

# Legal Empowerment Working Papers



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## N. 2 Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective

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## **Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective**

Adam Stapleton<sup>1</sup>

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### **Executive Summary**

This paper describes and documents the origins, evolution, strategy and impact of the Paralegal Advisory Service (PAS) in Malawi, a program that has become an independent NGO – the Paralegal Advisory Service Institute (PASI) – and that is now emulated in several other countries. PAS is significant not simply because its model has been adapted across Africa and more recently in Bangladesh, but because it represents a low-cost method of providing effective legal advice and assistance for ordinary people in conflict with criminal law.

It argues that the current trend in development thinking is progressively cutting off support for such civil society work and legal services for the poor to the detriment of development, human rights and justice, and that the experience of PAS and similar organizations suggests that the international community needs to rethink an approach that is in danger of proving counterproductive. In short, the needs of the poor in the justice sector are being sacrificed on the altar of donor “harmonization”.

It asserts that government cannot “go it alone” in providing legal aid services to its people and that PAS demonstrates the benefits that accrue from a public/private partnership in this field. It concludes with the recommendation that donor agencies should not pursue an uncritical strategy but hold national governments accountable to principles of good governance which include *inter alia* the active promotion of such partnerships.

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## Introduction

Almost ten years ago, the States Members of the United Nations adopted the Millennium Declaration<sup>2</sup> to end world poverty, in which they noted the importance of good governance in attaining development goals<sup>3</sup> and the role of civil society.<sup>4</sup>

In its section on human rights, democracy and good governance, the Millennium Declaration went on to state that States Members "...will spare no effort to promote democracy and strengthen the rule of law..."<sup>5</sup> and would "...respect fully and uphold the Universal Declaration of Human Rights...strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all..." and to "...strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights".<sup>6</sup>

The 2005 Paris Declaration on Aid Effectiveness<sup>7</sup> admirably sought to harmonize overseas development assistance, align it with government policies and route funding as far as possible through government budgeting processes. It is a practical and sensible attempt to forge international consensus on development assistance.

The eight Millennium Development Goals in the Millennium Declaration are curiously silent on the subject of justice and the rule of law, notwithstanding a clear link between weak/dysfunctional justice systems and societal breakdown.<sup>8</sup> Whatever the intention, the effect in practice has been to demote the importance of the justice sector and cut it off from mainstream funding. Civil society organizations are advised by donors that unless they can demonstrate a link between poverty alleviation and justice reform they will not be successful in applying for grants.

The effect of the Paris Declaration, as interpreted by program managers based in-country, has often been to disregard the work of civil society actors in providing legal services at the community level – i.e. where the poor usually are to be found – and direct most funding directly to governments, whether or not the government is able or willing to channel the funds necessary to promote access to justice.

The impact of these two instruments, taken together, has been to diminish or sever funding to organizations that have provided access to justice where central governments have proved unwilling or unresponsive or unable – and so thrown the proverbial baby out with the bathwater.

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<sup>2</sup> United Nations Millennium Declaration 2000, UN A/RES/55/2 (2000).

<sup>3</sup> Any success in meeting development goals 'depends, inter alia, on good governance within each country.' UN Millennium Declaration 2000, at paragraph 13.

<sup>4</sup> It resolved to "...develop strong partnerships with the private sector and with civil society organizations in pursuit of development and poverty eradication". Ibid paragraph 20, bullet point 4.

<sup>5</sup> Ibid section V paragraph 24.

<sup>6</sup> Ibid section V paragraph 25, bullet points 1–3.

<sup>7</sup> Organisation for Economic Co-operation and Development (OECD), High Level Forum. The Paris Declaration has been agreed by 22 donors and 57 partner governments. The Paris Declaration "...marks a significant set of donor commitments to improve the effectiveness of aid for the stated purposes of accelerating the achievement of the 2015 Millennium Development Goals and reducing poverty and inequality". Cited in: J Perlin and M Baird, *Towards a New Consensus on Justice Reform: Mapping the Criminal Justice Sector*, Open Society Justice Initiative (2008) 25.

<sup>8</sup> The preamble to the Universal Declaration of Human Rights 1948 states: "...it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Contributing factors to civil wars in many parts of the world have been attributed to the inability of the justice system to resolve disputes impartially or at all.

This is a tale of one such organizational “baby” called the Paralegal Advisory Service (PAS).

PAS started life in four prisons in Malawi in May 2000 as a project of Penal Reform International (PRI) with the modest goals of assisting young persons in conflict with the law and helping to clear the homicide backlog. Few thought that it would last beyond a few months, because any partnership between civil society organizations on the one hand and law enforcement agencies on the other was considered at the time to be an innovation too far.

By 2003, PAS was providing national legal services on the front line of the criminal justice system in police stations, courts and prisons; by 2008, similar organizations based on the PAS model had been launched in West Africa<sup>9</sup> and East Africa,<sup>10</sup> and, on a pilot basis, in Bangladesh.<sup>11</sup> Invitations to start a similar scheme have been received from Liberia,<sup>12</sup> Zambia,<sup>13</sup> Tanzania<sup>14</sup> and Lesotho.<sup>15</sup> Visitors come from North American institutions to see what is going on in Malawi and to cooperate with the paralegals,<sup>16</sup> whose work is viewed as good practice: in 2004, it won recognition from the United Nations Centre for Human Settlements (UN Habitat)<sup>17</sup> and was profiled by the United Nations Children’s Fund (UNICEF).<sup>18</sup> The work of PAS has been called “pioneering” by the New York Times<sup>19</sup> and it has been cited in academic and policy publications.<sup>20</sup> Two films have been made about its work.<sup>21</sup> In 2007, PAS was constituted as the Paralegal Advisory Service Institute (PASI), a free-standing non-governmental organization (NGO).

The scheme in Malawi has been independently evaluated on three occasions<sup>22</sup> and variously described as “energizing the criminal justice system”,<sup>23</sup> “indispensable, bridge building, voices of the voiceless”,<sup>24</sup> and most recently “...PAS has taken a leading role

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<sup>9</sup> Benin, under the *Projet d’assistance judiciaire aux détenus* (PAJUDE), in 2002; and Niger, under the *Association nigérienne pour la défense des droits de l’homme* (ANDDH), in 2006.

<sup>10</sup> Kenya, under the Kenya Prisons Paralegal Project (KPPP), in 2004; and Uganda as the PAS (Uganda) in 2005.

<sup>11</sup> PAS (Bangladesh), with funding from the German Development Agency (GTZ), as a joint project with the Ministry of Home Affairs and the Bangladesh Prison Service.

<sup>12</sup> In 2006 the Ministry of Justice in Liberia formally invited PAS to start a pilot. This invitation was repeated after the Chief Justice of Liberia and a senior delegation visited Malawi in 2008 to observe PAS in action.

<sup>13</sup> Following a visit by the Chief Commissioner of the Zambia Prison Service, Jethro Mumbuwa in 2004.

<sup>14</sup> The Commissioner for the Tanzania Prison Service, Nicas Banzi, chaired a two day seminar in Dar-es-Salaam in 2004 to discuss PAS and requested that a pilot start in three prisons around Dar-es-Salaam.

<sup>15</sup> The Deputy Minister of Justice formally requested PAS to start in Lesotho following a presentation in Nairobi in November 2006.

<sup>16</sup> Northwestern University’s Center for International Human Rights has been working with the Ministry of Justice, the Legal Aid Department and the Office of the Director of Public Prosecutions and with PAS to screen the homicide caseload and so assist in the reduction of the case backlog. A team from the International Human Rights Clinic at Fordham University visited in November 2008 to work on public interest litigation with one of the PAS teams, focusing on the constitutional right to trial within a reasonable time.

<sup>17</sup> PAS was granted a Best Practice Award by UN Habitat in 2004.

<sup>18</sup> Interagency Co-ordination Panel on Juvenile Justice, *Protecting the Rights of Children in Conflict with the Law*. (2005), 38.

<sup>19</sup> Michael Wines, ‘The Forgotten of Africa, Wasting away in Jails without Trial’ *The New York Times*, 6 November 2005

<sup>20</sup> Vivek Maru, ‘Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide’ (2006) 31 *Yale Journal of International Law*, 427; UK Government *Eliminating World Poverty: Making Governance Work for the Poor*, White Paper on International Development, (2006) 48.

<sup>21</sup> Pierre Kogan, *Path to Justice*, 2004; and Pierre Kogan, *Freedom Inside the Walls*, 2005.

<sup>22</sup> Thomas Hansen (2004) *Evaluation of Activities 2002-2004*; Fergus Kerrigan (2002) *Energising the Legal Justice System in Malawi*; Martin Pierce (2007) *Changing the Landscape*. The reports were prepared for DFID.

<sup>23</sup> Kerrigan, (2002).

<sup>24</sup> Hansen, (2004).

in Africa and beyond in demonstrating the value that paralegals can bring to criminal justice systems, even where there is no shortage of lawyers. It has succeeded, with its Malawian justice partners, in visibly changing the legal landscape for both accused persons and prisoners ... PAS has registered itself as an unusually effective project."<sup>25</sup>

These evaluations were also quantitative. The clinics conducted in prisons between November 2002 and June 2007 empowered approximately 150,000 prisoners to represent themselves in court and access the justice system, for example to make a bail application, enter an informed plea to the charge, conduct their defense, enter a plea in mitigation or draft an appeal to the High Court.<sup>26</sup>

Impressive as this figure sounds, its impact has been to reduce the overall remand population – those awaiting trial – from 40–45% of the overall population to a current figure of 17.3%.<sup>27</sup>

A similar impact has been noted in Kenya and Uganda. In Kenya, an independent evaluation found that the Kenya Prisons Paralegal Project had "...significantly helped decongest the prisons...by speeding up the determination of long-pending cases in courts...helped remove bottlenecks curtailing access to justice for the poor through facilitation of meetings between key criminal justice agencies...improve prison conditions."<sup>28</sup>

In Uganda, the evaluation team noted: "Although the team did not carry out a thoroughgoing validation test,<sup>29</sup> the evidence we summoned strongly suggests attribution to PAS. For instance, the Commissioner of Prisons told us that inmate population had fallen from 63% to 58% in five months. In the absence of any other intervention apart from PAS, he could only attribute this fall to its activities<sup>30</sup>. A similar observation was made by the Officer in Charge of the Gulu Regional Prison<sup>31</sup> where PAS is present. He showed us prisons population statistics before and after PAS. The evidence clearly revealed a significant reduction. In his informed estimation, this was because of the work of PAS. As a way of further verifying these assumptions, the team took the PAS figures and compared them with those of the prisons and police. The correlation was compelling."<sup>32</sup>

Two supplementary informal case studies illustrate the impact of a team of two paralegals in Kenya and Malawi. In Langata women's prison in Kenya, in a six week period, the paralegals reduced the remand population from 80% of the total to 20%.<sup>33</sup> These were either women who had overstayed awaiting a trial and whose sentence on a finding of guilt would anyway not have exceeded the time they had served in prison, or women charged with bailable offences or otherwise held unlawfully. Many of these women were also mothers and/or single parent householders; all were poor and unable to afford the services of one of the 4,000 lawyers in practice in the country.

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<sup>25</sup> Pierce, (2007).

<sup>26</sup> PASI. 'Where there is no lawyer', *Bringing Justice to the Poorest of the Poor*, brochure, (2007) 8.

<sup>27</sup> International Centre for Prison Studies, *World Prison Remand List 2008*. Since 2004 the mean average remand population has been under 25%.

<sup>28</sup> KPPP. First evaluation, Msiska/Nyongesa, (2005). Author's files.

<sup>29</sup> "What we did was to compare the paralegal 'release' statistics with those of the prisons. Similarly, we asked the [officers in charge] (OCs) to estimate the number of discharges attributable to PAS. The numbers agreed for the most part, with the exception of the Mbale Pilot, whose paralegal figures were, in our view, inflated." Author's files.

<sup>30</sup> Interview with Uganda Prison Service Commissioner Dr Johnson, 5 October 2006.

<sup>31</sup> Interview with the Officer in Charge of Gulu Prison, 12 October 2006.

<sup>32</sup> PAS (Uganda), first independent evaluation, Ngunyi/Namakula, 2006, vii. Author's files.

<sup>33</sup> Minutes of the first regional coordinators' meeting, Nairobi, 30 April – 2 May 2006.

In Zomba prison in October 2003 a team of two paralegals conducted a paralegal clinic on murder/manslaughter. Following the clinic, 33 accused approached the team and indicated that they were willing to enter a plea to manslaughter.<sup>34</sup> The cases were duly referred to (i) the legal aid department so that a lawyer could interview the group and advise them on the consequences of entering a plea, (ii) the Director of Public Prosecutions to determine whether a plea to the lesser charge was acceptable and (iii) the criminal registry for the cases to be listed. Subsequently 29 people entered pleas, were convicted of manslaughter and sentenced.<sup>35</sup> This resulted in savings to the judiciary of some £18,000 on the basis of the average cost of convening a court to try the matter (2004 figures). The Chief Justice sent a letter of thanks to the PAS national coordinator.<sup>36</sup>

This is the hook that catches the interest of prison administrations across Africa and in Bangladesh, where high remand populations are placing considerable pressure on available space inside prison and on their management capacities. The intervention of PAS helps to push cases through the system, so that those who are stuck “in the system” are moved on and those held unnecessarily are moved out.

So how did it all start?

In 1996 an extraordinary meeting took place in Kampala, Uganda, at which 133 delegates from 47 countries, including 40 African countries, gathered to discuss the state of prisons in the continent. They included the President of the African Commission on Human and Peoples’ Rights (ACHPR), Ministers of State, prison commissioners, judges and international, regional and national NGOs.

There was no finger wagging: State and non-state actors, who were at loggerheads in their own countries, had grasped the enormity of the problems facing the prison administrations across the continent. There was almost instant recognition that no one could “go it alone” and that all needed to work together to find common solutions to the problems facing African prisons.

The meeting produced the *Kampala Declaration on Prison Conditions in Africa* which opened with the uncompromising words “Considering that in many countries in Africa the level of overcrowding in prisons is inhuman...” and went on to lay out an agenda for prison and penal reform on the continent in line with international standards, and specifically addressed the plight of remand prisoners, the use of “accredited paralegals”, the needs of prison staff, and alternatives to prison.

The importance of the Kampala Declaration was immediately recognized by ACHPR, which adopted the Declaration at its next Ordinary Session<sup>37</sup> and appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa in answer to one of the

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<sup>34</sup> Police routinely charge murder where the facts may disclose manslaughter. However, neither state prosecutors nor legal aid lawyers review the files until they are listed for trial. Properly advised, many accused will enter a plea of guilty to the appropriate offence. By helping prisoners to understand the law, paralegals enable them to enter an informed plea to any charge.

<sup>35</sup> PAS Newsletter, no. 4, February 2004. Author’s files.

<sup>36</sup> 8 October 2003. Following further research conducted by paralegals, PRI issued a discussion note explaining how the backlog of homicide cases could be further broken down into distinct categories and disposed of by way of plea to manslaughter or dismissal on grounds that the defense was irretrievably prejudiced by the delays in bringing the case to trial. PRI calculated that the lowest figure would amount to 48% of the caseload and produce savings to the judiciary of £200,000. PRI, *Tackling the Homicide Backlog in Malawi*. a discussion paper, 2005. Author’s files.

<sup>37</sup> October 1997.

specific recommendations of the conference.<sup>38</sup> A year later, the Economic and Social Council of the United Nations (ECOSOC) adopted the Kampala Declaration and its Plan of Action as a United Nations standard.<sup>39</sup>

PRI's work in Africa took as its point of departure the agenda set in Kampala in 1996 and sketched out in the Plan of Action. It sourced funding for the work of the African Commission's Special Rapporteur on Prisons and Conditions of Detention, and in the following year organized a regional conference on alternatives to prison in Zimbabwe in order to expose other countries on the continent to the groundbreaking community-service scheme that the Zimbabwe judiciary with NGO partners had been developing. A national committee was formed at the conference and a workplan was agreed for the coming months. PRI agreed to raise funds in support.

This became the model for the way PRI operated. Drawing on the Kampala Declaration, PRI (i) identified what had worked in Africa or elsewhere to address the prevailing priority, (ii) convened a meeting of major actors to review the situation in their countries and compare it with the situation elsewhere, (iii) agreed a provisional plan of action and (iv) proceeded to source the funds to implement the plan.

In this way PRI helped the Zimbabwean National Committee on Community Service to "package" their scheme. Brochures were produced explaining how it worked; forms, court documents and guidance notes were collated and reproduced in a single manual to show how the scheme operated in practice and so enable new countries to pilot a scheme immediately by adapting what had been tried, tested and adjusted in Zimbabwe. A roster of experts and resource persons from the region was compiled. Within a few years the scheme was being discussed, introduced, piloted and operated in a number of countries in sub-Saharan Africa.<sup>40</sup>

In juvenile justice, PRI helped the Government of Malawi in a similar way to develop a comprehensive program of reform. PRI invited the Ministry of Justice and Constitutional Affairs to co-host a regional conference that brought together a number of practitioners to discuss some useful approaches and strategies used in the region and elsewhere. Listening to the experiences of others, major actors in Malawi were emboldened to consider new and often innovative measures.<sup>41</sup>

One of the outcomes of the juvenile justice conference in Malawi was a realization that unless young persons in conflict with the law were afforded some kind of legal advice and assistance and were monitored, they would remain highly vulnerable. It was recognized that lawyers could not fill such a role: there were not enough of them, they would prove too costly and their expertise was not required. It was recognized that trained non-lawyers, also known as "paralegals", could provide the necessary services at an affordable rate.

So PAS was conceived.

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<sup>38</sup> The Ghanaian academic and Commissioner Professor E. Dankwa was appointed as the first Special Rapporteur on Prisons and Conditions of Detention in Africa.

<sup>39</sup> UN Commission on Crime Prevention and Criminal Justice (1997) E/CN.15/1997/21.

<sup>40</sup> With EU funding, the scheme was introduced in Malawi, Kenya, Uganda and Zambia and thereafter in Mozambique, the Central African Republic, Burkina Faso, Congo Brazzaville, Mali, Benin and Niger.

<sup>41</sup> The Juvenile Justice regional conference held in Lilongwe in November 1999 in partnership with the Malawi Ministry of Justice and Constitutional Affairs approved the Namibian "Juvenile Justice Forum" that was originally designed by the South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and implemented by the Legal Assistance Centre, Windhoek.

It started without fuss. It was predicated on the openness of the prison service to allow eight "NGO people"<sup>42</sup> inside the four main regional prisons for a period of 12 months; they were regulated by a clear and firmly worded code of conduct signed by each paralegal that placed them under the authority of the most junior prison officer. The code of conduct contains nine short paragraphs that include express proscription of any whistle-blowing to the media and confidential meetings with prisoners – every act carried out by the paralegal was to be within the sight and hearing of a prison officer – while recognizing the independence of the paralegal as a human rights monitor. The United Kingdom Department for International Development (DFID) agreed to fund the pilot scheme.

### **Forming phase: 2000–2001**

Initially the aims were to assist young persons in conflict with the law and identify the homicide backlog, which the lawyers and courts could start to process. Maintenance of a daily presence and talks with prisoners and prison officers, however, revealed a range of other needs.

The most obvious was that many prisoners had no idea what they were doing in prison or how long they would be detained there. Virtually none had access to a lawyer.<sup>43</sup> Some prisoners awaiting trial did not know what they were charged with; others did not know the date of their next court appearance, or what would happen when they were next produced in court.

Some of the sentenced prisoners were unsure whether the time they had spent on remand had been taken into account when sentence was pronounced; few had any notion of lodging an appeal, and even less of how to access the appeal process. The overwhelming majority had had no legal representation at trial.<sup>44</sup>

It was also obvious that many were held unlawfully or unnecessarily. Some had overstayed – that is, they had been detained for excessive periods – while others were admitted to bail but could not afford the terms set by the court.<sup>45</sup> In addition, the paralegals found a substantial number of prisoners who had been "dumped" in prison

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<sup>42</sup> The original NGOs involved were Malawi CARER, Youth Watch Society, Centre for Human Rights and Rehabilitation (CHRR) and Eye of the Child (EYC). Later the paralegal team from EYC moved away and set up their own NGO as the Centre for Human Rights Education, Advice and Assistance (CHREAA) and CHRR withdrew from the scheme to be replaced by the Centre for Legal Assistance (CELA).

<sup>43</sup> In line with many countries in sub-Saharan Africa, Malawi has a paucity of lawyers with 300 or so registered and only 120 in private practice. They are based in the two major cities and few outside the Legal Aid Department provide criminal representation.

<sup>44</sup> Representation is only guaranteed in capital cases in Malawi and even there the legal aid lawyers are often freshly graduated from law school with only a few weeks of experience. Source: PAS (2001) *Report of Trial Observations in Capital Cases 2000-2001*. Thus, even in serious cases before the First Grade magistrate (with powers to sentence up to 14 years), it is rare that an indigent accused will be represented by a lawyer.

<sup>45</sup> Again, this situation is not peculiar to Malawi: "In Accra, Ghana, prison authorities estimated that the courts had granted bail to between 65-75% of the 650 prisoners in St James Fort Prison, itself an old slaving station; these prisoners remained locked up because they could not raise the money to pay a surety to the court for their future attendance. An inquiry revealed that only seven out of the 650 remand prisoners had legal representation."

"A case review of three selected Kenyan prisons by the Kenya Prisons Service revealed that, of the total number of prisoners who had committed bailable offenses, 86% were granted bail but could not afford the financial terms set by the court, and only 6% had the means to hire lawyers." Adam Stapleton 'Introduction and overview of legal aid in Africa' in PRI and The Bluhm Legal Clinic, Northwestern University, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007), 9.



by police using a device called a "temporary remand warrant" to bypass the courts and hold someone in prison for 24 hours pending enquiries. Once the 24 hours had elapsed, police renewed the period *en bloc* and, in this way, a person could languish for weeks and even months without being produced before a court, to the chagrin of the prison officers who felt powerless to do anything to arrest the process. The police could do this because they acted in a vacuum. As a matter of fact, the paralegals found that each criminal justice agency acted in a vacuum, or silo: the police investigated the case, the courts heard it and the prisons held the accused. There was no link between the various justice agencies.<sup>46</sup>

The third obvious need was for something for prisoners to do: they just sat around all day.

With only two paralegals for each of the four prisons, which varied in size from 1,800 persons to 500 and contained over 60% of the total prison population, emphasis was placed at the outset on maximizing outreach to as many people in need as possible in the time available. Not only were one-to-one meetings between paralegal and prisoner proscribed under the paralegals' Code of Conduct: it was realized that they were inefficient. Paralegals had to think less like lawyers providing case-specific advice and act more as "filters": they had to think less of what they could do themselves and more about what they could outsource or facilitate, of how they could link up with others and of what dormant processes they could catalyze or re-start.

At the end of the first six months, the paralegals had gained qualified acceptance from the prison administration. The project recruited a third paralegal for each team. DFID extended funding. By January 2002, in quantitative terms, paralegals had facilitated the release of 369 prisoners, conducted 292 clinics in prison reaching 1,650 prisoners charged with homicide, observed the trials in 90 capital cases and issued their report. They had also started up micro-projects such as soap-making and sandal-making in the prisons they worked in.

More impressive was the way in which the paralegals managed in each location to link the various criminal justice agencies and facilitate communication among them. They revived the Court Users Committee, familiar to all practitioners as a forum for meeting each month under the chairmanship of the Chief Magistrate, which had fallen into disuse; and, at the cost of a few soft drinks and local transport,<sup>47</sup> police, courts, prisons and social welfare and traditional authorities came together each month to discuss the justice situation in the district while the paralegals took notes, drafted minutes and circulated them in the locality. Within weeks, the committees had all but abolished the practice of "temporary remand warrants" issued by police, and the numbers of prisoners committed to prison by this procedure was reduced to tens from the hundreds at the outset.<sup>48</sup> The Malawi Prison Service invited PAS to extend its services to new prisons.

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<sup>46</sup> The lack of communication is not restricted to developing countries. In a lecture given in 2002, the then Chief Justice of England and Wales, L.J. Woolf, observed: "The reasons for adjournment are numerous. Frequently, they are brought about by a breakdown in communication between the Crown Prosecution Service and the police. Where witnesses fail to attend, this can be the result of a failure to take sufficient steps to secure their attendance. A similar problem arises in relation to late changes of plea. It should not be beyond our capacity to put in place suitable systems that would avoid the communication breakdowns that give rise to so many adjournments. 2002 Rose Lecture "Achieving Criminal Justice", Manchester Town Hall, 29 October 2002.

<sup>47</sup> US\$20 is budgeted for each meeting.

<sup>48</sup> The northern, southern and central police regions complied promptly; the eastern region held out for some time. There is always a redoubt.

Reviewing the first two years of PAS, an evaluator found that it had “energized the criminal justice system in Malawi” and that by clearly focusing work plans and linking where they could, the paralegals had effected extraordinary change.<sup>49</sup> As one senior prosecutor remarked: “Without them, the whole process would go back to sleep.”<sup>50</sup>

### **Storming phase: 2002**

However not all was rosy. The micro-projects were a source of tension with prison officers and prisoners. Products were sold off or went missing. The paralegals realized that they could not sustain the relationship with prison officers, advise and assist prisoners and maintain small businesses at the same time. The first evaluation report picked this up and recommended discontinuing these activities under PAS.

Other developments proved hit-and-miss: the clinics were dull; the lecture format did not work under a hot sun with difficult concepts and hungry prisoners. A manual was produced that assisted the paralegals but did not really “communicate” the law and procedure to the prisoners. And the referral of cases to community service workers was not working very well.<sup>51</sup>

The paralegals met in a retreat to review the findings and recommendations of the report and decided to drop the micro-projects and invite others to run them instead. They agreed to invite theatre practitioners to help them to improve the clinics in prison. They agreed to expand their activities to new prisons.

This required the recruitment of 18 new paralegals and the need to standardize the training course.

### **Norming phase: 2002–2003**

The costs of training are high: bringing people to a central venue and housing and feeding them over a period of weeks places enormous strains on cash-based and operational budgets.<sup>52</sup>

Cost is a reason why legal aid services provided by central governments around the world are unable to meet the needs of ordinary citizens. PAS recognized from the outset that to succeed they had to prove that they were cost-effective. The approach they took to training was that it should be (i) practice-oriented, (ii) layered over time and (iii) affordable.

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<sup>49</sup> Kerrigan, above n 23.

<sup>50</sup> Mr Kamwembe, now Justice Kamwembe, formerly Chief State Advocate, interviewed in 2002. Kerrigan, above n 23.

<sup>51</sup> PRI facilitated the introduction of community service orders (CSOs) in Malawi under the European Commission’s replication program. The law was amended to require that the court consider a CSO in any case attracting a term of imprisonment of less than 12 months. In 2000, the Government of Malawi took over the management of the scheme. By 2002, community service workers were growing despondent because they were increasingly neglected as an agency within a larger department: motorcycles were not being repaired (no budget) and salaries were being paid in arrears (cash budget). Thus, when paralegals referred a case where the law had not been applied and would be appropriate for such an order, the community service workers would often fail to visit the prison and make the referral.

<sup>52</sup> Development budgets are virtually non-existent in many countries, and the funds available tend to be diverted to upgrading housing and foreign trips rather than training the rank and file – which is one reason why so many law-enforcement agencies around the world are under-trained.

- **Practice oriented**

Paralegals need to know how the law works in practice. The theory may be taught, but the practice has to be experienced. PAS approached the law enforcement officers and courts in each of the towns where the paralegal teams were located and invited their participation in the introductory training module. The introductory course involved several days with each justice agency and walking through, as it were, the justice process from arrest to court appearance and admission to prison. The paralegals had to observe a number of stages in the process and complete several assignments.<sup>53</sup>

In this way, over a month the paralegals learnt the practice from the practitioners, for good or ill, and the conditions in which the various agencies worked; they placed themselves in a student-to-teacher relationship with the agencies with whom they would be working in the future. This approach proved highly effective: it cost nothing more than a party at the end to thank the police and prison officers as well as court officials who had assisted, and it engendered the goodwill of their erstwhile teachers.

A number of modules were then developed that sought to balance classroom work – i.e. the theory – with the field work – i.e. the practice. The paralegal aid clinics (PLCs) form the core work of the paralegals in prisons. The original manual<sup>54</sup> was rewritten with an experienced practitioner in forum theatre,<sup>55</sup> and the second edition was published in 2007. It runs to 19 clinics from arrest and detention to appeal. It doubles as a manual for conducting clinics in prison, a course book on the law and procedure and as a manual of generic application to other common-law countries.<sup>56</sup>

In the morning, the paralegals learnt the law and procedure and relevant constitutional provisions; in the afternoon they prepared the clinic that would be given to prisoners in the prison the next morning. The group observed the clinic, which was given by between two and four new paralegals, and would critique it on their return to the classroom and clarify areas of confusion or doubt. This lasted up to six weeks, during which a presence in the prison was constantly maintained.

The other skills the paralegals needed to acquire concerned information management. Each day, the teams entered a prison and were inundated by a wave of data – new arrivals, sick people, urgent actions: look at this, what about that, here's this story, here's another, and so on. They required the organizational skills to make sense of the data and translate it into information for those who could act on it. They also required filing systems that would enable them to track the caseload and follow up as appropriate.<sup>57</sup> They were taken away for two weeks to work in the classroom and their offices for this, and for a week for basic computer training.

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<sup>53</sup> At police stations they observed arrest, interview and bail procedures and visited police cells. At court, they observed the procedures covering first appearance at court, adjournment, bail, taking of pleas, sentencing and summary trial. In prisons they observed the admission process, allocation of cells, disciplinary proceedings, production at court and release process, and they reviewed the files and filing process in the prison registry.

<sup>54</sup> Published by PRI in 2002.

<sup>55</sup> Forum theatre grew out of the work of the Brazilian dramatist Augusto Boal. The techniques were adapted for use in prison to help prisoners understand their situation in law and to access the law to extricate themselves. The manual was co-written with Nanzikambe, a theatre for development acting troupe based in Malawi.

<sup>56</sup> The PAS shares its materials as a matter of principle. The *PLC Manual* was developed for Malawi and for other countries applying English common law so that it can be easily adapted for use in these countries and so avoid – as with community service orders – spending time drafting new manuals, forms and guidance notes. It is available from PASI in hard copy and on the PRI website at: [www.penalreform.org](http://www.penalreform.org)

<sup>57</sup> The “provision of prompt and accurate information” was highlighted by Pierce (above n 25, 14) as one area where stakeholders had suggested the paralegals were “particularly” effective.

This completed the initial training, which closed with a formal invigilated examination of three hours certified by PRI. The newly recruited paralegals were now able to work independently inside prisons.

- **Layered over time**

Considerable attention was given to the development of the paralegals and their training needs, first because the criterion for selection as a paralegal expressly excluded university graduates – the aim was to provide opportunities for those with a secondary school leaver’s certificate and people who had worked in community projects before and were unable to access tertiary education through lack of funds or contacts or grades,<sup>58</sup> and second because the notion of a non-lawyer or paralegal working in the criminal justice sector was entirely new in Africa. PRI sought to develop a professional cadre of such people, akin to the paramedics working in the health sector, and so they had to set high standards and demonstrate manifest competence in everything they did.

Initially, the thought was to adopt a hierarchical approach to training with certification at basic, intermediate and advanced levels. This was soon recognized as impractical. Paralegals needed a range of skills that were not necessarily “advanced” at all: they needed “building up”. So emphasis was placed on getting the paralegals to practice what they had learned and then come back for more training in forum theatre and information management – and adding new trainings as they became relevant, from human rights law to leadership and team-building skills.

As the paralegal numbers increased and the scope of work expanded to courts and police, so new modules were added: for instance, how to conduct a trial observation, and, crucially, how to attend at police interviews.<sup>59</sup>

- **Affordable**

Where local expertise was available it was used; and where it could be used free – i.e. police trainers – it was. Where local expertise was not available locally, distance learning was employed, i.e. with an eight-week practical course on human rights law, covering fact finding and report writing.

In 2007, the University of KwaZulu Natal (UKZN) and the faculty there who had spearheaded the street law program in South Africa in the 1980s agreed to assist PAS in developing a two-year diploma course in paralegal studies, accredited and accepted by UKZN and the South Africa Qualifications Authority. The aim was to provide a standard across the region for paralegals working in the criminal justice system and to provide paralegals with a career path so that some could proceed with the diploma to the LLB and so become lawyers, while others could equip themselves with a qualification that was recognized internationally.

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<sup>58</sup> “This emphasis on training and career development is seen as a valuable lesson in how to retain staff, minimizing the risk of more academically qualified employees seeing the job merely as a stepping stone to other opportunities.” Pierce, above n 25, paragraph 3.3.7, 17.

<sup>59</sup> Piggybacking on to the DFID police reform program, PRI invited Malawi police trainers to train the paralegals in “investigative interviewing skills” so that they received the same training as investigating police officers.

## Performing phase: 2003–2006<sup>60</sup>

By the end of 2002, the PAS “baby” had established itself as viable.<sup>61</sup> It had also developed a program structured on four pillars: (i) providing legal education, (ii) providing advice and assistance, (iii) establishing linkages and (iv) informing policy and decision makers. It had a total of 26 paralegals, and the scheme had received a boost from its replication in Benin, supported by PRI.

In line with the invitation from the Malawi Prison Service, PAS proceeded to expand services to 13 more prisons catering for 84% of the total prison population, and recruited a further 12 paralegals, bringing the total to 38 – 15 of whom women where it stands today. The training in forum theatre techniques had an immediate and lasting impact on the conduct of the paralegal aid clinics in prison.

Between November 2002 and October 2003, PAS conducted just over 500 clinics attracting more than 16,500 prisoners compared with just under 300 clinics and 1,650 prisoners reached by January 2002 as noted above. The introduction of participatory learning techniques and forum theatre empowered prisoners to argue for bail, enter a plea in mitigation, conduct their own defense and cross-examine witnesses. Attendance levels at the clinics rose dramatically, not so much because they were thought to be entertaining as because prisoners noticed that their friends were not coming back from court. They were being sent home, whether on bail or having already served their sentence on remand.

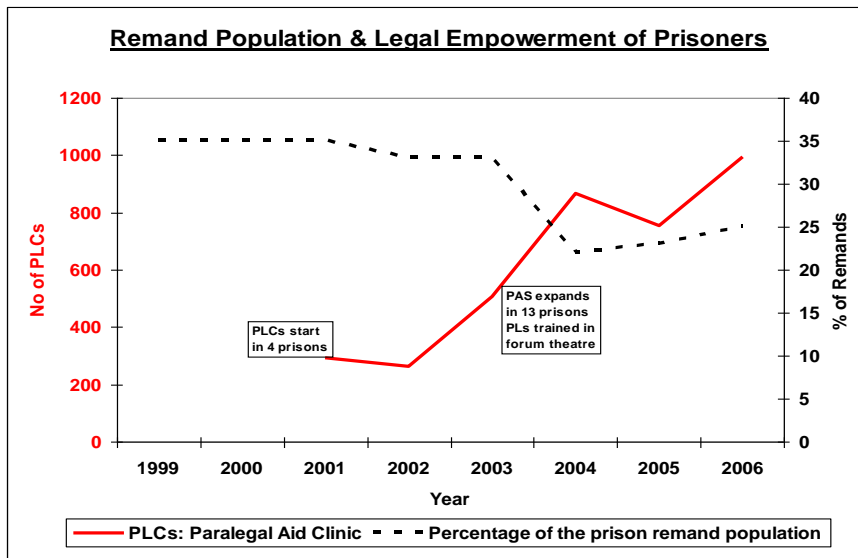
The impact on the overall remand population was striking (see graph below). From about 40% before PAS started, the paralegals had directly contributed to the reduction of the remand population to under 25% by 2004, where it has remained.<sup>62</sup> As mentioned above, the introduction of the scheme in Kenya in 2004 and Uganda in 2005 demonstrated a similar pattern. In all these countries, criminal justice actors attributed the drop in the remand population to the intervention by paralegals and their ability to engage the participation of the criminal justice agencies in processing these cases.

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<sup>60</sup> In September 2003, DFID awarded a three-year grant for it to scale up its services to all prisons, the courts and police stations and offer national legal aid service linking where appropriate to the Legal Aid Department.

<sup>61</sup> Applying criteria developed by the Development Assistance Committee (DAC) of OECD (1991): relevance, effectiveness, efficiency, impact, sustainability.

<sup>62</sup> Currently it stands at 17.3% according to the World Prison Remand List produced by the International Centre for Prison Studies in London: [www.prisonstudies.org](http://www.prisonstudies.org). By 2006, PAS was operating in 21 out of 26 prisons.



The justice system is under-resourced in many countries. The courts are overloaded; prisons are unable to produce a person in court because they lack the transport and the prosecution misplace files, or a police officer is transferred to another district. These problems are common across many parts of the world. PAS continued to evolve and, with the assistance of PRI, explore ways of addressing the problems they encountered by drawing on successful efforts elsewhere. PRI drew attention to the “camp courts” developed in Bihar State in India, whereby the courts come to the prisons to screen the caseload and release those held unlawfully or unnecessarily.

The paralegals introduced this approach in the four main prisons. Since a court can be constituted virtually anywhere, there was no objection in law. The objections came from magistrates and the High Court: one judge of the High Court opposed it on principle, observing that it undermined the majesty of a court by setting one up in prison. Magistrates were concerned less with principles than personal scruples: prisons are dirty places, the prisoners would hiss and boo at them and they would be embarrassed by the decisions of other magistrates.

It took a woman who was also a magistrate to break the mould and set up the first camp court in Malawi. She did so in the juvenile section of Zomba prison in plain view of all the young prisoners, on a wooden bench, in the full glare of the sun, accompanied by a paralegal, court clerk and police prosecutor, and with curious prison officers in attendance. She went through the list prepared by the paralegal in consultation with the prosecution and released a number of young persons.<sup>63</sup>

Often the numbers released were not particularly high – i.e. 20–30. The impact and utility of this mechanism lay elsewhere: prisoners saw the law in action and realized they were not forgotten. As a result, tensions were reduced and the magistrates themselves were encouraged. They were fêted on arriving inside the prison rather than booed. Their visits enabled them to see conditions of overcrowding and inform their sentencing practice. The mechanism was particularly effective in addressing urgent

<sup>63</sup> PAS facilitated 19 camp courts in 2003, 12 in 2004, 8 in 2005, 26 in 2006, 36 in 2007 and 35 in 2008.

situations<sup>64</sup> or when it was picked up at a Court User Committee meeting and a joint decision was taken to hold a camp court to address a problem.

In August 2003, following extensive negotiations, PAS gained access to five main police stations to assist young offenders in conflict with the law. It also started work in the four regional court centers, offering assistance and guidance to members of the public, witnesses and accused alike.

Gaining access to the police stations was never going to be easy. The entry point for the paralegals was their offer to trace the parents of suspected young offenders. This was welcome assistance to the police, who were themselves under-resourced and under-manned. Paralegals drafted another Code of Conduct with police officers to regulate their conduct at the police station. They started by making short daily visits to the police station to develop an acquaintance. In a short time, the police in the four pilot sites agreed a screening form drawn up by the PAS with social services and police officers. They allowed paralegals to interview the juveniles in the presence of a parent or guardian when possible and recommend a simple diversion option.<sup>65</sup>

After 12 months, the pilot scheme was evaluated by a joint team comprising members of the PAS and police in each of the four regions. They found the following:

<b>Item</b>	<b>Number</b>	<b>Comment</b>
Juveniles screened by PAS	80	Pilot scheme working well in Lilongwe and Blantyre. An evaluation of the scheme to take place in June.
No. bailed	33	
No. diverted	18	Diversions by police on the recommendation of PAS after consideration of the forms.
No. sent to approved school	8	
No. remanded	14	Juveniles with serious offenses and sometimes jointly charged with adults.
Police interviews attended	23	
Parent/guardian traced	25	Parents who did not know of their children's arrests were traced for bail and/or releases.
Juveniles referred to social service	6	Screened juveniles referred to social services for a social report with little outcome as the department is under-resourced
Other	19	Illegal immigrants. Cases referred to immigration officials and deportations effected.

The police and paralegal evaluation team jointly concluded as follows:

<sup>64</sup> For instance, when individual prisons became chronically congested, the paralegal would inform the Chief Magistrate of the area who would then mobilize a team of magistrates to visit the facility and order the release of a number of prisoners.

<sup>65</sup> Formal caution and release into the custody of the parents/guardians; release to the parents with or without bail; apology to the victim.

“The joint evaluation meetings that took place in the four police regions have confirmed that this partnership between the PAS and Malawi Police Service – if correctly utilized – can benefit accused persons during pre-trial stages, immediately on arrest and detention.

Lack of human and material resources can at times negatively affect the efficiency of criminal justice agencies like the police and social welfare department in juvenile cases (e.g. in tracing parents/guardians, finding sureties, preparing and submitting social reports to the courts).

Currently, most people (including the young) cannot access protective measures nor the most basic safeguards when they are arrested because there are no legal assistance programs operating in police stations (as for instance in Angola, where the Law Society has set up a roster system in the capital Luanda where student lawyers and young lawyers out of university attend the police interview in the police station).

In juvenile matters, both social welfare officers and parents/guardians are rarely available to assist the police in the administration of juvenile justice. As a result, juvenile cases can take overlong before they are concluded. Most children who are in conflict with the law run the risk of being treated as an adult while in the hands of police because it is very difficult to determine their age in the absence of a birth certificate. If age is not correctly assessed, young offenders often end up in prison as convicted adults (contrary to the Children and Young Persons’ Act currently in force).<sup>66</sup>

A meeting with senior police officers to review the report then agreed that PAS should be extended to adult offenders in police custody to improve access to justice.<sup>67</sup>

Since 2004, the paralegals have diverted an average of 77% of young persons in conflict with the law,<sup>68</sup> as indicated by the graph below.

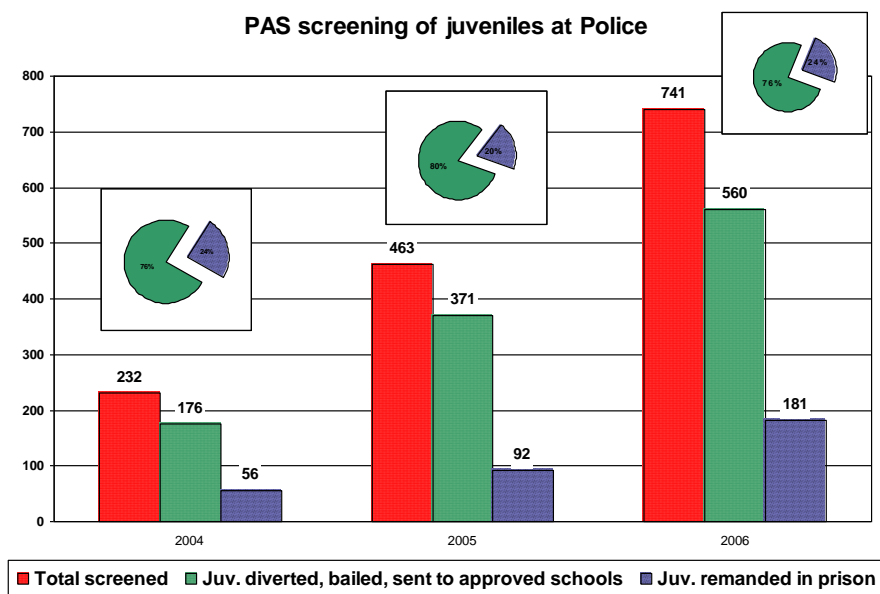
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<sup>66</sup> PAS. *A Consolidated Report on the Screening of Juveniles in Blantyre, Lilongwe, Mzuzu and Zomba Police Stations. Period 2003–2004*, (2004). Author’s files.

<sup>67</sup> By 2006, PAS was operating in 18 police stations.

<sup>68</sup> “Diversion in this instance includes, cautions (approximately 19%), bail (approximately 48%) and admission in the approved school (approximately 10%).” Pierce above n 25, paragraph 3.5.1, 21.





In the courts, the paralegals started to provide basic assistance for those attending, i.e. members of the general public, accused on bail and in custody, and witnesses. They showed them the layout of the court, explained what was going to happen at the court appearance and, with the permission of the prison staff, linked the accused in custody to their family members outside. By the end of 2006, they were functioning in 11 court centers; and in the period between November 2003 and October 2006 they had assisted 10,827 accused and 2,198 witnesses.

In addition, they worked with police, prison and judicial officers to produce two visual aids. The first, about bail,<sup>69</sup> explained how bail worked; it was widely distributed in police stations, police posts, courts, prisons and village *bomas* (enclosures for district or government offices). The second, which describes the criminal justice process in ten steps,<sup>70</sup> was also developed in collaboration with police, prisons and the judiciary and widely distributed.

### Adjourning and transforming phase

PRI was formulating an exit strategy from the earliest days. One of the tasks of the evaluator in 2004 was to recommend how PAS was to proceed as an independent, free-standing legal entity. Over the intervening period, considerable thought and discussion went into this until in 2007 PAS constituted itself as the Paralegal Advisory Service Institute with a Board made up of senior justice actors.

A concern in Africa and elsewhere is that organizations are led by charismatic or highly energetic individuals but lack organizational "depth". This is not the case with PAS

<sup>69</sup> *What is Bail?* (2004) produced by PRI and PAS in Chichewa with English translations and by KPPP and PAS (Uganda) in KiSwahili.

<sup>70</sup> *10 Steps from Your Arrest to Your Appeal* (2004) produced by PRI and PAS in Chichewa with English translations and reproduced as *9 Steps from Your Arrest to Your Appeal* by KPPP.

however: "Feedback and observation both emphasized the high degree of competence and motivation of the individual paralegals....The flat management style adopted by PAS appears to have contributed a great deal to the impressive levels of responsibility, drive and collaboration that was demonstrated on the visits to the four offices..."<sup>71</sup>

In order to guard against "capture" by senior management, the constitution of PASI vested powers in the paralegals through the organ of the General Assembly to elect and dismiss directors and board members, and so keep ownership of PAS with the paralegals themselves.

Ensuring continued funding of the PAS and diversifying its funding base was a *sine qua non* for the newly established institute. DFID pledged to extend PAS for a further 18 months and so free time to develop itself as an organization, but new partners in the donor community had to be sourced.

A strength of the PAS is its developmental approach: in the words of Muhammed Yunus<sup>72</sup> it takes "bite-sized" chunks of a problem and proceeds to address them. The extension of work into the community had proved problematic in the past. While seeking to avoid over-extending itself and "invading" the province of other paralegals and community workers operating in the villages, it nevertheless realized that some mechanism for referring cases back to villages was essential. PAS had established a communication chain linking the community to the police (tracing parents), prisons (tracing sureties) and courts (notifying witnesses and relations of court dates), and had trained 240 community based "animators", with UNICEF funding.

However, some mechanism was required to reduce the numbers of people entering into the formal justice system and overloading it. PRI had long been impressed by the work of the Madaripur Legal Aid Association in Bangladesh and the mediation model it had developed over 30 years.

UNICEF agreed to support a visit by the Madaripur Legal Aid Association to Malawi in 2007 to explore the viability of replicating their mediation model to sub-Saharan Africa. The overwhelmingly positive findings of the report and clear application to Malawi of lessons learned in Bangladesh led to a pilot scheme starting in 2008 with funding from Irish Aid.

It is too early to comment on the results of this pilot scheme, but the approach fits well with the overall strategy of PAS to provide an effective service for ordinary people to access their justice system(s) and of PRI to reduce the flow of persons into the criminal justice system.<sup>73</sup>

Part of the overall strategy of PAS was to develop a viable, cost-effective partnership between a private service provider and government. PRI put considerable effort into developing consensus among all practitioners for a national legal aid scheme that the development partners could initially support, through a basket fund, and that government could work towards.

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<sup>71</sup> Pierce, above n 25, paragraph 3.3.7, 17.

<sup>72</sup> Founder of the Grameen Bank micro-credit scheme "banker to the poor" in Bangladesh, and Nobel Peace Prize laureate.

<sup>73</sup> At the time of writing, 450 village mediators have been selected for the pilot sites and attended a four-phase training course in mediation, the establishment of monitoring structures and linkages and referral mechanisms to the formal justice system.

In some respects the timing was propitious: Malawi's Law Commission had already reviewed the Legal Aid Act and made some far-reaching recommendations, which were accepted by the Ministry of Justice.<sup>74</sup>

PRI negotiated a basket fund with donor agencies present in Malawi to take the place of a legal aid fund, pending the passage of legislation enabling such a fund. Memoranda of Understanding were drafted and entered into. Technically, PRI had completed the project cycle from design and implementation through to a successful exit strategy.

If only life were that simple.<sup>75</sup>

## Sustainability

What, then, is the cost of all this? According to the last independent evaluation: "Calculations made during the evaluation arrive at a figure of approximately £480 per month to keep a paralegal in the field. This calculation was based on 2006 expenditure."<sup>76</sup>

The three evaluations are all positive in their analysis of cost versus benefit. The first evaluation report recorded that "...the PAS project runs economically, without extravagance or waste".<sup>77</sup> The second noted that "...a small number of paralegals from the Paralegal Advisory Service is capable of delivering certain services that are relatively inexpensive, focused and targeting a great number of prisoners or other detainees".<sup>78</sup> The third evaluation noted that "...offices do not reflect any significant extravagance in the availability and use of resources. Indeed, the condition of some of the offices leaves a lot to be desired, with cramped and unappealing workrooms."<sup>79</sup>

Pierce examined this issue further, comparing the PAS paralegals with their counterparts in the Ministry of Justice. He found that while the former received more in terms of monthly take-home pay "...the differentials shrink significantly when the full package accorded to government employees are taken into account, particularly those at a senior level – with housing and other allowances, pensions, training opportunities at Diploma level, etc".<sup>80</sup>

He also examined staff turnover as a contributor to an assessment of cost-effectiveness. He compared a "very high turn-over of staff amongst paralegals in the DPP and LAD offices" with an "impressively low" turnover among PAS paralegals.<sup>81</sup> He further noted that "Paralegals have a well structured day that mostly sees them

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<sup>74</sup> In general terms, the Law Commission recommended that the Legal Aid Department should be reconstituted as an independent Legal Aid Bureau, with funding from parliament, and that "co-operation agreements" (known elsewhere as service contracts) should be entered into with private service providers such as PAS.

<sup>75</sup> The basket fund is yet to be established. The political tensions and trade-offs in Malawi since the last elections in 2004 have frozen legislative output. Among other things, new international staff with different personalities and fresh policies have arrived to manage old programs.

<sup>76</sup> This amount includes the costs of salaries of the paralegals and two coordinators, training events and meetings, central and regional office running expenses, overheads paid to the NGOs managing the regional offices and a proportion of PRI's management costs that can be attributed to PAS. The figure does not include one-off costs such as those attributable to the implementation of an exit strategy, the development of PAS training materials and capital expenditure. Pierce, above n 25, 18.

<sup>77</sup> Kerrigan, above n 23.

<sup>78</sup> Hansen, above n 24, 6.

<sup>79</sup> Pierce above n 25.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at 20 "...with only four paralegals having left PAS voluntarily since it started in 2000."

engaged directly in activities in the courts, police stations and prisons in the mornings, with follow-up work mostly done in the afternoons. There is a daily de-briefing meeting at the end of the day. The impression left behind is one of unusually productive and task-oriented teams who are well supported by planning and organizational structures that help the efficient allocation of human resources."<sup>82</sup>

The issue of providing a sustainable legal aid service is one that requires closer consideration. Justice systems and NGOs are not income-generating entities. They do not produce wealth. Someone has to pay, and that someone is government. The provision of justice services is, like health and education, essentially a matter for government. While it appears to be recognized that government alone cannot meet all the "unmet needs" of ordinary people in wealthy countries,<sup>83</sup> the current maxim among donors, and encouraged by the "Paris principles", is that a project is only sustainable if it is taken over by government. Put another way, NGOs and other civil society groups do not merit ongoing development support because they are inherently unsustainable organizations, or because they must generate funding themselves after a few years of donor financing.<sup>84</sup>

This in spite of the growing body of evidence that a litany of good practices developed by civil society have foundered once subsumed in the maw of government, as indicated in the experience of community service discussed in Footnote 51.

Golub posits three "sustainability myths".<sup>85</sup> The first is that "...support for state legal institutions will yield self-sustaining reforms and enduring improvements in services". He cites an interview he conducted with former United States Agency for International Development (USAID) official John Blackton working in Egypt, who asks:

"Will that hold up when we leave? Will our changes move from our court clusters to the nation as a whole? Have we brought about a genuine change in judicial culture – one in which reducing case delay is valued? I fear that the answer will, three years after we are gone, be "no" to most if not all of my questions. The expat and Egyptian professionals organized within the construct of "the project" are the ersatz substitute for political will and a new judicial culture. We [the project team] are in fact, variables in the experiment. Our presence strongly impacts the results. Donors don't like to admit how much this is true, but in justice projects in settings like Egypt, I believe it is significantly so."<sup>86</sup>

Where there is intellectual ownership among recipients, there is no need for any "ersatz substitute". PAS was entirely home-grown, with PRI offering a supporting role. Its success is largely due to a collaborative effort involving the participation of many stakeholders, linked together by the paralegals. A former Minister for Justice catches something of the pride that PAS has generated among justice actors: "What excites me

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<sup>82</sup> Ibid.

<sup>83</sup> The UK government maintains service contracts with private legal aid providers, for instance.

<sup>84</sup> Stephen Golub, *Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative*. Rule of Law Series, Carnegie Endowment for International Peace, Working Paper, (2003) 41, 19.

<sup>85</sup> Ibid at 19-21.

<sup>86</sup> Ibid at 20.

more about what is happening in the Malawi justice sector is that we are trying to find our own solutions to our problems and at a cost we can sustain in the long term."<sup>87</sup>

Golub's second sustainability myth concerns the notion that "government initiatives should always be seen as potentially sustainable and that civil society efforts should not".<sup>88</sup> He asks: "If state institutions merit such ongoing support, especially with highly uncertain outcomes, then why exclude civil society from the long-term mix? In reality, legal services NGOs and other civil society groups can outlast the appointments of the personnel heading and staffing many government agencies and acquire a greater knowledge of their fields."<sup>89</sup>

Community legal services, or legal services organizations as they are sometimes called, have long been established in the communities they serve: "They help people gain access to the benefits and protections of the legal system, both inside and outside the court system...They help change the rules...They change the way the rules are applied by judges, bureaucrats and the police. More abstractly, they enable people to think differently about themselves ... and the government agencies that have power over their lives. They work with and for their clients. They collaborate with other organizations to meet their clients' basic needs. In the long run, bringing about change is the essence of the work they do – at the very least change for a particular individual on an immediate problem, and whenever possible lasting change that empowers people to control their own lives."<sup>90</sup>

A recent review of community legal services in Bangladesh undertaken for DFID<sup>91</sup> found that these services are available in an estimated 35-40% of the country, with family-related disputes being the most common. It found, strikingly, that 96% of beneficiaries believed that community legal services help people to become less poor, and that 88% of opinion leaders believed that community legal services helped government to become more responsive to the needs of the poor.

It has been observed in practice how "...[r]eform initiatives are invariably driven by a combination of internal and external forces and incentives of various kinds..." and that "...[w]hile commitment on the part of responsible public officials from the outset inspires confidence, reforms may ultimately be secured through bottom-up pressure applied by civil society, the private sector or a combination of stakeholders".<sup>92</sup>

PAS has brought about change in Malawi through a collective endeavor to provide legal empowerment at the grassroots level, as well as mechanisms for people to access justice. Since its inception, the paralegals corps has remained virtually unchanged, while in the same period the prison service has had three different heads, the judiciary has had two Chief Justices and a high turnover of magistrates, the police, the ministries of Justice and Home Affairs have seen their chiefs come and go with such frequency that an accurate count is not kept.

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<sup>87</sup> Bazuka Mhango, MP, Minister of Justice, Malawi, opening the national meeting to start a national legal aid scheme in Malawi, February 2007.

<sup>88</sup> Golub, above n 84, 20.

<sup>89</sup> Ibid at 21.

<sup>90</sup> World Bank, *Legal Services for the Poor Best Practices Handbook*, World Bank Legal Vice Presidency (2003) 4.

<sup>91</sup> The Asia Foundation, *Promoting Improved Access to Justice: Community Legal Service Delivery in Bangladesh*, (2007) 6. Author's files.

<sup>92</sup> Asia Development Bank, *Draft Country Governance Assessment Bangladesh* (2004) at paragraph 882. Author's files.

The third sustainability myth is that "...legal services and related NGOs in many developing nations must have the potential to become wholly self-supporting if medium-term outside support is to be justified."

Golub argues that donors and other development agencies should move beyond repeatedly uttering the "NGOs must make themselves sustainable" mantra and take more responsibility for assisting worthwhile partner organizations in moving toward sustainability, *inter alia* through "self-sustaining endowments" and citing the Ford Foundation, USAID and most recently the Asia Development Bank, which have established such mechanisms for "selected high-impact organizations and important fields in certain countries".

Finally, Golub differentiates organizational sustainability, which biases funding toward often ineffective state institutions, and sustainability of impact. He argues: "If a given legal services NGO serves enough people, or builds enough capacities for the poor to effectively assert their own rights, or affects enough laws – such impact is sufficient to justify past and future donor investment. It would be unfortunate for such an organization to cease operating down the line, but its existence would still be validated by the poverty it has helped alleviate and the justice it has helped secure."<sup>93</sup>

In the short time PAS has been in existence, the 38 paralegals have not only assisted tens of thousands of persons in conflict with the law, they have catalyzed change both in attitude and process. They have enhanced communication, cooperation and coordination among justice actors so that any change becomes "systematized" and hence sustained.

As non-lawyers, they have been open to learning lessons from other sectors such as health. Just as paramedics and nurses offer low-cost services to provide effective primary preventive services, dealing with minor ailments and incidents providing basic and appropriate first aid, the paralegals in PAS offer similar services in police stations, courts and prisons. Furthermore, just as paramedics and nurses refer serious and complex cases to doctors, surgeons or specialists, so the paralegals refer serious and complex cases to the lawyers.

The over-emphasis on establishing high-cost legal services through formal adjudication in the courts relying exclusively on highly trained – and hence costly – lawyers has been commented on elsewhere.<sup>94</sup> This approach, exclusively top-down and supply-led with scant regard for the services ordinary people may need, has not yielded the results hoped for.<sup>95</sup> As a result, the person who comes into conflict with the law has no access to first legal aid. His/her situation then starts rapidly to deteriorate as a confession is coerced, s/he is sent to prison and waits years for his/her trial on a charge s/he does not understand.

PAS has demonstrated in Malawi and in countries in East and West Africa that, like paramedics, paralegals can provide a critical role, particularly in the early stages of the criminal justice process. They can screen cases in prisons, police and courts and filter the caseload. They may (i) advise and assist those in conflict with the law at police

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<sup>93</sup> Ibid.

<sup>94</sup> Thomas Carothers (ed.) *Promoting the Rule of Law Abroad In Search of Knowledge*, Carnegie Endowment for International Peace (2006).

<sup>95</sup> Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*, World Bank Social Development Papers, (2006) Paper No 37; Christopher Stone et al, *Supporting Security, Justice and Development: Lessons for a New Era*, Vera Institute paper, (2005) see [www.vera.org/publications](http://www.vera.org/publications).

stations, at court at first instance and in the prisons, (ii) educate the public and accused on the law and procedure so that people understand the status of the case and more importantly (iii) how to apply to the justice process in their own case. They can inform policy makers on the obstacles to the law. They link all the actors and facilitate communication and coordination and refer serious and complex cases to legal experts.

In this way, paralegals can and do provide primary legal aid services that no one else is providing, which in turn results in:

- the elimination of unnecessary detention;
- speedy processing of cases;
- diversion of young offenders;
- reduction of case backlogs;
- improvement of the “equality of arms” in court; and
- reduction of the remand population.

The chief intervention therefore lies in developing a professional cadre of paralegals who work with – and to – the formal justice agencies and facilitate the justice process through the provision of appropriate legal aid services that will reduce the flow of cases into a process that currently ends in a period of incarceration.

Unfortunately, many donor agencies charged with implementing projects on the ground are not listening. The current trends favor direct budget support to governments, to the exclusion of civil society, and the avoidance of “parallel implementation structures”.<sup>96</sup> To put it crudely: “government good, civil society unsustainable”.

While governments develop their strategies linked to a medium-term expenditure framework in the name of “ownership”, often crafted by foreign consultants, donors align their aid flows with the priorities identified by government, often with the assistance of donors, and donors then “harmonize” their use of common arrangements and procedures – the voices of the poor grow increasingly faint.<sup>97</sup>

Civil society organizations with a consistent track record of service delivery see their sources of funding dry up as donors construe the “Paris principles” to mean that they must work through, and provide funding support to, the very government machinery that has signally failed to bring about accessible justice to the citizens of a country, and to provide funding only to those civil society organizations that can demonstrate a direct link between their work and poverty reduction in line with the Millennium Development Goals (MDGs).

This narrow approach cuts across the spirit of the Paris Declaration, which aims to make aid more effective and in so doing actively encourages “...the participation of civil society and the private sector...”<sup>98</sup> rather than their marginalization.

The keyword here is “partnership”, because it is through partnerships that the donor agencies, reform-minded governments and the private sector can best accommodate the harmonization of external funding and ensure that the funding available benefits

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<sup>96</sup> *Paris Declaration on Aid Effectiveness* 2005, Section III: Indicators of Progress, point 6.

<sup>97</sup> There is a hint that the policy makers in their capitals are beginning to alter this thinking. Some donors realize that what national governments want from their justice systems is not the same thing as what their citizens expect. It is reported that some donors “...seem to be shifting towards a ‘demand driven’ approach to criminal justice reform” and that justice reform driven by state institutions with the NGOs playing a marginal role “is not sufficient”. J Perlin and M Baird, *Towards a New Consensus on Justice Reform: Mapping the Criminal Justice Sector*, Open Society Justice Initiative (2008) 26.

<sup>98</sup> *Paris Declaration* 2005, paragraph 14, bullet point 3.

the poor. The opportunities provided by public-private partnerships in the justice sector such as PAS should be welcomed because they provide donors with a “pragmatic alternative that lies between project support, with funding outside of government, and sector budget support, with funding directly to government”.<sup>99</sup>

For instance, by establishing and contributing to a basket legal aid fund, as is the case in Uganda and Malawi, and supporting the idea of “cooperation agreements” or contracts between the fund and private service providers “...donors will have the opportunity to move towards a staged approach to budget support. This staged approach should involve less risk, by supporting a partnership between government, which may have little experience in delivering the services, and a [civil society] organization ... which has proven experience of delivery cost-effective services efficiently.”<sup>100</sup> Such arrangements introduce a sharper, clearer and more accountable culture in conducting business.

### Meeting the Challenges Ahead

Paralegals under PAS constitute the “front-line” of a national legal aid service. If they are to provide a primary justice service – as paramedics provide primary health services – then they will require recognition by government and the legal establishment.

In 2004, PRI organized a pan-African conference on legal aid in Lilongwe.<sup>101</sup> The conference produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action. Among other things, the Lilongwe Declaration recommended broadening the definition of legal aid – moving from representation by lawyers in a court to including advice, assistance, education and access to alternative dispute resolution – and including service providers such as paralegals outside the formal legal establishment. It traced a line of authority for these developments from several ACHPR resolutions.<sup>102</sup> Both the Lilongwe Declaration and Plan of Action were subsequently adopted by ACHPR<sup>103</sup> and the United Nations Commission on Crime Prevention and Criminal Justice.<sup>104</sup>

The ECOSOC resolution on “International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems, Particularly in Africa”<sup>105</sup> went beyond expressing concern that the prolonged incarceration of suspects and pre-trial detainees violated their fundamental human rights and recognized that “...providing legal aid to suspects and prisoners may reduce the length of time suspects are held at police stations and

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<sup>99</sup> Pierce, above n 25, 35.

<sup>100</sup> Ibid.

<sup>101</sup> “Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers”, 22–24 November 2004. Senior representatives from prisons, the judiciary, the Bar and civil society attended from Benin, Botswana, Burkina Faso, the Democratic Republic of the Congo, Ghana, Kenya, Liberia, Mali, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. See: *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (footnote 45).

<sup>102</sup> ACHPR Resolution on the Right of Recourse and Fair Trial 1992; Kampala Declaration on Prison Conditions in Africa 1996; ACHPR Resolution on the Right to a Fair Trial and Legal Assistance in Africa 1999 (the Dakar Declaration); and ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001.

<sup>103</sup> The Lilongwe Declaration was adopted by the African Commission at its 40<sup>th</sup> Ordinary Session, November 15–29, 2006. Ref. ACHPR/Res.100 (XXXX) 06.

<sup>104</sup> Report on the Sixteenth Session (28<sup>th</sup> April 2006 and 23–27 April 2007 and 29–30 November 2007) Economic and Social Council, Official Records, (2007) supplement No.10. E/CN.15/2007/17/Rev.1.

<sup>105</sup> ECOSOC Resolution 2007/24.



detention centers, in addition to reducing the prison population, prison overcrowding and congestion in the courts”.<sup>106</sup>

It goes on to note that many States Members “...lack the necessary resources and capacity to provide legal assistance ...in criminal cases...”<sup>107</sup> and to recognize the “...impact of action by civil society organizations in improving access to legal aid in criminal justice...”.<sup>108</sup> The body of the resolution goes on, in the polite style of United Nations resolutions, to encourage States Members implementing criminal justice reform “...to promote the participation of civil society organizations in that endeavor *and to cooperate with them*”<sup>109</sup> (author’s italics).

For those working in the field, away from the capitals, the cooperation of justice agencies has not proved to be an obstacle. Over-stretched and under-resourced police and prison officers have repeatedly demonstrated their willingness to enter into partnership with responsible civil society organizations. The legal establishment too has shown that where the demarcation between paralegal and lawyer is clearly stated, the role of the paralegal has been a welcome development.

## **Standardization and regulation**

In gaining recognition, the paralegal movement – if it can be so termed – needs to keep the legal establishment on its side and nurture the relationship. Requests in Malawi from the poor as well as the judiciary for paralegals to provide a representational role in a lower court appear to some to stray over the line into the domain of the lawyer. To date this development is still under discussion and has received qualified approval from the Malawi Law Society.

Many paralegals wish, eventually, to become lawyers. As mentioned above, UKZN has developed an accredited two-year diploma course for paralegals working under PAS that (i) sets a standard for the region and (ii) provides a career structure for those who wish to remain as accredited paralegals or proceed to further legal studies.

If donor agencies chorus “unsustainable” whenever they see an NGO, the reaction of the legal establishment on hearing the word “paralegal” is to raise a number of obstacles in the name of “regulation”. Naturally, many will prefer to maintain the status quo. However, if the aim is to provide the poor with access to justice, the objections simply cannot be sustained. The codes of conduct signed by each paralegal in Malawi, Kenya, Uganda and now in Bangladesh have proved to be a highly effective self-regulating mechanism.<sup>110</sup> The training the paralegals receive stands comparison with any criminal lawyer; and their services are free. Yet the legal establishment in some countries persists in raising objections to any innovation while providing no solution to the needs of the thousands of indigent accused persons who pass unnoticed through their police stations and languish for years in their prisons.

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<sup>106</sup> Ibid at paragraph 18.

<sup>107</sup> Ibid at paragraph 19.

<sup>108</sup> Ibid at paragraph 20.

<sup>109</sup> Ibid at point 2.

<sup>110</sup> “The Codes of Conduct were singled out, by paralegals and partners alike, as a major contributor to the quality of relationships developed. By leaving the institutions clearly in control of when and where and whether PAS activities are carried out and by making it explicit that paralegals are present in the institutions by invitation only, the Codes of Conduct successfully disarmed any resistance and suspicion that might have been expected.” Pierce, above n 25, paragraph 3.3.3, 15.

## Managing expectations

“Perhaps the biggest key to the remarkable success of PAS has been the mutual trust and respect that has been engendered with partners. This was apparent not only from the warmth of feedback, but also from observing the interactions between paralegals and prisoners, and paralegals and their justice sector colleagues.”<sup>111</sup>

PAS has succeeded in lubricating the wheels of a justice system that has grown rusty and creaky: it diverts cases at police stations, pushes cases out of the prisons and empowers ordinary people to apply the law in their own case. However paralegals cannot substitute for lawyers, nor can PAS – innovative as it is – substitute for more systemic reform. The remand population may be reduced, but the prisons will remain overcrowded unless other reform measures and strategies are brought to bear. The flow of people into a criminal justice system that ends in prison needs to be reduced and prison needs to be reconsidered as an option of last, rather than first or only, resort.

## Regional cooperation and development

The role of paralegals in post-conflict states should be self-evident. It is here that it has run into most resistance, however. The new governments with the support of their “development partners” appear entirely focused on the reconstruction of the police stations, prisons and court houses damaged by war and on the need to train the panoply of judicial and law enforcement officers and lawyers. The assumption is that a justice system will emerge phoenix-like from the ashes of the old, even when the most cursory examination of the old will often show it to have been deeply flawed.

The calls for lessons to be learned and good practices to be shared begin to produce a dull echo as the “listening” to which many practitioners are “talking” remains tuned into the supply-side.

From Afghanistan to Liberia, courthouses, prisons and police stations are reconstructed at considerable cost and the “capacity” is then developed to service them – a process of several years. The Liberian proverb “Dried dog meat is good to eat, but while it dries what do you eat?” acts as a useful corrective: for while the lawyers and judges are trained, prisoners grow restive at their prolonged incarceration pending trial and eventually riot, inflicting costly damage to the prisons newly built to house them. Often the same old corrupt faces reappear in judicial robes or police uniform, to the dismay of local populations. The tried and tested failures of the past are repeated in the formal justice arena while 80% of the population continue to resort to their own traditional justice remedies within their own communities.

Legal services NGOs can prove instructive. The focused work of Timap for Justice paralegals in Sierra Leone addressing the justice needs of villagers in their communities, the Madaripur Legal Aid Association’s mediation workers operating through community-based organizations in rural Bangladesh, the work of the *Bureau internationale catholique de l’enfance* (BICE) with juveniles in the Democratic Republic of the Congo, and lawyers from the People’s Legal Aid Centre (PLACE) providing free services for the internally displaced persons in their camps outside Khartoum (the list

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<sup>111</sup> Ibid.

goes on), all attest to the “rich experience” of good practices<sup>112</sup> that have been developed to address the “unmet needs” of ordinary and/or highly vulnerable people, especially in post-conflict situations where the need for a ready and prompt primary legal service is required.

## Conclusion

The most recent evaluation of PASI observes that “...PAS has taken a leading role, in Africa and beyond, in demonstrating the value that paralegals can bring to criminal justice systems, even where there is no shortage of lawyers. It has succeeded, with its Malawian justice partners, in visibly changing the legal landscape for both accused persons and prisoners.”<sup>113</sup>

It is submitted that the application of the PAS paralegals extends beyond the criminal justice system. Paralegals could operate effectively and more cheaply as human rights officers in United Nations peacekeeping operations. They could act as fact finders and evidence gatherers in investigations of the International Criminal Court. There is an anomaly in bringing into rural settings, often in Africa, highly trained, highly expensive experts from foreign countries, who attract high attention and need to be protected, rather than employing trained paralegals from the region, who can easily and swiftly adapt to the local situation.

The criteria for what may constitute “good practice” has been summarized along the following lines:

- the practice is generally low-cost;
- it has a high impact;
- it requires the participation of a number of different actors;
- it often involves partnerships with civil society;
- it catalyzes reform processes and assists in changing institutional attitudes;
- it conforms to national constitutional guarantees and international human rights standards;
- it pursues an approach that benefits the vulnerable and poor; and
- it is transferable from one country to another.<sup>114</sup>

PAS meets these criteria squarely and provides a creative approach to the provision of competent legal aid services in line with the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004).<sup>115</sup>

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<sup>112</sup> “The rich experience available across the continent can best be utilized if proven and effective programmes are progressively implemented in more countries.” *Ouagadougou Declaration on Accelerating Prison and Penal Reform* (2002), Recommendation 5, Encouraging Best Practice.

<sup>113</sup> Pierce, above n 25, 1.

<sup>114</sup> PRI, *Index of Good Practices in Reducing Pre-Trial Detention*. (2005) Version 7, 4.

<sup>115</sup> Recommendation 7: Diversifying legal aid service providers. It has all too often been observed that there are not enough lawyers in African countries to provide the legal aid services required by the hundreds of thousands of persons who are affected by criminal justice systems. It is also widely recognized that the only feasible way of delivering effective legal aid to the maximum number of persons is to rely on non-lawyers, including law students, paralegals, and legal assistants. These paralegals and legal assistants can provide access to the justice system for persons subjected to it, assist criminal defendants, and provide knowledge and training to those affected by the system that will enable rights to be effectively asserted. An effective legal aid system should employ complementary legal and law-related services by paralegals and legal assistants.

Donors should support those civil society initiatives that are proved to be effective in increasing access to justice for poor people, especially where they lead towards partnerships with the state. However, where governments do not adhere to principles of good governance and such partnerships are therefore closed to civil society organizations, the Paris Principles cannot be invoked to defend such governments because the losers will be the poor.