to mediate disputes and negotiate settlements that allow formal charges to be dropped.

Although schemes involving law students have many benefits, they also have a number of limitations. Given the need for legal advice and assistance to be available around the clock, and the importance of continuity of representation, it is difficult to use students for the provision of front-line services at the early stages of the criminal process, especially at police stations. Student schemes require careful organization and professional supervision to ensure the services provided are satisfactory. Such requirements may be difficult to fulfill in less wealthy nations. In addition, because of the educational component, law students are only able to serve a relatively small number of clients for a limited amount of time (either a semester or an academic year, depending on how the clinic has been set up). Moreover, law schools are few and far apart in some countries. It has been estimated that in sub-Saharan Africa there are well over one hundred law faculties and many other law schools, but distribution is highly skewed, with almost half of all law faculties in Africa located in Nigeria and South Africa.<sup>200</sup>

## 5.4 Choosing the Appropriate Method of Provision

Decisions in any particular country about appropriate models for the delivery of criminal defense services have to be based on a range of factors, including the numbers and availability of lawyers willing and able to provide publicly funded services, financial and other resources available, the power and attitudes of lawyers and bar associations, and patterns of demand for those services. In practice, decisions are often made without appropriate consideration of the needs of actual and potential service users. The result is that the decisions are often dominated by a “top down” view of the criminal justice system, and by the views and interests of existing legal institutions and professionals. As one observer noted:

Today’s heavy emphasis on judges, lawyers and courts is analogous to what the public health field would look like if it mainly focused on urban hospitals and the doctors staffing them, and largely ignored nurses, other health workers, maternal and public education, other preventive approaches, rural and community health issues, building community capacities, and non-medical strategies (such as improving sanitation and water supply)...The result is that the paradigm places great faith in a narrow view of the legal field: worshipping at the altar of institutionalization, as it were.<sup>201</sup>

There is growing awareness that, as with primary health services, there is a need for primary justice services. The emergence of legal empowerment strategies in poor communities, growing recognition of paralegals as a cadre of front-line legal service providers, and increasing support amongst donors, academics, and university law clinics, suggest a broadening outlook in response to the unmet needs of ordinary people. Put another way, there is a need for “different types of lawyers”<sup>202</sup> better suited to the particular circumstances, especially in low income countries.

It is important to recognize that, quite apart from meeting international and human rights obligations, spending on criminal defense services should not be regarded as a net cost. There are many ways in which such spending may both reduce other forms of public expenditure and contribute to respect for the law in particular and the development of civil society in general. The need in any particular country, however, is for services and models of delivery that are effective, affordable, and tailored to local conditions. The objective, therefore, should be to find a model of provision that is appropriate to the needs of the majority of people and which is affordable to the state.



## 6. Conclusion

Around the world, millions of people each year are unnecessarily, and avoidably, arrested and incarcerated in pretrial detention, often for lengthy periods of time, and frequently in unsuitable, unsanitary, or dangerous conditions. The adverse effects—on individuals, their families and communities, on criminal justice personnel, on states—are well documented. The criminal justice systems in many countries are dysfunctional—both a cause and an effect of excessive arrest and pretrial detention. Not only do such systems fail to ensure that people suspected or accused of crime are dealt with appropriately, with dignity, and in accordance with international laws and norms, but they fail to protect the community, and encourage disrespect for criminal justice institutions and the rule of law.

Suspects and defendants lack the knowledge and skills, and often the social standing, to effectively engage in the process. Systems and procedures are often inefficient and counter-productive, with the result that defendants are not produced in court on the right day and at the right time, witnesses and sureties are not notified of court hearings, prosecutors and judges lack the information to make rational and just decisions, and backlogs of cases are never cleared. A lack of co-ordination between criminal justice agencies leads to ineffective court hearings. Recording and tracking mechanisms are inadequate or non-existent, so there is no reliable record of interviews with suspects and witnesses, and of decisions made, and prisoners get lost in the system. The professional standards of police officers, judges, and other criminal justice officials are compromised by lack of knowledge and training and the daily necessity of coping with

inadequate resources and overburdened systems. With limited involvement by other professionals and the community, and inadequate information about how the system and processes operate, there is a lack of transparency and accountability. As a result, strategies designed to bring about improvements, and pathways to a more rational and effective system, remain hidden.

Suspects and defendants rarely benefit in practice from those procedural safeguards that exist in theory and are fundamental to fair trial guarantees. The first of such mechanisms is a right to counsel and legal aid. The overwhelming majority of suspects and defendants around the world are too poor to afford legal advice and representation. In many countries, state-funded legal services are non-existent, or they are narrow in scope, poorly funded, and of extremely poor quality. Diverse “safety net” schemes—haphazard *ex officio* panel appointment systems, assigning random attorneys from the practicing bar at very low government pay rates—produce erratic or poor quality services and, in turn, sub-standard justice. As a result, the most poor and vulnerable are detained and sentenced to prison without effective legal representation. In some jurisdictions, the government is obliged to provide legal assistance only regarding accusations of the most serious crimes, leaving the majority of defendants facing imprisonment without legal counsel. All too often, the outcomes of criminal proceedings—guilt or innocence, freedom or detention—hinge arbitrarily on defendants’ finances.

The right to legal advice, assistance, and representation is the foundation of all other rights in the criminal process. Without a lawyer or legal representative, an accused person is less likely to be aware of his or her legal rights, and less likely to enjoy the procedural safeguards provided for under international law. Although this is of concern in its own right, it is also linked to the rest of the criminal justice process: the likelihood and severity of pretrial detention, police abuse and torture, illegal and prolonged detention, and the severity of punishment and prison overcrowding, are magnified by the lack of access to good quality legal advice and representation.

Although international law, and national laws in many countries, suggest an express or implied governmental responsibility for providing free and effective legal assistance to indigent criminal defendants, there is little understanding among policy-makers of the need for an organized, systematic response to fulfilling this responsibility. As a result, government policy in this area is often *ad hoc*, ill-conceived, or poorly administered. Moreover, legal aid for criminal defendants is often overlooked in donor-supported criminal justice initiatives. No international standards prescribe a particular system or structure to ensure the delivery of legal aid. Each state must tailor appropriate solutions to its own context. Failure to find cost-effective models for managing and delivering legal aid, combined with a lack of appreciation of the importance and benefits of effective legal aid, result in such rights and obligations remaining theoretical and illusory.

Experience from a range of countries and regions shows that early intervention by lawyers and paralegals in criminal justice processes can have a positive impact on many, if not most, of these problems and deficiencies. By advising and assisting suspects and accused, the involvement of lawyers and paralegals can lead to more appropriate charge and pretrial detention decisions, and to fewer people being unnecessarily held in pretrial detention, or to their being held for shorter periods of time. By working with clients, tracing witnesses, and contacting sureties, lawyers and paralegals can assist in obtaining relevant information necessary for police, prosecutors, and judges to make appropriate decisions. They can identify people who are unnecessarily or unlawfully detained and—through information, education, and representation—secure their release. They can identify suspects and defendants who are children or otherwise vulnerable, or who are in need of medical attention, and seek to ensure that they are treated appropriately. They can help coordinate the people and agencies involved so that court hearings are effective. And lawyers and paralegals can, where appropriate, assist with the diversion of people from formal criminal proceedings.

In addition to working with individual clients, lawyers and paralegals can, provided that they are suitably trained and organized, also have a positive impact on criminal justice systems and the wider community. The presence of lawyers and paralegals in police stations and, to an extent, in courts and in prisons, can render criminal justice system activities more transparent and hence more accountable. Lawyers and paralegals can educate suspects and accused persons, their families, friends, and communities, and can also provide training for the police, judges, and other criminal justice officials. They are well placed to identify systemic problems, and to develop and realize effective solutions. By engaging in such activities, they can improve confidence in the system and, as a result, foster greater social cohesion and respect for the rule of law.

Schemes using lawyers and paralegals to intervene at the early stages of the criminal process can, with relatively modest investment, produce significant positive outcomes both for individuals and for the wider community. Such investment can produce direct financial benefits flowing from reduced pretrial detention and more efficient processes and systems. It can also produce less direct, but no less real, benefits which ultimately can contribute to the reduction of crime and to the enhancement of democratic accountability.





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2010) (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10176&LangID=E>).

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# Notes

1. “Pretrial detention” is defined as the period during which an individual is deprived of liberty (including detention in police lock-ups) through to conclusion of the criminal trial (including appeal). Other terms commonly used for pretrial detainees include “remand prisoners,” “remandees,” “awaiting trial detainees,” “untried prisoners,” and “unsentenced prisoners.”

2. See generally Open Society Justice Initiative, *Community-based Paralegals: A Practitioner’s Guide* (New York: Open Society Foundations, 2010).

3. 12th UN Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 12–19 April 2010, available at [http://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador\\_Declaration/Salvador\\_Declaration\\_E.pdf](http://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador_Declaration/Salvador_Declaration_E.pdf).

4. See generally Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2010).

5. ICCPR, art. 9. ACHR, art. 7 is almost identical, as is ACHPR, art. 6. The ECHR, art. 5 does not contain an express prohibition on arbitrariness, although this is regarded by the ECtHR as fundamental, but it does set out an exhaustive list of exceptions. Article 5(1)(c) permits deprivation of liberty by lawful arrest or detention for the purposes of bringing the person before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably necessary to prevent them committing an offense or fleeing after having done so.

6. ICCPR, art. 9(2). ECHR, art. 5(2) is similar, but in addition requires that the information be given in a language that the person understands. ACHR, art. 7(4) requires such information to be given to anyone “who is detained.” There is no equivalent provision in the ACHPR.

7. ICCPR, art. 9(3). Similar provisions are found in ECHR, art 5(3), and ACHR, art. 7(5). The ACHPR art. 7(1)(d) does provide for the right to be tried within a reasonable time before an

impartial court or tribunal, but there is no provision regarding prompt production before a judge, nor to release pending trial, although these are provided for by the ACHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, paras. M5 and N3 respectively.

8. ICCPR, art. 14(2). See also ECHR, art. 6(2); ACHR, art. 8(2); ACHPR, art. 7(1)(b).

9. ICCPR, art. 14(3). See also ECHR, art. 6 § 1, which refers to the right to a hearing within a reasonable time, as does ACHR, art. 8(1), and ACHPR, art. 7(1)(d).

10. ICCPR, art. 14(3)(b); ECHR, art. 6(3)(a); ACHR, art. (2)(b). The ACHPR does not contain a parallel provision, although art. 7(1)(c) does provide for a right to defense, and the right to adequate time and facilities is provided for by the ACHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, para. N3.

11. ICCPR, art. 14(3); ECHR art. 6(3)(c). There is a similar provision in AHRC, art. 8(2) although it is open to signatory states to determine what state-aided legal assistance should be provided. The ACHPR, art. 7(1)(c) provides that a person has the right to be defended by a lawyer of his choice, but makes no provision for legal aid. However, this is provided for by the ACHPR *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, para. H.

12. Council of the European Union, 12141/09, DROIPEN 69, COPEN 142, Brussels 23 July 2009, and European Commission, *Action Plan for Implementing the Stockholm Programme*, COM(2010) 171 final, Brussels 20 April 2010.

13. European Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, Green Paper from the Commission, Brussels 19 February 2003, COM(2003) 75 final, para. 2.5.

14. Havana Principles on the Role of Lawyers, agreed by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, Principles 1, 2 and 3.

15. Rome Statute Article 55(2)(c) and (d).

16. The AHRC provides that the right to legal assistance applies to “every person accused of a criminal offence” (art. 8(2)), and the ACHPR refers to the right to legal assistance in the context of the right of every individual ‘to have their cause heard’ (art. 7(1)).

17. Committee for the Prevention of Torture, *2nd General Report*, CPT/Inf (92) 3, 36, available at <http://www.cpt.coe.int/en/annual/rep-02.htm>.

18. ECtHR 8 February 1996, *John Murray v UK* No. 18731/91; ECtHR 18 February 2010, *Zaichenko v Russia* No. 39660/02; ECtHR 13 October 2009, *Dayanan v Turkey* No. 7377/03; and ECtHR, Grand Chamber, 27 November 2008, *Salduz v Turkey* No. 36391/02.

19. ECtHR 13 October 2009, *Demirkaya v Turkey*, No. 31721/02; and ECtHR 14 October 2010, *Brusco v France*, No. 1466/07. Following a determination of the French Constitutional Council that denial of legal assistance during police interrogation was unconstitutional (Decision n° 2010-14/22 QPC of July 30th 2010), the French National Assembly adopted a government proposal to introduce such a right. Similarly, following a decision of the UK Supreme Court in *Cadder v HMA* [2010] UKSC 43, the Scottish Assembly adopted a law giving suspects a right to legal assistance during police interviews.

20. The Statute of the International Tribunal for the former Yugoslavia; Art. 18(3), and the Statute of the International Tribunal for Rwanda Art. 17(3) both provide for legal assistance during interrogation, and see CPT 2nd General Report (CPT/Inf (92) 3), sections 36–38.
21. See note 12.
22. ACHR Article 2(d) and (e).
23. *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, EA Ser.L/V/II.62, doc. 10, rev. 3, 1983, at p. 100.
24. *Annual Report of the Inter-American Commission, 1985–1986*, OEA/Ser.L/V/II.68, doc. 8, rev. 1, 1986, p. 154. See further Association for the Prevention of Torture Legal Briefing, *Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty* (APT, March 2010), available via [http://www.apt.ch/index.php?option=com\\_docman&Itemid=260&lang=en](http://www.apt.ch/index.php?option=com_docman&Itemid=260&lang=en).
25. Article 7(1).
26. PGRFTLA Principle M(2)(b), (e) and (f). See further the Lilongwe Declaration and Plan of Action, 22–24 November 2004.
27. See text to note 14.
28. ECtHR 10 June 1996, *Benham v UK*, No. 19380/92; and see E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 41.
29. See, generally, E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), chs. 2, 12 and 13; PILI, *Making Legal Aid a Reality* (Budapest: PILI, 2009).
30. See note 12.
31. PGRFTLA, Principle G(b).
32. PGRFTLA, Principle H(a).
33. PGRFTLA, Principle H(b).
34. Principles 16 and 18.
35. ECtHR 21 April 1998, *Daud v Portugal*, No. 22600/93, paras. 36–42.
36. Although such terms have been interpreted in relation to a number of the Conventions and Charters referred to. For an examination of the interpretation of such terms see, for example, S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press 2005).
37. United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo rules), resolution adopted by the General Assembly, 14 December 1990, A/RES/45/110, rule 6.1.
38. See further Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011) and the papers referred to at p. 6 therein.
39. For example, because a person may be detained in custody for only part of the period prior to trial.
40. Unless otherwise stated, the figures given in this section are taken from M. Schönteich, “The Scale and Consequences of Pretrial Detention around the World,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008). Jurisdictions take

different approaches to defining, and collecting statistics on, pretrial detention. For a discussion of different approaches within Europe see A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), p. 13. For an analysis of the different ways of measuring pretrial detention see Open Society Justice Initiative, *The Socio-economic Impact of Pretrial Detention* (New York: Open Society Foundations 2010), p. 11.

41. Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2010), p. 11. See also, R. Walmsley, *World Pretrial/Remand Imprisonment List* (London: International Centre for Prison Studies, 2008), at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf>.

42. Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2010), p. 15.

43. Unless otherwise stated, the statistics in this paragraph are taken from R. Walmsley, *World Pretrial/Remand Imprisonment List* (London: International Centre for Prison Studies, 2008), at <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf>.

44. [http://www.prisonstudies.org/info/worldbrief/wpbc\\_county.php?country=30](http://www.prisonstudies.org/info/worldbrief/wpbc_county.php?country=30).

45. A. Nwapa, "Building and Sustaining Change: Pretrial Detention Reform in Nigeria," in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention*, (New York: Open Society Foundations, 2008), p. 86.

46. Although that figure includes those who have not exhausted their appeal opportunities. See E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), ch. 9, para. 1.4. For further statistics on pretrial detention in Europe see A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009).

47. Accompanying Document to the Proposal for a Council Framework Decision on the European Supervision Order in Pretrial Procedures Between Member States of the EU, SEC(2006)1079 (Brussels: European Commission, 2006) pp. 10, 11.

48. L. Ehlers, "Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa," in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 136.

49. A. Nwapa, "Building and Sustaining Change: Pretrial Detention Reform in Nigeria," in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 86.

50. A study by the Humanitarian Legal Assistance Foundation (HLAF) in 2008 found that in two prisons in Manila (both with populations exceeding 3,000 prisoners) the average period spent in custody from arrest to decision by the court was 6 years and 6 months in Quezon City Jail, while in Mandaluyong City Jail it was 4 years and 8 months: R. Abitria, *How Speedy Are Philippine Criminal Cases Disposed of? A Survey of the Cases in Quezon City Jail and Mandaluyong City Jail* (Pasig City: HLAF, 2008).

51. See, Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations 2011), section II, available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/socioeconomic-impact-deten](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/socioeconomic-impact-deten)

tion-20110201, and the three other papers in the same series: *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-torture-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409); *Pretrial Detention and Public Health: Unintended Consequences, Deadly Results*, available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-health](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-health); and *Pretrial Detention and Corruption: Unable to Pay Bribes, Millions Languish in Detention*, available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409).

52. See, for example, ECtHR 29 November 1988, *Brogan and Others v UK*, Series A, no. 145-B, (1989) 11 EHRR 117.

53. Although if the person is charged within 36 hours of initial detention at a police station, they may not be produced before a court for up to a further 24 hours. terrorism. In the UK, terrorism suspects can be held up to 14 days without charge, but a judge must approve their detention beyond 48 hours.

54. See the UN Office of the High Commissioner for Human Rights *Statement by the Working Group on Arbitrary Detention upon Conclusion of its Mission to Malaysia (7–18 June 2010)* (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10176&LangID=E>). The statement also notes that detention for up to two years, renewable without limit, may be authorized by the Minister of Home Affairs without recourse to the courts. The position is similar for those detained as suspect drug traffickers.

55. E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 435.

56. See, for example, ECtHR 5 April 2005, *Nevmerzhitsky v Ukraine*, no. 54825/00, and ECtHR 24 April 2003, *Smirnova v Russia*, Nos. 46133/99 and 48183/99.

57. A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), p. 64.

58. E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), ch. 10, para. 2.3.1.

59. R. Cohen *et al.*, *Fair Trials in Nepal: A Critical Study*, Advocacy Forum, p. 9.

60. R. Cohen *et al.*, *Fair Trials in Nepal: A Critical Study*, Advocacy Forum, p. 8.

61. See A. Morales, P. Pérez and G. Welsch, *Chile: Caracterización de la población en prisión preventiva* (Santiago de Chile: Fundación Paz Ciudadana, March 2011).

62. M. Duce, C. Fuentes and C. Riego, “The Impact of Criminal Procedure Reform on the Use of Pretrial Detention in Latin America” (Santiago: Centro de Estudios de Justicia de las Americas), available at [http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search\\_result](http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search_result).

63. A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), p. 92.

64. A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), p. 95.

65. For a review of such factors in the European context see E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 603.
66. A. Nwapa, "Building and Sustaining Change: Pretrial Detention Reform in Nigeria," in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), pp. 88 and 89.
67. R. Cohen et al., *Fair Trials in Nepal: A Critical Study*, Advocacy Forum, p. 8.
68. J. Sandefur, B. Siddiqi, and A. Varvaloucas, Baseline Evaluation Report (Unpublished draft, Open Society Justice Initiative, 2011).
69. Paralegal Advisory Service (Uganda), *Progress report April–June 2010*, p. 14.
70. J. Sandefur, B. Siddiqi, and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, Open Society Justice Initiative, 2011).
71. UN Office of the High Commissioner for Human Rights *Statement by the Working Group on Arbitrary Detention upon Conclusion of its Mission to Malaysia (7–18 June 2010)* (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10176&LangID=E>).
72. "[T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." (Per Justice Powell in *Barker v Wingo* (1972) 407 U.S. 514.)
73. A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), pp. 80–82.
74. M. Duce, C. Fuentes and C. Riego, "The Impact of Criminal Procedure Reform on the Use of Pretrial Detention in Latin America" (Santiago: Centro de Estudios de Justicia de las Americas), available at [http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search\\_result](http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search_result).
75. The consequences to the defendant are drastic, especially as the National Prosecution Service report a conviction rate of under 12%. See NPS *Quarterly Performance Report*, 2009.
76. Study of Cook County Video Bond Court conducted by clinical law students in the Bluhm Legal Clinic, Northwestern University, Chicago, USA, Autumn 2007.
77. M. Duce, C. Fuentes and C. Riego, "The Impact of Criminal Procedure Reform on the Use of Pretrial Detention in Latin America" (Santiago: Centro de Estudios de Justicia de las Americas), available at [http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search\\_result](http://www.cejamericas.org/portal/index.php/en/virtual-library/virtual-library/search_result).
78. R. Saxena, "Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India," in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 60; Bagenard et al, *Activating the Criminal Justice System in Bangladesh* (EC, 2005).
79. J. Sandefur, B. Siddiqi, and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, Open Society Justice Initiative, 2011).
80. M. Gottfredson and D. Gottfredson, *Decision Making in Criminal Justice: Towards a Rational Exercise of Discretion* (New York: Plenum Press, 1988).

81. J. Sandefur, B. Siddiqi, and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, Open Society Justice Initiative, 2011).
82. R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention*, (New York: Open Society Foundations, 2008), p. 61; A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention*, (New York: Open Society Justice Initiative, 2008), p. 89.
83. A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Justice Initiative, 2008), p. 89.
84. British Council, *Final Report*, DFID Project to Clear the Homicide Backlog in Malawi, Annex 1D, September 10, 1997.
85. See Open Society Justice Initiative, *Pretrial Detention and Corruption: Unable to Pay Bribes, Millions Languish in Detention* (Open Society Foundations, 2010) available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409/summary-pretrial-detention-corruption.20100409.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409/summary-pretrial-detention-corruption.20100409.pdf); Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011), available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/socioeconomic-impact-detention-20110201](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/socioeconomic-impact-detention-20110201); and J. Lambsdorff, “Consequences of Corruption—What Do We Know from a Cross-Section of Countries?” (Passau: Passau University, 2005).
86. See, for example, R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Pretrial Detention* (New York: Open Society Foundations, 2008), p. 60; J. Sandefur, B. Siddiqi, and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, Open Society Justice Initiative, 2011).
87. See, in relation to England and Wales, A. Sanders, R. Young and M. Burton, *Criminal Justice* (4th edn, Oxford: Oxford University Press, 2010), p. 463.
88. See, for example, E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), ch. 13, para. 4.6.2 (Hungary and France); A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Pretrial Detention* (New York: Open Society Foundations, 2008), p. 89 (Nigeria); M. Duce, C. Fuentes and C. Riego, “The Impact of Criminal Procedure Reform on the Use of Pretrial Detention in Latin America” (Santiago: Centro de Estudios de Justicia de las Americas), available at [http://www.cejamerica.org/portal/index.php/en/virtual-library/virtual-library/search\\_result](http://www.cejamerica.org/portal/index.php/en/virtual-library/virtual-library/search_result) (Latin America). In East Africa, the police practice of taking a relative of a gang member into custody is widely denounced by civil society organizations.
89. See Open Society Justice Initiative, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf).
90. For example, in Nepal the “police routinely falsify arrest records or fail to keep an appropriately detailed arrest record” (R. Cohen *et al.*, *Fair Trials in Nepal: A Critical Study*, Advocacy Forum,

p. 8). The Special Rapporteur on Torture found that the police “often do not register the names of arrested/detained persons immediately” (UNHRC “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak,” 17 February 2005, UN Doc A/HRC/10/44/Add.5, p. 67).

91. See, for example, R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 61 (India); E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), ch. 13, para. 4.6.2 (France and Hungary).

92. See, for example, R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Pretrial Detention* (New York: Open Society Foundations, 2008), p. 61 (India). A study in the USA showed that in the counties in the study, an average of 31% of defendants who remained in custody throughout the pretrial period did so solely due to an inability to post bail, and in some counties the figure was over 50%. See PJI, *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes* (Washington DC: Pretrial Justice Institute, 2009), p. 17.

93. See, for example, R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 61 (India); A. van Kalmthout, M. Knapen and C. Morgenstern (eds.), *Pretrial Detention in the European Union* (Tilburg: Wolf Publishers, 2009), p. 95 (Belgium, Hungary, Latvia, and Poland).

94. See Penal Reform International, *Index of Good Practices in Reducing Pretrial Detention*, Version 7, 2005, p. 29.

95. E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), ch. 13, paras. 5.1 and 5.2.

96. T. Spronken, G. Vermeulen, D. de Vocht and L. Van Puyenbroeck, *Study on Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union—2008 Update* (Maastricht: Maastricht University/IRCP, 2009), p. 92.

97. ECtHR, Grand Chamber, 27 November 2008, No. 36391/02.

98. The position prior to the *Salduz* case is described in E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Antwerp: Intersentia, 2007) p. 168, and the law in this respect has not changed.

99. E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 447.

100. UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 100. See also PRI/Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (PRI, 2007).

101. R. Cohen *et al.*, *Fair Trials in Nepal: A Critical Study*, Advocacy Forum, p. 29.



102. D. Colbert, R. Paternoster and S. Bushway, “Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,” (2002) 23 *Cardozo Law Review* 5 1719–1793, at pp. 1723 and 1724.
103. P. Acosta, Chief Public Attorney, Public Attorney’s Office, Manila, interviewed March 8, 2011.
104. See, for example, T. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006), and J. Tankebe, “Public Confidence in the Police: Testing the Effects of Public Experiences of Police Corruption in Ghana,” (2010) 50 *British Journal of Criminology* 296–319.
105. Known as Measure B of the EU Roadmap of procedural rights. See *Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings* COM(2010) 392/3; and Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01). See generally T. Spronken, *An EU-Wide Letter of Rights* (Antwerp: Intersentia, 2010).
106. I. Elveris, G. Jahic and S. Kalem, *Alone in the Courtroom: Accessibility and Impact of Criminal Legal Aid* (Istanbul: Istanbul Bilgi University Publications, 2007); E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 510.
107. R. Cohen et al, *Fair Trials in Nepal: A Critical Study*, Advocacy Forum, p. 8.
108. A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 89.
109. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT Standards*, 2009, para. 50, available via <http://www.cpt.coe.int/en/docss-standards.htm>.
110. See, for example, T. Sullivan, “Recording Federal Custodial Interviews” (2008) 45 *American Criminal Law Review* 1297, at 1298.
111. Havana Principles on the Role of Lawyers, agreed by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.
112. “[T]he Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial”: ECtHR, Grand Chamber, 27 November 2008, *Salduz v Turkey*, No. 36391/02, para. 54.
113. In EU jurisdictions, this will be provided for by Measure B of the EU Roadmap of procedural rights. See note 11.
114. It was held in ECtHR 24 September 2009, *Pishchalnikov v Russia*, No. 7025/04, at para. 79, that while the right to legal advice may be waived by the suspect, such a waiver “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right.”
115. England and Wales has long established duty lawyer schemes covering all police stations and magistrates’ courts, and under which all defendants who are produced in court from police custody are entitled to be represented by a duty lawyer. See generally E. Cape, *Defending Suspects at Police Stations* (5th edn., London: LAG, 2006).

116. A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008).

117. D. Colbert, R. Paternoster and S. Bushway, “Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,” (2002) *Cardozo Law Review* 23: 1719–93, pp 1793–53–1757. See generally R. Bowles and M. Cohen, *Pretrial Legal Aid for Criminal Defendants: A Cost-Benefit Approach*, (London and New York: Department for International Development/ Open Society Justice Initiative).

118. V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (London: Legal Services Research Centre, 2010), p. 81.

119. R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 66.

120. “Locked up and Forgotten?”, Conference on Penal Reform in Developing Countries, 6/7 October 2010, available at [http://www.penalreform.org/files/GTZ\\_locked\\_UP\\_forgotten.pdf](http://www.penalreform.org/files/GTZ_locked_UP_forgotten.pdf).

121. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 76.

122. Sierra Leone, Justice Sector Development Programme (JSDP), *Annual Report 2010* (London: UK Department for International Development (DFID), 2010).

123. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 78.

124. UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 53; A. Stapleton, *Empowering the Poor to Access Criminal Justice—A Grass-root’s Perspective*, Legal Empowerment Working Papers No. 2 (Rome: IDLO, 2010), p. 4.

125. See generally, Open Society Justice Initiative, *Pretrial Detention and Corruption: Unable to Pay Bribes, Millions Languish in Detention* (New York, Open Society Foundations, 2010), available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409).

126. See generally, *Country Visit Reports of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, available at: <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Visits.aspx>.

127. See generally, Open Society Justice Initiative, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York: Open Society Foundations, 2011), available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf); the various publications of the Association for the Prevention of Torture, available via <http://www.apt.ch/>; the various reports of the European Committee for the Prevention of Torture, available via <http://www.cpt.coe.int/en/about.htm>; and D. Narayan, *Voices of the Poor: Can Anyone Hear Us?* (Oxford: Oxford University Press, 2000) pp. 249 ff.

128. See, for example, Association for the Prevention of Torture, *Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty* (London: APT, 2010), p. 1.
129. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards* (CPT 2006) p. 8.
130. Basic Principles for the Treatment of Prisoners, adopted and proclaimed by UN General Assembly resolution 45/III of 14 December 1990.
131. D. Wolfe, “Policy Reform Is the Key to Harm Reduction,” *Harm Reduction News* 5 (3), 2004.
132. See generally, Open Society Justice Initiative, *Pretrial Detention and Public Health: Unintended Consequences, Deadly Results* (New York: Open Society Foundations, 2010), available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-health](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-health).
133. The EU is planning measures to protect vulnerable suspects and defendants. See note 11.
134. UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 50; C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 79.
135. J. Flatley et al, *Criminal Statistics: England and Wales 2008 Statistical Bulletin* (London: Home Office, 2010). For an analysis see R. Young, “Street Policing after PACE: The Drift to Summary Justice,” in E. Cape and R. Young, *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford: Hart, 2008).
136. Penal Reform International, *Index of Good Practices in Reducing Pre-trial Detention*, version 7, 2005, at p. 27.
137. Under the Criminal Procedure Act 1991, Art. 36(1).
138. UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 59.
139. See section 1.1 above.
140. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 80.
141. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 79.
142. Examples taken from C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), pp. 75, 76 and 78.
143. Examples taken from A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), pp. 91 and 95.
144. Annual Activity Report October 2009–September 2010, Madaripur Legal Aid Association, Bangladesh, February 2011, p. 24.

145. V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (London: Legal Services Research Centre, 2010), p. 79.

146. See, for example, C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), pp. 75 and 78.

147. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 76.

148. For example, the Open Society Justice Initiative engages in strategic litigation in national, regional, and international courts and tribunals across a broad range of human rights issues. See <http://www.soros.org/initiatives/justice/litigation/more>.

149. ECtHR, 28 October 1998 *Assenov v Bulgaria* No. 000, cited by J. Goldstone, ‘Public Interest Litigation in Central and Eastern Europe’ in *Justice for the Poor* (Oxford: Oxford University Press, 2009) p. 268. The case has been followed in a number of subsequent judgements of the ECtHR. See generally Open Society Justice Initiative, *From Judgement to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations, 2010).

150. R. Saxena, “Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 66.

151. For examples, see C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 80; and A. Nwapa, “Building and Sustaining Change: Pretrial Detention Reform in Nigeria,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 95.

152. C. Msiska, “On the Front Lines: Insights from Malawi’s Paralegal Advisory Service,” in Open Society Justice Initiative, *Justice Initiatives: Pretrial Detention* (New York: Open Society Foundations, 2008), p. 75.

153. Open Society Justice Initiative, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York: Open Society Foundations, 2011), available at [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf).

154. Association for the Prevention of Torture, *Legal Safeguards to Prevent Torture: The Right of Access to Lawyers for Persons Deprived of Liberty* (Geneva: APT, 2010), p. 1.

155. See D. Colbert, R. Paternoster and S. Bushway, “Do Attorneys Really Matter? The empirical and legal case for the right of counsel at bail” (2002) 23 *Cardozo Law Review* 5, 1719–1793, at pp. 1758–1761.

156. See for example D. Dixon, *Interrogating Images: Audio-visually Recorded Police Questioning of Suspects* (Sydney: Sydney Institute of Criminology, 2007), p. 262. For evidence of the impact of audio-recording of police interviews in England and Wales, see D. Brown, *PACE Ten Years on: A Review of the Research* (London: Home Office, 1997) ch. 7.

157. See the Lilongwe Plan of Action for implementing the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa*, for a comprehensive statement of actions to be taken in the African context, many of which are relevant to other regions.

158. For the position in Europe, see E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010). For the position in the USA see, for example, the National Association of Criminal Defense Lawyers website at <http://www.nacdl.org/public.nsf/DefenseUpdates/Index?OpenDocument>, and the reports of the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association, at [http://www.americanbar.org/groups/legal\\_services/legal\\_aid\\_indigent\\_defendants/resources/reports\\_studies.html](http://www.americanbar.org/groups/legal_services/legal_aid_indigent_defendants/resources/reports_studies.html).

159. In some countries the number of lawyers is very low. For example, in Sierra Leone there are only 298 lawyers for a population of 5 million, in Uganda 2,000 lawyers for a population of 32 million, and in Tanzania it has been estimated that in 13 out of 21 regions there are no lawyers at all. See UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 14.

160. Havana Principles on the Role of Lawyers, agreed by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, Principle 15.

161. See D. McQuoid-Mason, "South African Legal Aid in Noncriminal Cases," in PILI, *Making Legal Aid a Reality* (Budapest: Public Interest Law Institute, 2009). Further information can be obtained from the Legal Aid South Africa web-site at <http://www.legal-aid.co.za/>. For examples from richer countries see: the Legal Services Agency, New Zealand, at <http://www.lsa.govt.nz/index.php>; the Legal Services Commission, England and Wales, at <http://www.legalservices.gov.uk/>; the Scottish Legal Aid Board, at <http://www.slab.org.uk/>; and Legal Aid Ontario, at <http://www.legalaid.on.ca/en/>.

162. See further E. Cape, *Defending Suspects at Police Stations* (5th edn, London: LAG), ch. 1, as well as Chapter 4 of this publication.

163. International Renaissance Foundation, *Public Defender Offices Report 2009* (Kyiv: IRF, 2010).

164. J. Sandefur, B. Siddiqi and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, OSJI, 2011).

165. Details of the accreditation scheme may be obtained from <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation-scheme.page>.

166. See [http://www.legalservices.gov.uk/docs/cds\\_main/Accrepsi.pdf](http://www.legalservices.gov.uk/docs/cds_main/Accrepsi.pdf) for details. For other guidance on approaches to training and certification, see Open Society Justice Initiative, *Community-based Paralegals: A Practitioner's Guide* (New York: Open Society Foundations, 2010), ch. 7.

167. One of the two forms of fully qualified lawyer in England and Wales, the other being known as barristers.

168. L. Bridges and S. Choongh, *Improving Police Station Legal Advice* (London: Law Society, 1998).

169. UNODC, *Handbook on improving access to legal aid in Africa* (New York: UN, 2011), p. 9. For the range of models in Latin America, see C. Biebesheimer and F. Kejia (eds.), *Justice Beyond Our Borders* (Washington: Inter-American Development Bank, 2000), ch. 2.

170. C. Ogletree and Y. Sapir, "Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences" (2004) 29 *NYU Rev L & Soc Change* 203, p. 221.

171. International Renaissance Foundation, *Public Defender Offices Report 2009* (Kyiv: IRF, 2010), p. 55.

172. See, for example, S. Ogier and R. Tait, *Evaluation of the Public Defence Service Pilot: Final Report* (Auckland: Martin Jenkins, 2008), p. 6.

173. In England and Wales standards are controlled through the contracting system, which can be accessed at <http://www.legalservices.gov.uk/criminal/contracting/10652.asp>. For the range of standards in the USA see the National Association of Criminal Defense Lawyers website at <http://www.nacdl.org/public.nsf/DefenseUpdates/Standards?OpenDocument>.

174. This can be for a variety of reasons, including economic efficiency, but may also be because it is believed that paralegals are more suited to certain types of work. See, for example the account of the Bronx Defenders' "holistic" approach to defending clients at <http://www.bronxdefenders.org/our-work/holistic-defense>.

175. See <http://www.defensoriapenal.cl/> for the official website (in Spanish).

176. See International Renaissance Foundation, *Public Defender Offices Report 2009* (Kyiv: IRF, 2009).

177. See, for example, the Bronx Defenders at <http://www.bronxdefenders.org/>, and the Legal Aid Society at <http://www.legal-aid.org/en/criminal/criminalpractice.aspx>, both based in New York, and the Public Defender Services for the District of Columbia, based in Washington, D.C., at <http://www.pdsdc.org/>. See also K. Akester, *Public Defenders: Learning from the US experience* (London: Justice, 2001).

178. For an evaluation see L. Bridges *et al.*, *Evaluation of the Public Defender Services in England and Wales* (London: The Stationery Office, 2007).

179. For an evaluation see T. Goriely *et al.*, *The Public Defence Solicitors' Office in Edinburgh: An Independent Evaluation* (Edinburgh: Scottish Executive Central Research Unit, 2001).

180. For an evaluation see S. Ogier and R. Tait, *Evaluation of the Public Defence Service Pilot* (Auckland: Martin Jenkins, 2009).

181. Although robust evidence as to comparative cost is not available. See L Bridges *et al.*, *Evaluation of the Public Defender Services in England and Wales* (London: The Stationery Office, 2007), p. 26; and K. Akester, *Public Defenders: Learning from the US experience* (London: Justice, 2001).

182. T. Geraghty, "Access to Justice: Challenges, Models, and the Participation of Non-lawyers in Justice Delivery," in PRI/Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (Chicago: PRI/Bluhm Legal Clinic of Northwestern University, 2007) p. 60.

183. K. Akester, *Public Defenders: Learning from the US Experience* (London: Justice, 2001), p. 7. This is a finding that resonates in Africa today; see UNODC, *Survey of Legal Aid in Africa* (Vienna: UNODC, 2011).

184. See the Havana Principles on the Role of Lawyers, agreed by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990, Principles 15–23.

185. E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 621 (Hungary) and p. 623 (Poland), for example.

186. T. Geraghty, “Access to Justice: Challenges, Models, and the Participation of Non-lawyers in Justice Delivery,” in PRI/Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (Chicago: PRI/Bluhm Legal Clinic of Northwestern University, 2007) p. 64. For experience of this tendency in the USA see R. Smith, *Legal Aid Contracting: Lessons from North America* (London: LAG, 1998), ch. 3.

187. Under the “state brief” system in some African countries, each court holds a small budget to allocate to lawyers to defend persons in capital cases. For Poland, see E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), p. 433.

188. For example, a study in Hungary found that “some lawyers... ‘reside’ at police stations and their practices are based on appointment” by the police: Z. Szabo and S. Szomo, “Fegyveregyenlőség (Equality of Arms),” (2007) 3 *Rendészeti szemle (Law Enforcement Review)* 19, p. 39.

189. A. Stapleton, “Introduction and Overview of Legal Aid In Africa,” and T. Geraghty *et al.*, “Access to Justice: Challenges, Models, and the Participation of Non-lawyers in Justice Delivery,” in PRI/Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (Chicago: PRI/Bluhm Legal Clinic of Northwestern University, 2007) pp. 13 and 78 respectively. In Belgium trainee lawyers are required spend some of their time in a Legal Aid Bureau, but there is concern about their levels of expertise and commitment to the work. See E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Antwerp: Intersentia, 2010), pp. 70 and 96.

190. In England and Wales, for example, the Law Society has done a lot of work in articulating standards and developing quality assurance mechanisms that apply to lawyers carrying out criminal defense work whether or not legally-aided. See note 163.

191. For example, private practice lawyers are used both in cases of conflict of interest in Ukraine and to relieve pressure on public defenders. See International Renaissance Foundation, *Public Defender Offices Report 2009* (Kyiv: IRF, 2009) p. 55. Public defender agencies in a range of countries, including Chile and England and Wales, use private practitioners in similar circumstances.

192. A study in the UK showed that salaried (public defender) services are cheaper on a cost-per-case basis than private practice models. However, the study was based on data from earlier studies conducted in the 1980s. See T. Goriely, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience* (Department for Constitutional Affairs, London 1997).

193. See <http://www.bronxdefenders.org/our-work/holistic-defense> for details.

194. T. Geraghty *et al.*, “Access to Justice: Challenges, Models, and the Participation of Non-lawyers in Justice Delivery,” in PRI/Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (Chicago: PRI/Bluhm Legal Clinic of Northwestern University, 2007), p. 82.

195. Open Society Justice Initiative, *Community-based Paralegals: A Practitioner’s Guide* (New York: Open Society Foundations, 2010).

196. ABA, *Directory of Law School Public Interest and Pro Bono Programs*, available at [http://www.abanet.org/legalservices/probono/lawschools/pi\\_pi\\_clinics.html](http://www.abanet.org/legalservices/probono/lawschools/pi_pi_clinics.html).

197. See, for example, the Center on Wrongful Convictions at Northwestern University School of Law, where students and faculty involvement played an instrumental role in 12 of the 18 death penalty exonerations in Illinois: <http://www.law.northwestern.edu/wrongfulconvictions/>.

198. For example, the Leitner Center for International Law and Justice at Fordham University School of Law worked with the Centre for Human Rights, Education, Advice and Assistance (CHREAA) in Malawi to bring a successful complaint before the UN Working Group on Arbitrary Detention, Opinion No. 11/2009 (Malawi) concerning accused persons overstaying on remand in prison.

199. “Navigating the early stages of the criminal justice system in Cook County,” legal awareness materials produced by students of the Bluhm Legal Clinic, Northwestern University, December 2007.

200. UNODC, *Handbook on Improving Access to Legal Aid in Africa* (New York: UN, 2011), p. 14.

201. S Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Rule of Law Series no. 41 (Washington, D.C.: Carnegie Endowment for International Peace, 2003).

202. S. Manteaw, “Legal Education in Africa: What Type of Lawyer Does Africa Need?” (2009) 39 *McGeorge Law Review* 915–916.



## Open Society Justice Initiative

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.

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The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

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Early intervention by lawyers and paralegals can have a positive impact on pretrial justice in general and pretrial detention in particular. Examples from across the globe show that early intervention schemes can reduce the use of pretrial detention, improve the performance of criminal justice personnel, lead to more rational and effective decision-making, and increase accountability and respect for the rule of law.

*Improving Pretrial Justice* provides an important guide to the international standards governing pretrial justice, as well as the problems and challenges attendant to the pretrial stage of the criminal justice process. The book also documents the impact of early intervention by lawyers and paralegals and looks at various models for providing such assistance, using replicable examples drawn from around the world.

