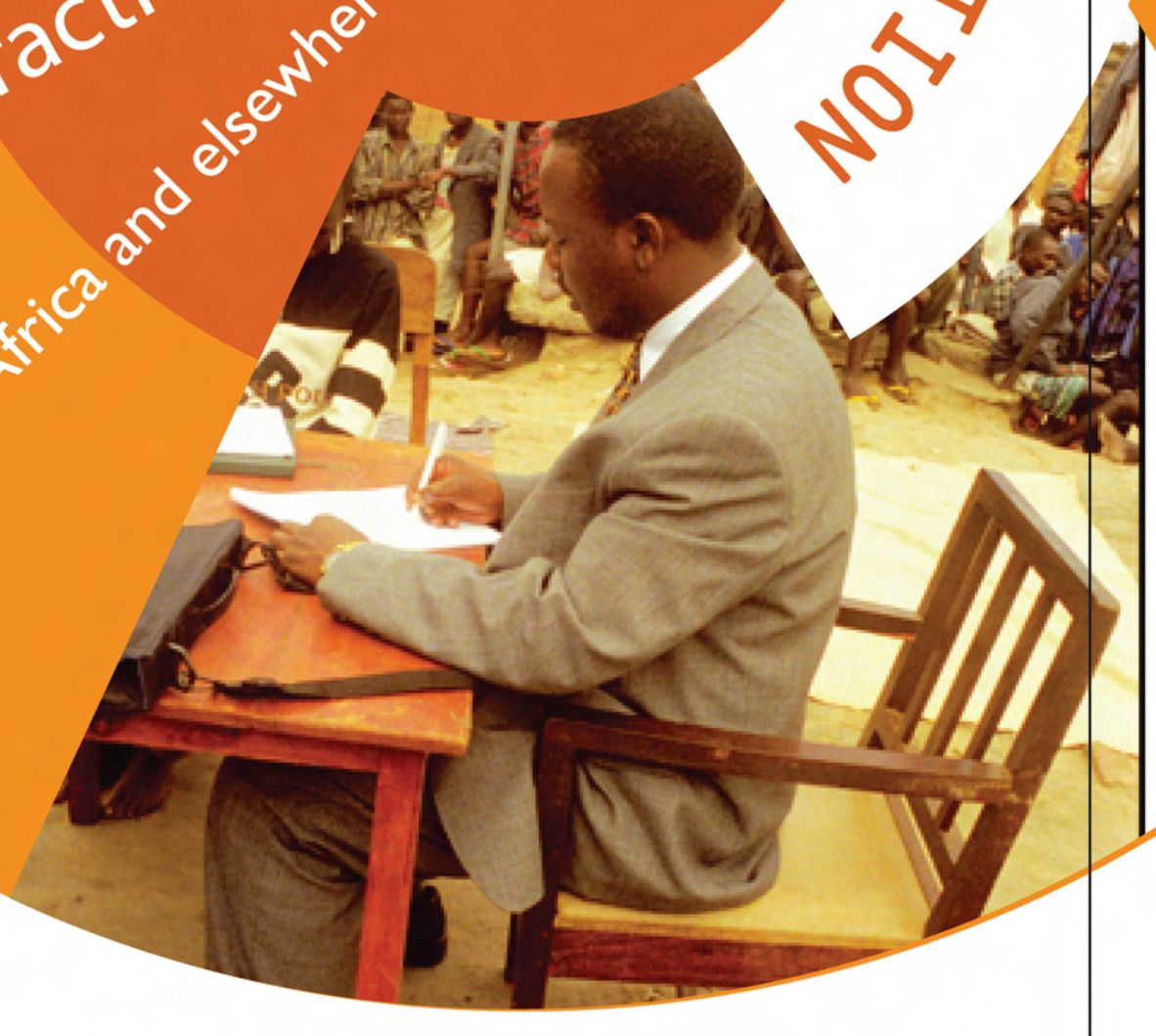
REDUCING PRE-TRIAL DETENTION

An index on 'good practices' developed in Africa and elsewhere

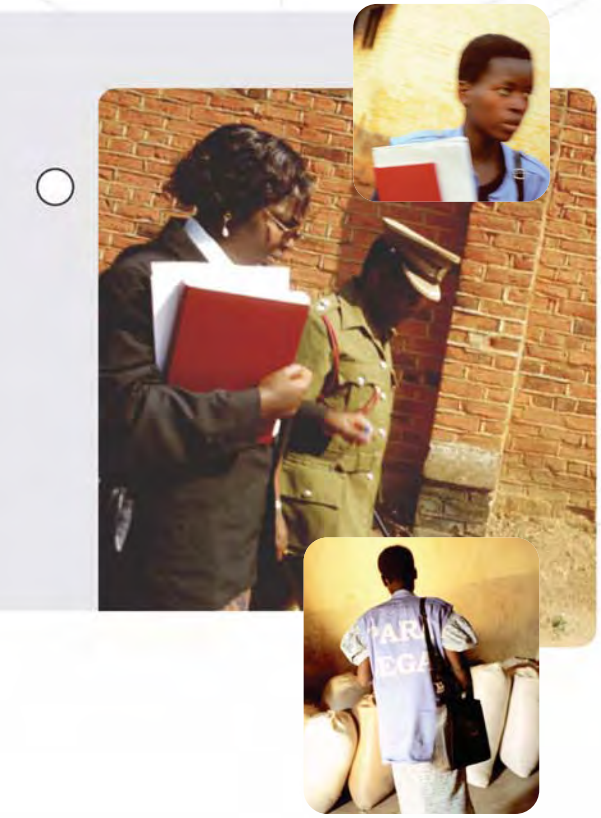


PRI penal reform international

Table

References & standards

- **Kampala** Declaration on Prison Conditions in Africa - 1996
- **Ouagadougou** Declaration on Accelerating Prison and Penal Reform in Africa - 2002
- **PRI's** 10 points plan to reduce overcrowding in prisons in Africa
- **PRI's** 10 points plan on juvenile justice



chapters

introduction

Overcrowding in African prisons is inhuman…

Overcrowding is one of the most pressing problems facing most prisons in Africa (and around the world). The first pan-African Conference on Prison Conditions in Africa held in Kampala, Uganda in September 1996 put the situation starkly, 'the level of overcrowding in prisons is inhuman'.[1]

…and getting worse

Since 1996, the situation has worsened. In preparation for the second pan-African Conference on Prisons and Penal Reform in Africa held in Ouagadougou, Burkina Faso, in September 2002, questionnaires were sent to all the heads of prisons on the continent to which 27 prison administrations replied. Most countries reported that their prisons are overcrowded (20 of the 27) and the overcrowding rate for the 16 countries which provided the relevant data (accommodation capacity and total prison population) ranged from 69% to 296%, the average being 141%[2]. In listing their main problems, prison departments replied that 'overpopulation and overcrowding' came first.

Excessive length and use of pre-trial detention is a major cause of overcrowding in prisons. In some countries 80% of the prison population comprises prisoners awaiting trial. The prison in Cotonou, Benin, built for 400 persons had, in June 2004, 1765 persons, 1410 of whom were on remand. In Accra, Ghana, James Fort prison has a capacity of 200 and 695 were remanded in December 2001. In Kenya, Nairobi remand prison built in 1911 has a capacity of 600 persons. In March 2003 there were 3000 prisoners awaiting trial.

The Kampala Declaration recommended that prisoners should be kept in remand detention for the shortest possible period, avoiding for example, continual remands in custody by the court. Prison administrations report average lengths of pre-trial detention varying from three months to five years. But often, this period is largely exceeded. For instance in Madagascar, in the summer 2000, 28% of the 12,400 remand prisoners had been in custody for more than five years. In 2001, in the same country, researchers came across a prisoner who had been awaiting trial for 19 years. In 1999 others came across two alleged witches in Benin who had been on remand for 18 years. In Malawi, one prisoner has been awaiting trial since 1994[3] and hundreds of prisoners are awaiting trial on murder since 1998 (2003). In Kenya, prison authorities drew attention to two cases of homicide that had been waiting trial for 18 years and 17 years respectively in March 2003[4].

The causes are many

The causes of overcrowding are multiple. Principally the lack of resources channelled by government to the police, judiciary and correctional services means that the

1 Kampala Declaration on Prison Conditions in Africa 1996. Adopted at the Sixth Session of the United Nations Commission on Crime Prevention and Criminal Justice, 28 April-9 May 1997. E/CN.15/1997/21.

2 See 'Analysis of responses to questionnaires directed to prison services, representatives of the judiciary and non-governmental organisations' prepared for the Ouagadougou Conference on Prison and Penal Reform in Africa, by Roy Walmsley, ICPS on PRI website: www.penalreform.org.

3 Maula prison, March 2004.

4 PRI mission report, March 2003.

agencies are not equipped nor trained to carry out their intended purpose. Money alone does not meet the problem, however.
There are other causes which result less from a lack of money and more from poor lines of communication between the criminal justice agencies and weak co-ordination and co-operation at the local and policy levels. The list of problems compiled from the responses to the Ouagadougou questionnaires included:

- poor knowledge of the laws
- accused persons unable to pay for legal representation
- poor functioning of the judicial system
- slow process of criminal procedures
- lack of awareness of legal aid
- corruption
- insufficient budget in the justice system
- hostile court environment
- lack of interest and commitment by criminal justice administration and staff
- overloaded case roll and congestion in the system.[5]

The effects are felt beyond the prison walls

Congestion in prisons and overloaded case-rolls skew the criminal justice system. Court administrators and registries are put in a state of constant management. Lengthy delays in trial deny timely justice to the accused as well as his/her victim(s). Families deprived often of the principal breadwinner suffer disproportionately and create even greater social pressure on poorer communities. The costs are not only incurred by family members, but also by government who have to house these people. In addition, there is the health hazard posed by prisons harbouring large numbers of people in unhealthy conditions. Prisons become 'incubators of disease' which are transmitted by prison officers and prisoners on release to people outside.

The need to view the sector as a whole

If there is one lesson to be learned from the work done in the justice sector over the past ten years or so, it is that for there to be any impact on penal and justice reform, the criminal justice sector must be viewed and approached as a whole, involving all agencies, since congestion in prison results from a whole chain of decisions made by a range of different actors. Another is that change and reform take time: they require a process that often involves entrenched attitudes and inherited practices that are difficult to change. Effective change requires support from external partners but solutions must be developed and owned locally.

No access to Justice makes poor people poorer

Since the World Bank produced its reports 'Voices of the Poor' in 1999, the international community has become aware of the importance placed by poor people on an effective national justice system which provides safety and security for ordinary people. The reports make the link between justice and poverty production or reproduction. Instead of the claim (unsubstantiated) that access to justice reduces poverty, these reports show that without access to justice people are or feel worse off.

Justice, as a 'sector', had been overlooked by development agencies and governments, particularly the area of criminal justice. However over the past ten years, the African continent has given rise to a range of good practices in the justice sector - often highly innovative - which have shown measurable improvements in justice delivery.

[5] Walsmley ibid.

Development agencies too are showing increasing signs that the justice sector is high on their agenda and that they are committing to long-term programmes.

Ways of approaching a solution

PRI's 10 Points Plan to Reduce Overcrowding in Prisons was tabled at the 10th UN Congress on Crime Prevention and the Treatment of Offenders in Vienna (10-17 April 2000) and has been subsequently adapted for Africa. It seeks to provide penal reform minded organisations and governments with a check-list of areas to look at when considering how to reduce the use of imprisonment.

The Kampala Declaration on Prison Conditions in Africa, 1996, was followed by an international conference on penal reform held in the United Kingdom in 1999 and then a second pan-African conference in Ouagadougou 2002. The declarations from these conferences advocate a new agenda for penal reform.

In this index, PRI looks at good practices in reducing pre-trial detention on the African continent which all these conference declarations highlight as a major problem to be addressed. The practices listed below are not intended as an answer or solution but ways of approaching a solution, since few persons anywhere could seriously point to any one justice system as representing the perfect model.

What constitutes a 'Good Practice'?

In this paper we distinguish good from best practice since 'best practice' imports a value judgment and standard setting; while 'good practice' is less exacting and may amount to an activity that shares a number of common features.

The purpose of the approach we have taken is to highlight the projects which aspire to a just result taking into account the constraints (financial and human) with which many African countries are faced.

We have been guided by the practical wisdom set down in the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa (2002) which urges in paragraph 1 that to reduce the prison population

Working together...

'*Criminal justice agencies should work together more closely to make less use of imprisonment. The prison population can only be reduced by a concerted strategy. It should be based on accurate and widely publicized information on the numbers and kinds of people in prison and on the social and financial impact of imprisonment. Reduction strategies should be ongoing and target both sentenced and unsentenced prisoners*.'

And recognises in paragraph 2 that

...with limited resources

'*Further recognition should be given to the reality that resources for imprisonment are severely limited and that therefore African prisons have to be as self sufficient as possible*.'

We have applied the following criteria in selecting the 'good practices' listed below:

- they are generally low-cost
- they often have a high impact
- they require the participation of a number of different actors in the criminal justice system

- they often involve partnerships with civil society
- they catalyse reform processes and assist change institutional attitude
- they conform to national constitutional guarantees and international human rights standards
- they pursue an approach that benefits the vulnerable and poor
- they are transferable from one country to another

Spreading good practices...

The practice of the law in Africa is often highly creative and innovative - it has to be given the constraints within which justice systems operate in many countries. Over the past ten years the sector has had to develop its own ways of making justice accessible to ordinary people. Good practices have emerged and are being shared through such regional mechanisms as the Conference of Central, Eastern and Southern Africa Heads of Correctional Services (CESCA); through the associations formed by national co-ordinators of Community Service and mutual support and assistance provided; and through a growing recognition of - and reliance on - regional expertise as highlighted in a series of regional conferences[6] and policy statements.[7]

...and developing new ideas

Developing and implementing new ideas in the justice sector requires human and material resources, good leadership, effective coalitions and a great deal of time. *Ad-hoc* solutions tend to be effective only in the short term.

In 1998 in Nigeria, a presidential taskforce on prison decongestion and reforms was constituted which approved criteria for release of prisoners and visited every prison in the country to verify data. Trials were speeded up and magistrates visited prisons. Between December 1998 and October 2000 over 8000 prisoners were released. Within three months the prisons were even more congested.

In 1999 in Malawi, the juveniles in Zomba prison were suffering appalling conditions. Paralegals conducted a short study into the lawfulness of each boy's detention. The enquiry found that of the 179 young persons found in Zomba prison not one was there in accordance with the laws of Malawi. The Chief Commissioner and Chief Resident Magistrate organized the closure of the section. Within two months it had re-opened and by the end of 12 months the population stood at 120 young persons and rising.

The measures taken above are valuable in that they expose the extent of the problem; however they fail to achieve the cure sought because what is needed - to continue the medical metaphor - is an integrated course of treatment to tackle the multiple ills that cause a particular disease within the system. The 'good practices' referred to in this paper are, in the main, practices which involve and require the participation of all agencies in the criminal justice system.

[6] Kampala Declaration on Prison Conditions in Africa 1996 (E/CN.15/1997/21); Kadoma Declaration on Community Service Orders in Africa 1997 (E/CN.15/1998/L.2/Rev.1); Resolutions of the Kampala Consultative Meeting on Accessible Justice in Africa 1999 (available from PRI); Arusha Declaration on Good Prison Practice 1999 (E/CN.15/1999/12); Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa 2002 (available from PRI).

[7] Safety, Security and Accessible Justice - Putting policy into practice. DFID 2002. www.dfid.gov.uk

Justice costs

Justice systems are not income-generating entities. They do not produce wealth: they cost money. However as events on this and other continents prove again and again, without effective justice systems there is poverty and chaos. This index is an effort to inform decision makers on the good use to which they might put their (already stretched) budgets.

How to use this text

This is a work in progress. We invite those who read this document to critique it and add to it.

Within each section, we briefly set out the problem to be addressed and then summarise the solution or 'good practice' that has been provenly effective in tackling the problem(s) identified. The summary is not meant to be exhaustive. Our hope and intention is that those interested in the summary will contact the practitioners directly to learn more. In this way, we seek to encourage closer interaction between countries, agencies and organisations, and individuals.

acknowledgements

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The Kampala Declaration on Prison Conditions in Africa

Between 19-21 September 1996, 133 delegates from 47 countries, including 40 African countries, met in Kampala, Uganda. The President of the African Commission on Human and Peoples' Rights, Ministers of State, Prison Commissioners, Judges and international, regional and national non-governmental organisations concerned with prison conditions all worked together to find common solutions to the problems facing African prisons. The three days of intensive deliberations produced ***The Kampala Declaration on Prison Conditions in Africa*** *which was adopted by consensus at the closure of the conference.*

PRISON CONDITIONS

Considering that in many countries in Africa the level of overcrowding in prisons is inhuman, that there is a lack of hygiene, insufficient or poor food, difficult access to medical care, a lack of physical activities or education, as well as an inability to maintain family ties,
Bearing in mind that any person who is denied freedom has a right to human dignity,

Bearing in mind that the universal norms on human rights place an absolute prohibition on torture of any description,

Bearing in mind that some groups of prisoners, including juveniles, women, the old, the mentally and physically ill, are especially vulnerable and require particular attention,

Bearing in mind that juveniles must be separated from adult prisoners and that they must be treated in a manner appropriate to their age,

Remembering the importance of proper treatment for female detainees and the need to recognise their special needs,

The participants at the International Seminar on Prison Conditions in Africa, held in Kampala from 19 to 21 September 1996, recommend :

1. that the human rights of prisoners should be safeguarded at all times and that non-governmental agencies should have a special role in this respect, that is recognised and supported by the authorities,

2. that prisoners should retain all rights which are not expressly taken away by the fact of their detention,

3. that prisoners should have living conditions which are compatible with human dignity,

4. that conditions in which prisoners are held and the prison regulations should not aggravate the suffering already caused by the loss of liberty,

5. that the detrimental effects of imprisonment should be minimised so that prisoners do not lose their self respect and sense of personal responsibility,

6. that prisoners should be given the opportunity to maintain and develop links with their families and the outside world, and in particular be allowed access to lawyers and accredited para-legals, doctors and religious visitors,

7. that prisoners should be given access to education and skills training in order to make it easier for them to reintegrate into society after their release,

8. that special attention should be paid to vulnerable prisoners and that non-governmental organisations should be supported in their work with these prisoners,

9. that all the norms of the United Nations and the African Charter on Human and People's Rights on the treatment of prisoners should be incorporated into national legislation in order to protect the human rights of prisoners,

10.that the Organisation of African Unity and its member states should take steps to ensure that prisoners are detained in the minimum conditions of security necessary for public safety.

REMAND PRISONERS

Considering that in most prisons in Africa a great proportion of prisoners are awaiting trial, sometimes for several years,
Considering that for this reason the procedures and policies adopted by the police, the prosecuting authorities and the judiciary can significantly influence prison overcrowding,

The participants at the International Seminar on Prison Conditions in Africa, held in Kampala from 19 to 21 September 1996 recommend:

1. that the police, the prosecuting authorities and the judiciary should be aware of the problems caused by prison overcrowding and should join the prison administration in seeking solutions to reduce this

2. that judicial investigations and proceedings should ensure that prisoners are kept in remand detention for the shortest possible period, avoiding, for example, continual remands in custody by the court,

3. that there should be a system for regular review of the time detainees spend on remand.

PRISON STAFF

Considering that any improvement in conditions for prisoners will be dependent on staff having a pride in their work and a proper level of competence,

Bearing in mind that this will only happen if staff are properly trained,

The participants at the International Seminar on Prison Conditions in Africa held in Kampala from 19 to 21 September 1996 recommend the following:

1. that there should be a proper career structure for prison staff,

2. that all prison personnel should be linked to one government ministry and that there should be a clear line of command between central prison administration and the staff in prisons,

3. that the State should provide sufficient material and financial resources for staff to carry out their work properly,

4. that in each country there should be an appropriate training programme for prison staff to which UNAFRI should be invited to contribute

5. that there should be a national or sub-regional institution to deliver this training programme,

6. that the penitentiary administration should be directly involved in the recruitment of prison staff.

ALTERNATIVE SENTENCING

Noting that in an attempt to reduce prison overcrowding, some countries have been trying to find a solution through amnesties, pardons or by building new prisons,
Considering that overcrowding causes a variety of problems including difficulties for overworked staff,

Taking into account the limited effectiveness of imprisonment, especially for those serving short sentences, and the cost of imprisonment to the whole of society,

Considering the growing interest in African countries in measures which replace custodial sentences, especially in the light of human rights principles,

Considering that community service and other non-custodial measures are innovative alternatives to imprisonment and that there are promising developments in Africa in this regard,

Considering that compensation for damage done is an important element of non-custodial sentences,

Considering that legislation can be introduced to ensure that community service and other non-custodial measures will be imposed as an alternative to imprisonment,

The participants at the International Seminar on Prison Conditions in Africa held in Kampala from 19 to 21 September 1996 recommend the following:

1. that petty offences should be dealt with according to customary practice, provided this meets human rights requirements and that those involved so agree,

2. that whenever possible petty offences should be dealt with by mediation and should be resolved between the parties involved without recourse to the criminal justice system,

3. that the principle of civil reparation or financial recompense should be applied, taking account of the financial capability of the offender or of his or her parents,

4. that the work done by the offender should if possible recompense the victim,

5. that community service and other non-custodial measures should if possible be preferred to imprisonment,

6. that there should be a study of the feasibility of adapting successful African models of non-custodial measures and applying them in countries where they are not yet being used,

7. that the public should be educated about the objectives of these alternatives and how they work.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Considering that the African Commission on Human and Peoples' Rights has the mandate to ensure the promotion and the protection of human and people's rights in Africa,
Considering that the Commission has shown on many occasions its special concern on the subject of poor prison conditions in Africa and that it has adopted special resolutions and decisions on this question previously,
The participants at the International Seminar on Prison Conditions in Africa, held in Kampala, Uganda, from 19 to 21 September 1996, recommend that the African Commission of Human and Peoples' Rights

1. should continue to attach priority to the improvement of prison conditions throughout Africa,

2. should nominate a Special Rapporteur on Prisons in Africa as soon as possible,

3. should make the member states aware of the recommendations contained in this Declaration and publicise United Nations and African norms and standards on imprisonment,

4. should co-operate with non-governmental organisations and other qualified institutions in order to ensure that the recommendations of this Declaration are implemented in all the member states.

The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa

Between 18-20 September 2002, 123 delegates from 38 countries including 33 African countries met in Ouagadougou under the high patronage of the President of Burkina Faso. The President of the African Commission on Human and Peoples' Rights, Ministers of State, Prison Commissioners, Judges and international, regional and national non-governmental organizations all worked together to find ways of accelerating penal reform in Africa. The three days of intensive deliberation produced the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa which was adopted by consensus at the closure of the conference with the request that it be forwarded to national governments, the African Union and the 12th Session of the United Nations Commission on Crime Prevention and Criminal Justice.

Recognising that there has been progress in raising general prison standards in Africa as recommended by the Kampala Declaration on Prison Conditions 1996

Recognising also the specific standards on alternatives to imprisonment contained in the Kadoma Declaration on Community Service Orders in Africa 1997; and on good prison administration set out in the Arusha Declaration on Good Prison Practice 1999

Noting the recognition given to these African standards by the United Nations as complementary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Declaration on the Basic Rights of Prisoners and the United Nations Standard Minimum Rules for non-custodial measures (the 'Tokyo Rules')

Mindful of the key role played by Africans in formulating an agenda for penal reform through the 1999 Egham Conference on 'A New Approach for Penal Reform in a New Century'

Noting with satisfaction the important practical steps that have been taken to implement these standards at an African level through the activities of the African Commission on Human and Peoples' Rights and its Special Rapporteur on Prisons and Conditions of Detention

Commending the practical measures that have been taken by prison authorities in African countries to apply these standards in their national jurisdictions

Recognising that notwithstanding these measures there are still considerable shortcomings in the treatment of prisoners, which are aggravated by shortages of facilities and resources

Welcoming the growing partnerships between Governments, non governmental organizations and civil society in the process of implementing these standards

Emphasising the importance of a criminal justice policy that controls the growth of the prison population and encourages the use of alternatives to imprisonment

The participants at the second pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18-20 September 2002, recommend

1. Reducing the prison population

Criminal justice agencies should work together more closely to make less use of imprisonment. The prison population can only be reduced by a concerted strategy. It should be based on accurate and widely publicized information on the numbers and kinds of people in prison and on the social and financial impact of imprisonment. Reduction strategies should be ongoing and target both sentenced and unsentenced prisoners

2. Making African prisons more self-sufficient.

Further recognition should be given to the reality that resources for imprisonment are severely limited and that therefore African prisons have to be as self sufficient as possible. Governments should recognize, however, that they are ultimately responsible for ensuring that standards are maintained so that prisoners can live in dignity and health.

3. Promoting the reintegration of offenders into society

Greater effort should be made to make positive use of the period of imprisonment or other sanction to develop the potential of offenders and to empower them to lead a crime-free life in the future. This should include rehabilitative programmes focusing on the reintegration of offenders and contributing to their individual and social development.

4. Applying the rule of law to prison administration

There should be a comprehensive law governing prisons and the implementation of punishment. Such law should be clear and unambiguous about the rights and duties of prisoners and prison officials. Officials should be trained to follow proper administrative procedures and to apply this law fairly. Administrative decisions that impact on the rights of prisoners should be subject to review by an independent and impartial judicial body.

5. Encouraging best practice

Further exchange of examples of best penal practice is to be encouraged at national, regional and international levels. This can be enhanced by the establishment of an all-African association of those involved in penal matters. The rich experience available across the continent can best be utilized if proven and effective programmes are progressively implemented in more countries. The Plan of Action to be developed from the proceedings of the Ouagadougou Conference will serve to further such exchange.

6. Promoting an African Charter on Prisoners' Rights

Action should be taken to promote the draft African Charter on Prisoners' Rights as an instrument that is appropriate to the needs of developing countries of the continent and to refer it to the African Commission on Human and Peoples' Rights and the African Union.

7. Looking towards the United Nations Charter on the Basic Rights of Prisoners

The international criminal justice community should look towards developing a United Nations Charter of Basic Rights for Prisoners with a view to strengthening the rule of law in the treatment of offenders. African experience and concerns should be reflected in this Charter, which should be presented to the 11th United Nations Congress on the Prevention of Crime and Criminal Justice in Bangkok, Thailand, 2005.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa

128 delegates from 26 countries including 21 African countries met between 22-24 November 2004 in Lilongwe, Malawi, to discuss legal aid services in the criminal justice systems in Africa. Ministers of State, judges, lawyers, prison commissioners, academics, international, regional, and national non-governmental organizations attended the conference. The three days of deliberations produced the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (set forth below), which was adopted by consensus at the closure of the Conference with the request that it be forwarded to national governments, the African Union Commission on Human and Peoples' Rights, the African Union Commission, and the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok in April, 2005, and publicized to national and regional legal aid networks.

Preamble

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

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

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

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

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

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

adoption by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April, 2005;

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

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

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

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

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

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

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

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

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

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

All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and

vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

2. Sensitizing all criminal justice stakeholders

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

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

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

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

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

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

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

support for such mechanisms provided that they conform to human rights norms.

6. Diversifying legal aid delivery systems

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

7. Diversifying legal aid service providers

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

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

It is universally recognised that lawyers are officers of the court and have a duty to see that justice systems operate fairly and equitably. By involving a broad spectrum of the private bar in the provision of legal aid, such services will be recognised as an important duty of the legal profession. The organized bar should provide substantial moral, professional and logistical support to those providing legal aid. Where a bar association, licensing agency, or government has the option of making pro-bono provision of legal aid mandatory, this step should be taken. In countries in which a mandatory pro-bono requirement cannot be imposed, members of the legal profession should be strongly encouraged to provide pro-bono legal aid services.

9. Guaranteeing sustainability of legal aid

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

10. Encouraging legal literacy

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

A 10-points Plan to Reduce Overcrowding in Prisons in Africa

1. **Inform public opinion**

Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures.

2. **Improve access to, and co-ordination within, the criminal justice system**

Increasing public access to the police, courts and prisons engenders public confidence and transparency. Co-ordinating and streamlining the work of the criminal justice agencies assists both efficiency and compliance with international human rights standards.

3. **Invest in crime prevention and crime reduction**

Problem solving partnerships between the police, other public agencies, businesses and communities can produce effective plans to reduce the risk factors which lie behind much crime - drug misuse, family difficulties, school failure, unemployment.

4. **Divert minor cases from the criminal justice system**

Many cases can be effectively dealt with outside the formal criminal justice system.

5. **Reduce pre-trial detention**

In some countries as many as 75% of the prison population may be awaiting trial. Alternatives such as bail and regular reviews of cases can reduce pre-trial detention.

6. **Develop constructive alternatives to custodial sentences**

Courts need sentencing options that are effective and not just a 'soft option': without alternatives, imprisonment as a punishment of 'last resort' becomes a commonplace.

7. **Reduce sentence lengths and ensure consistent sentencing practice**

Sentencers need guidance to deter inconsistent sentencing practice.

8. **Develop special arrangements for youth offenders that keep them out of prison**

Children in conflict with the law (under 18) should be diverted from the criminal justice process. A term of imprisonment should be strictly a measure of last resort and for the shortest appropriate period of time.

9. **Treat rather than punish drug addicts and mentally disordered offender**

Courts should be able to order treatment for those whose crimes are often committed to feed their addiction. Prison is not a suitable institution for mentally ill people.

10. **Ensure the system is fair to all**

Imprisonment impacts disproportionately on the poor, the dispossessed and minorities who face discrimination outside. Monitoring should take place at every stage of the criminal justice system to ensure that discrimination does not take place and that the efforts to reduce imprisonment suggested in this plan are made in respect of all members of the community.

Ten Point Plan for Juvenile Justice

A contribution to the Committee on the Rights of the Child Day of General Discussion on "State Violence Against Children", Geneva 22 September 2000.

The following Plan focuses on ways of reducing violence within juvenile justice systems around the world. The plan builds on the relevant international instruments: the UN Convention on the Rights of the Child, the Standard minimum Rules for the Administration of Juvenile Justice and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Penal Reform International (PRI) believes that a proper administration of juvenile justice cannot be achieved without a strong education and social welfare system. Helping young people in conflict with the law to become law abiding adults is much more the job of parents, teachers, social workers and psychologists than it is police, courts and prisons.

PRI believes that juvenile offending should be dealt with as far as possible outside the formal criminal justice and penal systems. It is important to ensure that alternative systems- particularly those involving institutional care- take proper steps to protect children from violence and abuse.

Arrest and Interrogation

1) Arrest of children (defined as those under the age of 18 years) should be a measure of last resort and detention in police custody should be for the shortest time and in no case more than 48 hours. Use of police bail or bond with or without surety should be encouraged Those arrested by the police should be separated from adults and held in child friendly rooms rather than conventional cells. Questioning should be undertaken by selected and trained officers in the presence of parents, guardians or other appropriate adults. Children should be informed of their rights.

Age of Criminal Responsibility

2) Countries should set as high a minimum age of criminal capacity as possible and children below this age who are accused of crimes should not be taken through the criminal justice system. Measures should be found for dealing with such children that provide them with appropriate services whilst protecting their rights.

Diversion

3) There is a need for diversionary community alternatives to prosecution when children admit their offences. Warnings, cautions and admonitions can be accompanied by measures to assist the child at home, with education and with problems or difficulties. Conferences which involve the victim and members of the community may be particularly useful provided that there are safeguards to protect the well being of the child. Prosecuting authorities should develop guidelines to assist diversion in the lower courts.

Pre Trial detention

4) Children should, where possible, be released into the care of their families to await trial in their own homes. Conditional release should be accompanied by measures to support and supervise the child and family. A maximum time limit should be set for keeping a child on bail according to age and offence. Pre trial Detention should not be used for children other than in exceptional circumstances and under 14's should never be detained in prison establishments. Where it is used it should be for the shortest time, with a cut off period for which a person may be held awaiting trial, after which the child should be released on bail. Bail and other forms of conditional release should be accompanied by measures to support and supervise the young person and their family. Separation from adult detainees and strict monitoring of the conditions of children detained pre trial are imperative.

Alternative Sentences

5) A wide range of alternative sentences are needed particularly those which emphasise the values of restorative justice and seek to meet the needs of young people which are leading them into crime. Intensive programmes should be developed for more persistent and serious young offenders. Fostering and residential placements in educational and treatment facilities should be available where necessary.

Youth Courts

6) Special child courts/tribunals with less formal proceedings should be established for dealing with under 18's. Such courts should be held in camera and the presence of the parent/guardian is important. Judges should receive special training and concern themselves with the application of sanctions and measures as well as just sentencing. Sentencing should be based on a careful assessment of the needs of the young person as well as the circumstances of the offence. Legal representation should be encouraged and where a child is facing the possibility of a custodial sentence the state should automatically provide immediate legal support and aid.

Custodial sentences

7) Custodial sentences should be used as a last resort and for the shortest time, and used only in exceptional cases. Small open facilities with minimal security measures should be developed for children serving such sentences. Education and rehabilitation should be the main priorities. Decisions about the placement of young offenders in establishments should balance the need to maintain family contacts with the need for specialist regimes. A minimum age for placement in prison establishments should be set and should be no lower than 14.

Detention Facilities

8) Separate facilities should be used for children who are detained namely no mixing with adults. In large prison establishments, adult prisoners should not be used as guards in the unit where children are held. Regimes should be constructive with education, sporting and cultural activities provided during the day and in the evenings. Adequate numbers of staff should be trained and vetted. Non-governmental organisations should be encouraged to play a full part in the life of the institution. Facilities should have an anti-bullying policy and systems for mediating disputes between detainees. Appropriate methods of discipline, control and restraint should be used based on the minimum necessary use of force. Records should be kept and inspected of such incidents. Needs and risk assessments should be undertaken on admission with more serious offenders separated from less serious ones.

Inspection

9) Systems of independent scrutiny and inspection should be established for institutions for children. These should comprise government inspectors and representatives of the local community. Complaint systems with an independent element should be in place. Independent visitors should be encouraged to befriend young people and advocate on their behalf. Non-governmental organisations working on human rights issues should play a role in monitoring institutions for children or any other institutions where children are held. Matters for scrutiny should include the rights to privacy for children, to make complaints, to be held in open institutions unless security is necessary for the safety of the child or the public, the right to contact with family and the right to access educational, leisure, health and rehabilitative programmes.

Family Links

10) Every effort should be made to encourage contact between detained children and their families and communities. Visits should take place in private settings and children should be permitted to make visits to their family homes. Plans should be developed to assist the reintegration of the child into their family and community when they are released from detention. Reintegration programmes should be developed to help children move back into, and become contributing members of their communities.

identifying problems

Of all the examples of malfunctions within the legal systems throughout the continent, the most glaring are delays in dealing with criminal cases. These delays result in a marked increase in the number people remanded in custody, contradicting the internationally recognized rules of the right to be judged within a reasonable period of time. In addition, they have serious consequences for those who are affected by them.

A real-time snapshot of how the entire criminal justice system runs is the first requirement to solving this problem and identifying the bottlenecks.

At the prison level, it is important to have, first of all, a precise knowledge of each inmate's status in the prison and how it has developed over time. Those who have been remanded in custody for the longest periods are identified and cases going through criminal proceedings could be prioritized. At the court level, observing trials would be useful for analyzing the operations of the courts to see if the fundamental principals of fair justice are being respected.

With this information, clear and well-informed proposals could be submitted for remedying the inadequacies, violations or malfunctions of the justice system.

Conduct prisons census

Countries: **Kenya, Malawi, Uganda**
Agency: **Prisons + NGOs**

Prisons conduct a census everyday both in the morning and evening when everyone is locked up. A visitor to a prison will observe - at a glance – disaggregated information on the numbers of people in the institution: the numbers of adult men and women, young offenders, women with their children, persons in hospital and persons outside working. The information will also detail the number of persons convicted of an offence or awaiting trial. There will be even figures on those facing the death penalty or serving a term of 'life' imprisonment. These figures disclose an extraordinary amount of information; and they are contemporary and accurate.

Certain types of information that are objectively verifiable from case/court or prison files are easy and inexpensive to obtain and would enhance the picture. The research can be limited in scope to a specimen selection of prisons; or to a theme or particular enquiry.

The 2003 Uganda Prison Census concluded that of 17,000 persons in prison, the average prisoner is a male aged 18 to 30 years. The great majority (some 80% of all prisoners) are likely to have poor dependents. He has, at most, basic primary education or none at all and is either unemployed or a farmer. Two-fifths of the prison population *had not attained any education at all* and less than 1% has a diploma or degree.

In Malawi a census in 2003 found that 40% of convicted prisoners were serving sentences of less than three years for 'minor' offences. In Kenya a similar review found 61% of convicted prisoners to be serving 3 years and below (which in Kenya qualifies for consideration for a Community Service Order).

In Kenya, the census was limited to Nairobi Remand, Langata women and Nakuru prisons (2003) where prison officers found that 86% of remand prisoners who had committed 'bailable offences' had been granted bail but could not meet the conditions set by the court; and only 6% of all remands had hired a lawyer to represent them.

The Ugandan Prison Service found that over 460 prisoners had exceeded their constitutional remand period and were due for unconditional bail. In an earlier census of homicide remandees in Malawi (1997), 47 cases were found not to have a file and were dismissed. All the persons concerned were in custody awaiting trial and many had spent over six years on remand. The Kenya Prison Service identified a prisoner in Nakuru Prison who had been waiting for trial for 18 years 1 month and another in Langata who had been waiting trial for 17 years and 3 months.

The information gathered enables the authorities to process the caseload systematically.

Reducing the case backlog

Countries: **Kenya, Malawi, Uganda**
Agency: **DPP and Police (review of case files); criminal registry (case listing or 'cause list')**

Contact:
Kenya: Legal Resource Foundation Kenya Paralegal Prison Project national co-ordinator
Malawi: Paralegal Advisory Service, National co-ordinator

The long delays awaiting trial that many people endure often for many years constitutes a breach of the criminal law, constitutional guarantees and right to trial within a reasonable time. Many developing governments plead poverty by way of defence. The UN Human Rights Committee has dismissed this defence: *'The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe.*[1]

Heavy case backlogs tend to distort the administration of criminal justice, as mentioned above. The understandable temptation to seek 'quick fixes' should be resisted as they usually turn out to be costly and short-term. Case backlogs develop because the system is not functioning properly – principally because of under-resourcing but also because of failures in communication, co-operation and co-ordination between the various agencies concerned.

A concerted effort can be useful initially to rationalise the caseload and set in motion a process of justice reforms with a 'quick win' that raised morale and signals to prisoners and the public at large that something concrete is being done to manage cases more efficiently.

One category of remandee that PRI has noted to be particularly at risk of lengthy delays before his/her case can come to trial is the person charged with homicide.

[1] Lubuto v Zambia Communication No 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995)

In 1998, the court system in Uganda had an extreme backlog of criminal and civil cases. For example, in one court, during a nine-month period only one case was decided. This led to the appointment of a Case Management Committee with representatives from the police, probation, prosecution, the prisons and the judiciary. The Committee meetings were soon held on a monthly basis, as it immediately became apparent that poor communication was largely behind the lengthy court delays.

By tracking the progress of cases through the system from the very beginning, the Committee was able to identify the major "bottlenecks" between the police, courts, and prisons. The Committee initiated the practice of transferring cases from police to court immediately and taking evidence from available witnesses by the available magistrate to ensure fast disposal of simple cases. Another achievement was the development of a 'joint simplified procedure' to discontinue prosecution of certain cases in which the accused had not been formally arrested. Some 600 'deadwood' cases clogging up the administrative system of the judiciary in the Masaka district were disposed of in this manner.

In Malawi, in October 2003, paralegals conducted clinics in prison for homicide remand prisoners as a result of explaining the difference between murder and manslaughter, 32 prisoners indicated they wished to plead guilty to manslaughter. Following consultations with legal aid lawyers, the cases were listed before the High Court for plea where 29 entered a plea and were sentenced resulting in savings to the judiciary of more than $33,000. As a result of this exercise, 230 remand prisoners have indicated their intention of entering an early plea to manslaughter.

In Kenya in January 2004, the Kenya Prison Paralegal Project cut the remand population in Thyika women's prison from 80 to 20 prisoners following a case by case review of the prisoners.

Trial observations

Countries: **Malawi**
Agency: **NGOs, Courts**

Contact:
Malawi: Paralegal Advisory Service, National co-ordinator
International Commission of Jurists
Documents:
Amnesty International: Fair Trials Manual. *www.amnesty.org*

It may be that backlogs are reduced (as just mentioned above) and *x* number of cases disposed of in a certain period – i.e. the system becomes more efficient. But then what of the quality of the justice rendered and the fairness of the proceedings? Did those awaiting trial have 'adequate opportunities' to consult with a lawyer[1]; or access to a lawyer 'of experience and competence commensurate with the nature of the offence'[2]? Did the 'opportunities' ensure that time was available for counsel to canvas a plea or reduce the charge? Trial observations are useful in providing a snapshot of the workings of the criminal justice system and the fairness of that system and in informing the judiciary on some priority measures.

Between 2000 and 2001, paralegals in Malawi observed 91 capital trials in the High Court sitting on circuit around the country. They found that of the 91 trials listed 16 were adjourned *sine die* due either to the deaths of key witnesses (4) or accused in custody (4) or non-appearance of witnesses and accused. These adjournments have a direct cost implication as the cost of accommodating and keeping judges and lawyers were wasted. They revealed that 45 of the 75 trials listed ended in guilty pleas to manslaughter (again costs wasted as witnesses had to attend). They showed that of 20 accused on bail (note: for a capital offence) only 7 failed to appear for trial and it was not proven that these seven had had adequate notice of the trial date or venue.

The observations also disclosed the following:

[1] Annex para 8 UN Basic Principles of the Role of Lawyers 1990
[2] ibid para 6

- limited consultation period with lawyers: in almost every case legal aid lawyers first met the accused at court. This obviates the possibility of tracing witnesses (crucial when running a defence of alibi) and generally falls short of *UN Safeguards guaranteeing protection of the rights of those facing the death penalty 1984* and *UN Basic Principles on the Role of Lawyers 1990*
- lack of resources available to legal aid lawyers, their age and lack of experience
- trial judges' lack of familiarity with jury trials
- questionable standards observed by police during investigation
- inconsistency in reducing murder to manslaughter[3]

Trial observations can tell us a great deal about what is working well and what areas need to be improved. Mechanisms for encouraging and taking guilty pleas at an early stage and based on an informed judgement (through legal education as well as legal advice) can also reduce the case backlog and time spent on remand (see the Paralegal Advisory Service below).

[3] Report of trial observations of capital cases carried out between June 2000 – February 2001. Paralegal Advisory Service (Malawi). PRI. September 2001. Available from prililongwe@penalreform.org

Improving inter-agency co-operation

Lack of cooperation, communication and coordination between the different participants in the criminal justice system - judges, prison staff, police officers and social workers - is one of the main causes of malfunction in this sector. Many countries have developed mechanisms aimed at remedying the situation.

Sometimes all that is needed is to invite the stakeholders to meet regularly to discuss the problems observed, identify the bottlenecks and propose immediate solutions. They could also ensure that all the information they need to deal with the cases is in fact at their disposal and shared between all.

It could also mean being creative in bringing judges and those due to be tried closer together. For example, court sessions could be set up inside the prisons themselves so that judges could study the cases of prisoners who are remanded in custody. Thus, in the appropriate cases, a release on bail or automatic release could be granted if the person has been in detention awaiting trial for a period exceeding that permitted by law. Problems related to escorting prisoners are also avoided and many cases could be settled quicker and for less cost.

Linking the Criminal Justice System

Countries: **Uganda**
Agencies: **Courts, Police, Prisons, NGOs, Social Services**

Contact: The Chain Link initiative

The Chain Linked Initiative pilot in Masaka Magisterial district, Uganda, demonstrated that the justice agencies were all part of the same chain that makes up the administration of justice process and that they all stood to benefit from working more closely together and sharing information. Some of the immediate benefits included:

- 600 "deadwood" cases identified and withdrawn with the stroke of a pen by the DPP
- Joint prison visits with agreed action in relation to priority prisoners identified including release of those found to be imprisoned unlawfully.
- Development and distribution of agreed performance standards for different stages in the administration of justice process.
- Introduction of concept of court 'open week'.
- Joint meetings to weed out weak cases and co-ordinate the scheduling of trials.

The Chain Linked initiative has paved the way for the introduction of a co-ordinated approach to planning and budgeting on a national, sectoral level for the Justice, Law and Order sector programme (J/LOS) in Uganda today.

In addition to improving coordination between courts and prosecutors, the Chain-Linked Program has recognized that improved case management also requires coordination with citizens. For instance, among other innovative ideas, a Chief Magistrate has assigned a clerk to monitor the grounds around court to ensure that persons sitting there know what to do, where to go, etc. (see PAS-Malawi below). This same court has also designed posters and guides for court users in various languages and pinned them at the entrance of the court. These measures make it more likely that defendants will arrive promptly in court, prepared to present their cases.

Caseflow Management Committees and Court User Committees

Countries: **Uganda, Kenya, Tanzania, Malawi**
Agencies: **all (including social services, local community leaders and NGOs)**

Contact:
Malawi: Penal Reform International Lilongwe Office
Uganda: The Chain Linked Initiative

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

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

The Committees require little in the way of funding: $10 per meeting is budgeted for in Malawi which covers the cost of local transport and some refreshments. The CUC provides practitioners with a forum to address temporary crises as in the example above and also to discuss on a continuing basis ways of reducing the caseload by referring appropriate cases to the Community Service officers (who also attend these meetings); or back to traditional authorities for local settlement – as well as encouraging the police to speed up investigations and gather the evidence before the person is remanded in custody rather than afterwards.

Tri-partite Committees

Countries: **Pakistan (Punjab)**
Agency: **Judiciary and police**

Contact:
DFID police adviser, UK

In Punjab a Tri-Partite Committee meets once a month on a structured basis. The Committee consists of the District Magistrate, a Sessions Judge, and the Deputy to the Senior Superintendent of Police. It visits the District prisons, where it is able to monitor administrative records, interview some prisoners and is able to uncover malpractice on the part of the police. Where necessary the Committee can arrange for bail to be granted; and when deemed appropriate for cases to be discontinued under powers granted by the Home Secretary. It is claimed that in a fifteen month period 35,000 prisoners have been released from prison through this process[1].

[1] Chris Gale, DFID police adviser, appraisal of justice issues in Pakistan 2001

Tracking Prisoners: Developing a Database

Improving inter-agency co-operation

Countries: **Senegal**
Agency: **Judiciary and prisons**

Contact: IRD; General Inspectorate of Justice

Losing track of prisoners or lack of information about their penal status is a frequent cause for overstaying on remand. In Senegal, the General Inspectorate of the Judiciary, with the support of the Institute for Research and Development (IRD) has developed a computerized database. Its first objective was to re-organise the individual penal record systems, which had collapsed. A software was developed and installed in the regional and departmental courts, at the Appeal Court, as well as centrally at ministerial level. All users are connected and have received appropriate training. It is expected that prisons will be equipped and connected too. The software includes “alarm bells” each time a procedure deadline is being breached. In that sense, it is extremely useful in preventing unlawful pre-trial detention.

Developing new approaches to legal aid

It is imperative that prisoners, and especially those awaiting trial, should be informed about their rights and know how to exercise them. The State has the legal obligation to provide legal aid in cases where warranted in the interest of justice. In many countries, there are not enough lawyers, they cost too much for those who need them and they are not evenly distributed across the country. The legal aid programmes provided in most countries are too expensive and do not work.

Innovative and less costly mechanisms have been developed to provide necessary assistance to the most impoverished, to which they did not have access otherwise. By bringing in students, paralegals and articling student lawyers, this assistance could be made available at different levels.

In police stations, they could inform people brought in for questioning about their rights, preventing possible abuse.

In the prisons, prisoners - and guards - could benefit from being educated about the law, receive advice and, if necessary, help with monitoring their cases.

In the courts, users could be informed about the operation and organization of a court of justice.

These actors, who are found throughout the criminal justice chain, could also contribute to improving coordination between the different institutions involved.

Justice Centres

Countries: **South Africa**
Agency: **Law Society, Legal Aid Board**

Contact:
South Africa: Legal Aid Board

In South Africa, the Legal Aid Board (LAB) is an independent body responsible for implementing those provisions of the Constitution which require the State to ensure access to legal services. The LAB has established a network of 'one stop' Justice Centres staffed by lawyers ('professional assistants') and recently graduated law students ('candidate attorneys'). They offer advice and representation on civil and criminal matters. The LAB is also entering into agreements with university law clinics and NGOs to provide the outreach it cannot.

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

When a person steps in off the street, s/he is processed as follows:
Step 1: fill out application form
Step 2: means test
Step 3: interview with a paralegal who reviews the merits of the case and

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

On average, the candidate attorney in the DJC will expect to deal with 25-30 cases a day in the district court and as many as four trials a day in the regional court. Candidate attorneys do not visit the prison – instructions are taken at court in the holding cells.

Those on bail come to the DJC for a conference. They do not visit police stations either as legal aid is only granted at the first court appearance.

Salaries are considered competitive. The position is respected and lawyers in the DJC enjoy good status in society – most candidate attorneys stay on and become professional assistants. The costs of the Justice Centre were estimated to be 30% less than the former Judicare scheme (which involved contracts with private lawyers).

Campus Law Clinics

Countries: **South Africa, Uganda**
Agency: **University students and staff**

Contact:
South Africa: University of Natal; Association of University Based Legal Aid Institutions (AULAI); National Community-Based Paralegal Association (NCBPA) of South Africa; National Paralegal Institute of South Africa (NPI-SA):
Uganda: Legal aid clinic

In South Africa, most universities have a law clinic staffed by law students and supervised by the academic staff. The chief goal is to provide free legal services to indigent people and to promote the training of law students and graduates in the skills and values required to practise law. The Association of University Based Legal Aid Institutions (AULAI) represents 20 university-based law clinics and has been in existence for over 20 years. The role of Clinical Legal Education as a legal aid service provider is increasingly recognised in South Africa and elsewhere.[1]

Most of the clinics have formed relationships with paralegal advice offices that are located in rural areas. The clinic staff and students offer 'back-up legal services' and travel to advice offices and work with paralegals in providing advice and representation.
There are estimated to be some 250 advice offices with approximately 750 paralegals in South Africa. Of these, 150 are affiliated to the National Community Based Paralegal Association (NCBPA). The emphasis of the advice offices is on civil and customary law matters, rather than criminal. However they are mentioned here as a potential service provider for those in custody seen in light of the Paralegal Advisory Service below.

[1] Both the Ford Foundation and Open Society Institute have played an important role in the development of CLE in southern Africa. A useful overview is provided by Stephen Golub, 'Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights, and Poverty Alleviation.' Open Society Justice Initiative Issues Paper. January 2004: info@justiceinitiative.org

Other law clinics such as The Legal Aid Clinic of the Law Development Centre in Uganda have legal aid programmes for prisoners also using law students.

Assistance at Police interview

Country: **Angola**
Agency: **The Bar/Law Society, Police**

Contact:
Angola: Ordem dos Advogados (Bar Association), Co-ordinator of the Human and Rights and Access to Justice Commission

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

Paralegal Services

Programme d'Assistance Judiciaire aux Détenus (PAJUDE), Benin
Kenya Prison Paralegal Project (KPPP), Kenya
Paralegal Advisory Service (PAS), Malawi

Countries: **Benin, Kenya, Malawi,**
Agency: **NGOs in partnership with prisons, police and courts**

Contacts:
Benin : PAJUDE coordinator
Malawi: national co-ordinator PAS; Eye of the Child, Malawi CARER, Centre for Legal Assistance (CELA), Youth Watch Society,

The introduction of paralegals working in the criminal justice system is an innovative experiment in offering paralegal aid in criminal matters in Benin, Kenya and Malawi.

The concept was first piloted in Malawi in 2000 as the Paralegal Advisory Service (PAS) with eight paralegals working in four prisons. In October 2004, 37 trained paralegals cover 84% of the prison population and work in the four main police stations and four regional court centres.

The paralegals are centrally co-ordinated by a PAS national co-ordinator and employed by four NGOs working in partnership with the Malawi Prison and Police Services as well as the courts to offer legal education, advice and assistance in the prisons, police stations and courts, i.e. on the front-line of criminal justice. While in prison and police stations the paralegals are regulated by a Code of Conduct.

In prison, the paralegals conduct daily 'paralegal aid clinics' (PLCs[1]) using inter-active drama techniques to maximise the participation of prisoners (as many as 200 attend a clinic).

Following a PLC on bail, paralegals interview prisoners and assist those who wish complete standard bail forms which have been agreed with the judiciary. The prison authorities check the form against the prisoner's file and stamp the details recorded as accurate. The form is then lodged with the court and the case

[1] Paralegal Aid Clinics. A training manual for paralegals working in prison is available from PRI (Lilongwe) (prililongwe@penalreform.org)

heard as part of a block listing by a single magistrate (30 cases can be disposed of in this way). Where there is no objection to bail, the prisoner is released without a hearing. Other prisoners who are due to appear that week are rehearsed on how to make a bail application.

The paralegals have also agreed standard forms covering appeal against sentence with the High Court. They assist prisoners complete these and then lodge them with the court.

In police stations, they gained initial entry and acceptance through focusing on young persons in conflict with the criminal law. They assist trace parents, attend at interview and advise the accused of his/her constitutional rights; and screen the young person for possible diversion (see below under juvenile justice). In September, 2004, police agreed to extend the paralegals to all police stations to assist at interviews with adult suspects.

In courts, the paralegals assist witnesses, accused on bail and members of the public orientate themselves. They follow up the bail forms from the prisons. They visit the prisoners in the holding cells.

Results show that in the past four years the PAS had:

- Enabled more than 30,000 prisoners to represent themselves through paralegal aid clinics (PLCs)
- facilitated the release of approximately 2000 prisoners
- drawn the attention of the Director of Public Prosecutions, Police and criminal registry to the plight of hundreds of homicide remand prisoners who had been waiting years for trial or committal for trial
- conducted over 100 trial observations both of capital cases in the High Court and traditional justice fora

The impact observed has gone further than these figures suggest, however, the PAS has also:

- reinvigorated communication, co-operation and co-ordination between police, courts and prisons in all four magisterial districts
- encouraged magistrates to sit (with court clerk and police prosecutor) in prison and screen prepared case lists drawn up by the paralegals of persons who had been detained unlawfully or inappropriately through 'Prison Screening Sessions' (see 'Camp Courts' below)
- caused judges and magistrates to remark on the more 'sophisticated' understanding prisoners have of criminal law and procedure[2] as well as on the better understanding of their rights[3]
- reduced substantially the numbers of persons unlawfully remanded in prison and stabilised the remand population at 22% (from 50% before the scheme began)
- set professional standards within the criminal justice system which other actors are beginning to emulate.

[2] Evaluation report at para 6.1.4 page 23.

[3] Malawi Inspectorate of Prisons, Report to Parliament, Nov. 2002, page 19.

In Benin, the Programme d'Assistance Judiciaire aux Détenus (PAJUDE) began in 2002 based on the PAS in Malawi. Four paralegals work in four prisons with similar aims and purposes as the PAS. They screen the caseload and link up with the courts to speed up the process; they educate prisoners on the legal process; and draw the attention of the appropriate authorities to the situation of vulnerable categories of prisoners. By March 2004, the PAJUDE had facilitated the release of more than 850 prisoners.

In Kenya, the Kenya Prison Paralegal Project (KPPP) started in January 2004 following a study tour to Malawi to observe the PAS in action. The Kenya Prison Service have embraced the scheme which is managed by the Legal Resources Foundation (Kenya) and began on a pilot basis in selected prisons in and around Nairobi. Over a six month period, the 12 paralegals in the KPPP working in five prisons applied PLCs to educate more than 4,000 prisoners, screen and advise over 3,000 prisoners and facilitate the release of over 650 prisoners.

The monthly cost of a PAS paralegal is under GBP250.

Reforming justice for juveniles

Juveniles in conflict with the law represent a category of prisoners who are vulnerable, particularly when deprived of their liberty. According to the United Nations Convention on the Rights of the Child, "in all actions concerning children, the best interests of the child shall be the primary consideration" (Article 3). For that reason, there must be specific legal proceedings geared to them. There is generally a broad consensus that minors should only be incarcerated as a last resort.

Many countries go even farther and consider that original solutions must be found outside of the criminal justice system as much as possible to deal with the issues surrounding juvenile delinquency, under certain conditions. These are extrajudicial measures, including verbal warnings or cautions issued the police, reparations, restitution, arbitration, community service, various therapies, etc.

These programmes are based on a restorative approach to justice, which makes the offender accountable for the wrong committed. They take into account the interests of the victim, the offender and society and are aimed at dealing appropriately to remedy the damages caused.

Pre-trial Diversion of Young Offenders

Countries: **South Africa, Namibia, Democratic Republic of Congo**
Agency: **NGO in partnerships with prosecution authorities**

Contact:
Namibia: Co-ordinator, Child Justice project, Legal Assistance Centre
Democratic Republic of Congo: BICE Co-ordinator
South Africa:NICRO

Young people in custody are always at risk. In police stations they are particularly so as conditions tend to be worse and inaccessible to non-police officers.

In Namibia, the Child Justice project of the Legal Assistance Centre has been in operation for more than eight years. Members of the project visit police cells to determine the number of young persons, the reasons for and conditions of their detention and whether they are held separately from adults. They further check whether the parents know of their arrest and detention and whether they have been assessed by social workers for possible diversion.

In Kinshasa, DRC, the Bureau International Catholique de l'Enfance (BICE) has established a legal assistance programme for young persons in conflict with the law. BICE set up 12 Local Child Protection Committees (*Comites Locaux de Protection de l'Enfance)* which visit 60-80 local police holding cells (*cachots*). Each committee numbers around 15 members who are all volunteers. BICE provides four advisers (*assistants conseils)* who are lay people trained by BICE to whom the committees report and one legal officer (*assistant juridique)* who is a trained lawyer and who co-ordinates the programme and refers cases to private lawyers – whose costs are covered. Between January-June 2003, the programme in Kinshasa facilitated the release of over 530 young offenders and women with babies.

Pre-trial Community Service Orders

Countries: **Namibia, South Africa**
Agency: **NGO / social services in partnership with prosecution authorities**

Contact:
Legal Assistance Centre, Namibia

One of the diversion options in use in Namibia is 'pre-trial community service' whereby the young person 'pays back' to the community for the harm s/he has done. The young person works for a number of hours in a 'non-profit' organisation. The conditions are that the young person is 14 or over, admits to the offence and has no history of mental disorder. The young person and parents sign a contract with the placement agency and social worker. A time sheet is kept which is returned to the court as proof that the young person has completed the order so that the case can be withdrawn.

Community service schemes based on the Zimbabwe model (in Kenya, Malawi and Uganda for instance) also allow for Community Service Orders to be passed on young offenders following conviction at court. They have yet to be applied in pre-trial hearings however.

Community service has been identified as an acceptable alternative to pre-trial detention. NGOs can (and do) take an active role in the implementation of the program and conduct interviews of offenders to help determine the appropriate number of hours of community service. The program also relies on elements of informal conflict resolution that involve the offender's family and other members of the community. One important factor in the success of any program is that the community service order takes into account the offender's preferences and work skills as far as possible. However, community work for children under 18 should not prevent children from attending school or vocational activities and should have an educational component.

increasing judicial activism

Judicial authorities are responsible for ensuring respect for the principle of equality in the courts and for procedural rules in prisons and police stations.

Their role is to ensure that everyone is treated equally before the law, so that rich or influential people do not receive special treatment and the law is uniformly applied across the country. The authorities could adapt the existing texts so that no one would be unduly excluded from any benefits provided for under the law due to their economic or social status. Through the involvement of community representatives, the authorities could ensure a more just and better-understood application of the law.

By establishing a dialogue, or even negotiations, between the public ministry, the accused and the victim, the legal process could be eased considerably, while respecting the rights and interests of everyone.

By better organizing their work and imposing a strict respect for procedures, reminding everyone of their obligations, judicial authorities fulfil their duty of ensuring the smooth administration of justice.

Taking proactive measures to ensure the 'equality of arms' principle is maintained and that unrepresented accused persons are not unduly prejudiced

Country: **United Kingdom**
Agency: **Magistracy**

Where an accused is unrepresented in the lower courts, it is often the case that s/he faces the double prospect of a hostile bench and hostile public prosecutor. The magistrate is there to see that justice is done. Where an accused fails to put his/her case, s/he should be assisted in the interests of justice. In the United Kingdom, the court clerk will take the part of an unrepresented accused. In common-law jurisdictions in Africa, the English version of the 'court clerk' (who is a trained lawyer) does not exist. The magistrate could therefore take this role.
A more pro-active role by magistrates to see, for instance, that police investigations are not permitted to drag; that charges are promptly and fairly framed; that the presumption in favour of bail is properly explored and that conditions are not unduly onerous would serve to reduce the pre-trial population.

Relax and Diversify Bail Conditions

Agency: Court

Bail is a presumptive right guaranteed in many constitutions with a common law tradition. Bail should only be refused where the offence is serious and there is a reasonable risk that the offender will a) fail to appear for trial; b) commit further offences; c) interfere with the evidence; or d) be at personal risk or a risk to others were s/he to be released. However in practice in many countries and particularly in rural areas, the granting of bail is the exception rather than the norm.

Many people are remanded in custody because they cannot meet the conditions for bail set by the court. If an accused is charged with a minor offence and is unable to pay the surety set by the court to be released on bail, then justice requires that the person should be released pending trial. Otherwise, people end up serving a longer time on remand than they would have served – if found guilty of the offence – under a sentence of the court.
James Fort prison in Accra, Ghana, held 695 remand prisoners in December 2001 against a capacity of 200. The head of the prison estimated that 70% were charged with minor offences and that at least 60% had been granted bail by the court (i.e. over 400 prisoners) but were unable to raise the necessary surety set by the court.[1]

Bail conditions should take account of the means of the offender. A surety of $10 may be insignificant to a person of means but a considerable amount for a poor person to raise. This also serves to acquaint the public with the principles behind bail.

[1] PRI mission report

Involve the Community in Bail Proceedings

Agency: **Courts and Community Leaders**

Contact:
South Africa, Wilfried Scharf University of Cape Town

Many people in rural areas particularly do not understand the purpose of bail. Often they bring the accused to the police and find him/her back in the community the next day. They do not understand the procedure and infer that the person has been 'let off'. This can and does lead to acts of summary justice often with fatal consequences. Magistrates are reluctant to recourse to bail because they fear the reaction of the population.

In Gauteng, South Africa, a scheme has proved effective whereby the magistrates invite community leaders to address the court on the issue of bail, i.e. whether or not the community would be willing to have the accused back on provisional release.

This serves several purposes: it provides the magistrate with an informed view as to the character of the accused, the seriousness with which the offence is considered and likely threat of harm to the accused (i.e. whether to remand for his/her own protection; or find an alternative address far away); it also serves to inform the community about the purpose of bail; and it publicises the return date to the community so that they can ensure the accused returns to the court on the day of trial.

Note: representatives of the community are not 'parties' to the application but witnesses. They have no right to a hearing but may serve to assist the court in determining the strength of any objection raised by the police.

Giving Credit for an Early plea of Guilty

Agency: **Judiciary**

By pleading guilty to an offence, an offender shows remorse and saves court time and witness expense. In some jurisdictions (e.g.: in the UK), credit of one third of the sentence the person would have received following a contested trial is awarded in recognition. This mechanism also focuses the minds of the accused when entering a plea before the court.

Pleas and Directions: the Pre-Trial Hearing

Agency: **Judiciary, lawyers**

Trials – especially trials by jury – are expensive ways of dispensing justice. One way to ensure costs are not wasted is for the criminal registry to list cases for a pre-trial hearing when only counsel appear before a judge to review the cases on the cause list or coming up for hearing and inform the judge whether a) a case is ready for a trial (witnesses have been warned and both defence and prosecution are ready); or b) may turn into a plea of guilty; or c) for other reasons will not go ahead. This saves expense and court time. It also provides an opportunity for prosecuting and defence counsel to meet and consider a 'plea bargain'.

Plea Bargain

Country: **United Kingdom**
Agency: **Lawyers**

The plea bargain is a common, legitimate device to encourage an accused to enter a plea of guilty to a lesser charge than the one on which s/he was originally indicted. Thus, where the indictment charges murder, but it is a borderline case, the prosecution may indicate to the defence (through the lawyer) that s/he might accept a plea to the lesser charge of manslaughter. The pre-trial hearing listed above facilitates this type of 'bargain'. Where there is no pre-trial hearing and the matter is simply listed for trial, this type of discussion and reflection may take place in court before the trial starts. Many cases 'collapse' at court in this way.

This type of plea guilty is to be distinguished from the American version which goes further and offers the accused impunity on the condition s/he gives evidence against another or others.

In a number of countries the plea bargain is less a 'bargain' than a request that the police or State prefer the right charge. For instance, in many jurisdictions the police routinely charge 'murder' where a person dies, notwithstanding the facts of the case plainly disclose manslaughter.

Plea bargaining is a common practice in the English-speaking countries. This practice was recently developed in countries that have different law traditions such as French-speaking countries but some concerns do exist about it. The main objections are that the State would exercise pressure on the offender for him to accept the bargain – with the threat of a maximum sentence – or that people would plead guilty to an offence they have not committed for fear of a trial – where the outcome remains uncertain.

Consistency in Sentencing Practice

Agency: **Senior Judicial Authority**

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

Discharging those cases that have taken too long to investigate or come to trial

Agency: **judiciary**

Where the police have not proceeded speedily and the accused is prejudiced thereby, courts (in the UK, for instance) routinely discharge the accused rather than hold him/her in custody. When the police are ready with their evidence they can re-arrest the accused and proceed to trial. This mechanism costs nothing, acts as an incentive to police, checks abuse of process and protects the accused.

Making Cost Orders Against Lawyers for Unnecessary Adjournments

Agency: **Judiciary**

The 'adjournment syndrome' referred to above is also an issue in many jurisdictions. In the UK, courts regularly make cost orders against lawyers and the Legal Aid department where the lawyer is a) unprepared; b) fails to attend; c) double-books him/herself in another court; d) otherwise seeks an adjournment on unmeritorious grounds.

Speeding up judgements

Agency: **Judiciary**

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

Custody Time Limits

Agency: **Senior Judicial Authority**

Custody time limits beyond which an accused cannot be kept any longer in custody can be useful in speeding up police investigations or procedures. However they need to be strictly enforced by the courts and closely monitored by prisons if they are to be effective.

Camp courts Prison Screening Sessions in Prison by Magistrates

Countries: **India, Uganda, Malawi**
Agencies: **magistrates, police prosecutor, prisons**

Contact:
Malawi: Principle resident Magistrate; PAS Coordinator,:

In Bihar, India, judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These 'camp courts' only handle matters involving minor offenders. The courts are seen as a useful way to reduce overcrowding, speed up justice delivery, and restore the 'hope' factor in the life of prisoners.

Prior to the camp courts, over 12,000 pre-trial prisoners were lodged in various jails of Bihar, waiting to be tried for minor offences. Many had been languishing for more time than the sentences when the local high court directed jail authorities to organize 'camp courts' in the State's jails to hasten the disposal of minor cases. The 'camp courts' handle only petty offenses, such as breach of the peace. The camp courts are organized under the auspices of the Bihar State Legal Services Authority, by order of the Chief Judicial Magistrate. Judicial magistrates and executive magistrates of respective districts preside over the camp courts. Before each session, a superintendent of the local prison submits a list of prisoners eligible to participate.

The Bihar camp courts convene on the last Saturday of every month. The camp courts have been highly effective at reducing the backlog of simple bailable criminal cases.

In Malawi, encouraged by paralegals, magistrates have applied this practice. They visit prison to screen the pre-trial caseload and weed out those who are there unlawfully or unnecessarily and fix dates for trial. The exercise has been effective in reducing congestion and in restoring prisoners' confidence in the justice system by seeing justice in action. The word 'court' posed a problem in Malawi and the formulation 'Prison Screening Session' was adopted to describe more accurately the function of this mechanism and avoid any suggestion that cases were being tried hidden from public view.

In most jurisdictions, the judiciary have a statutory right to visit places of detention (i.e. prisons and police stations); in some they have a positive duty so to do. Independent inspections ensure: prisoners are properly treated, granted bail when appropriate; appear in court as scheduled; are legally incarcerated; will have their trial heard speedily; hear prisoners' complaints.

Diversion

(see Juvenile Justice above)

Agency: judiciary, prosecution, social services/NGOs, Community, victim

Diversion programmes have also been successfully applied to adult offenders. In many countries in Africa there is no legislative framework dealing with diversion. An exception is to be found in the Criminal Procedure Act in the Sudan which states:

"an injured or interested party may relinquish his private right in the criminal suit by pardon or conciliation at any time before passing a final judgment."

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

One central tenet of Islamic law is that it is based on pardon and reconciliation. Ideas about 'pardon and reconciliation' are increasingly being explored in formal justice systems in the western world usually under the term 'restorative justice.' Family Group Conferencing, victim-offender mediation/conferencing and sentencing circles are some examples where restorative justice has been used to 'personalise' the offence and put victims, offenders and their communities at centre stage.

The formal caution ("Rappel à la loi") as described in Section 6 – Measures to be taken by the police – is another diversion measure which can be used by the Public Prosecution in France. However, it only applies to petty and first time offenders.

enhancing the role of the police

The initial experience at the police station is the decisive first stage of the criminal justice chain. In many countries, especially those where the legal system is based on Common Law, the decision to lay charges is made by police officers. They could therefore initiate alternative measures to legal proceedings, such as giving a verbal warning or caution, for example, or imposing a sentence of community service. These are used mostly for minors.

Furthermore, monitoring of police custody conditions, when conducted by independent volunteers, also contribute to limiting abuse and promoting respect for procedures.

Greater use of Formal Caution

Agency: Police

In many jurisdictions, particularly those with a common-law tradition, police officers have a discretion whether to charge an offender or not. The positive aspects of a diversion policy which incorporates a formal caution is that the decision to use a caution is usually made fairly quickly – which confronts the offender with the impact of his/her actions. The views of the victim must also be considered in making a decision to caution. It is predicated on the understanding that the offender accepts his guilt and expresses remorse in some way – it is also possible to strengthen the formal caution policy by the imposition of some activity on the offender such as some work in the community (ie pre-trial community service).

In short, where the offence is not serious; where the offender admits his/her fault; where there are substantial mitigating circumstances; and where this is the person's first offence and s/he is unlikely to reoffend – then the police officer should consider a caution instead of proceeding to charge the person with the named offence.

Note: the same issues impact on the following section (dealing with 'Diversion of Juvenile Offenders') and the two could be read together.

Diversion of Juvenile Offenders

Countries: **Malawi, Namibia**
Agency: **Police, NGOs**

Contact:
Malawi: National Co-ordinator, National Juvenile Justice Forum

Juvenile or young offenders should be 'screened' - or assessed - on arrest by a person not concerned with the investigation to enquire whether the accused could be dealt with in a way other than through criminal prosecution.

Paralegals in Malawi have agreed with the police and the National Juvenile Justice forum to interview the young suspects in the police stations using a 'screening form' developed in consultation with the police and judiciary. The paralegal doing the screening then 'recommends' a diversionary option if the young person satisfies the criteria (first offender, minor offence, admits fault) which is passed on to the prosecution who decide whether or not to divert the accused. The role of the paralegals in Malawi could be assumed by social services and probation officers where they exist in sufficient numbers. Paralegals also attend police interviews to ensure the rights of the young person are protected. (see too above: the Child Justice project in Namibia and the Local Child Protection Committees in DRC).

Lay Visitors Scheme

Agency: **Police and representatives of civil society**

Lay Visitors are people who apply for such an appointment, and are seen as representative of the community and should have good reputations, credibility and respect in that community. They are empowered to call at police stations unannounced and to have access to detained persons. They must have no personal direct or indirect involvement in the criminal justice system.

Their role is not to consider the merits of the detention or interfere in the investigative process, but to impartially observe the conditions of detention and treatment of the detainees. They look, listen and report their observations and what is said to them. They report their findings to the police authority, the senior police officer in charge of the police station and any local community fora/bodies.

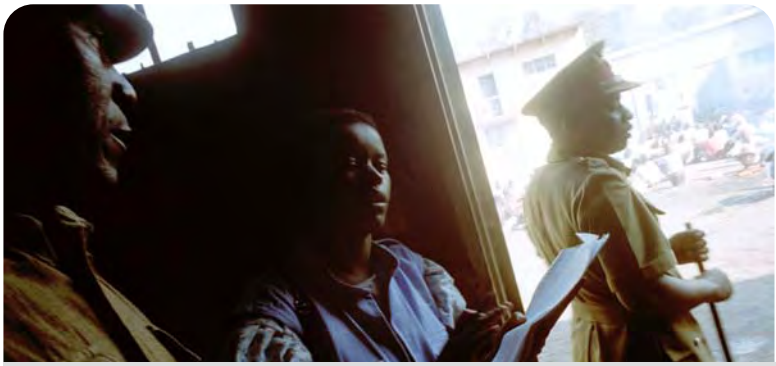
The scheme is operational in England and Wales where the local Police Authorities appoint and administer a system of Lay Visitors to prisoners held in police custody. The scheme is being introduced – inter alia – in Malawi.

Involving prison authorities

Prison authorities, who are responsible for the daily lives of prisoners, are naturally very involved in regulating the flow of the prison population.

It is their duty to be aware of the precise legal situation of each individual in their charge. They could serve as a communication channel to the judicial authorities, by informing them of the cases of incarceration which seem to be illegal or abusive. Depending on the case, this role is more or less extensive, but in any case it must be encouraged, including through legal measures.

In the prisons, external actors also serve as invaluable regulators. The United Nations Standard Minimum Rules (SMR) is explicit on this point as it recommends the need to carry out "regular inspections of penal institutions and penal services" (Article 55). The inspections must be independent, thus the need to involve the civil society in order to achieve these goals, and prison authorities are in charge of facilitating partnerships with organizations that represent society.



List monthly ‘returns’ of those who have been granted bail by the courts but are unable to meet the conditions set by the courts; list of those who have overstayed

Agency: **Prison**

Many prisons operating under the English common-law system prepare monthly ‘returns’ setting out those persons in their custody. Pre-prepared lists of those who: have been granted bail by the courts but are unable to meet the conditions set by the courts; or have overstayed; or who are seriously ill; or very old or young or pregnant - enable magistrates and police prosecutors to break down the caseload and process them as a matter of urgency. These lists can be prepared by paralegals (as they do in Malawi and Benin) as well as prison officers and presented directly to the senior magistrate (as in Uganda) or discussed at the monthly Caseflow Management Committee or Court User Committee meetings.

Review of Prison Legislation

Agency: **Line ministry, prisons, law commission**

The Ouagadougou Conference on Prisons and Penal Reform in Africa 2002, was presented with data collated from the questionnaires that at least 11 countries had prison legislation dating from the 1970s (3 countries), 1960s (5 countries) and the 1950s (3 countries). This legislation is likely to contain provisions that offend constitutional guarantees and international standards and recognised good practices. They need to be updated.

Malawi recently reviewed its prison legislation and PRI was invited to assist. As a result, contemporary legislation was collated from around the world and a commentary produced to provide the Law Commission and other members of the consultative working group with guidance on current good practice around the world. The text was drafted by a two person team (a leading international authority on prison legislation and national draftsman) who were guided by the consultative working group. The draft was extensively discussed in public.

The new bill contains two practical 'bursting provisions' for reducing the prison population. The first concerns the constitutional watchdog 'the Inspectorate of Prisons' chaired by a judge. It states that where the Inspectorate is of the opinion that the prison system is so over-crowded that the safety or dignity of prisoners is being affected materially, it may approach the Minister who may release prisoners either conditionally or unconditionally in order to alleviate the situation. A second measure empowers the Officer in Charge of a grossly overcrowded prison to approach the Chief Regional Magistrate and ask him/her to consider granting bail to any unconvicted prisoner in order to alleviate the situation.

Partnership with Civil Society

Countries: **Angola, DRC, Kenya, Malawi, Nigeria Sudan, Uganda**
Agency: **NGOs and Prisons**

Contacts:
Uganda: Foundation for Human Rights Initiative (FHRI)
Malawi: Malawi CARERCentre for Legal Assistance (CELA); Eye of the Child (EYC); Youth Watch Society (YOWSO)
Angola: Maos Livres, Paralegal co-ordinator
Sudan: PLACE
Nigeria PRAWA
DRC: Bureau International Catholique de l'Enfance
Kenya: Legal Resources Foundation
Penal Reform International
International Centre for Prison Studies

The preamble to the Ouagadougou Declaration welcomes 'the growing partnerships between Governments, non governmental organizations and civil society in the process of implementing these standards.'

There are increasing examples of successful collaboration between prisons and NGOs (to name a few: FHRI in Uganda; four NGOs in Malawi; Maos Livres in Angola; PLACE in the Sudan, PRAWA in Nigeria, BICE in the DRC). NGOs bring to prisons much needed resources (human, material and financial) and innovative ideas. They are able to lobby for improved terms and conditions of service for prisoner officers. They can assist with training programmes.

The opening of prisons to partnerships with responsible external organisations is key to any sustained programme to reduce prison overcrowding because these agencies are useful in linking prisons to police, courts, social services and getting cases moving through the criminal justice system.

Independent Prison Visitors

Countries: **South Africa, Malawi**
Agency: **Prisons, human rights institutions, civil society**

The UN Standard Minimum Rules (SMR) require regular inspections of prisons.[1] The European Prison Rules (EPR) emphasise the importance of 'independence from the prison administration' in any inspection mechanism.[2]

'Inspections which look closely into prison regimes or examine them officially to ensure that policies and practice are in conformity with laws and regulations are an important safeguard for prisoners and staff alike...Moreover, such inspections can have a preventive value. By the early detection of unacceptable conditions and practices, more serious situations can be avoided.'[3]

Aside from audit personnel and other internal inspection mechanisms, many countries have independent inspection procedures – usually in the form of a judge or supervisory Board, chaired by a judge – which report any findings to parliament or the national assembly and take urgent action by way of interim measures at its own discretion.

Inspections should not be confined to 'official bodies or persons' as there is always a risk that in the course of time these inspecting bodies or persons become 'co-opted'. NGOs also have an important role to play as independent monitors and to check against 'co-option'.

In South Africa and Malawi, independent prison visitors have been introduced. The visitors are lay people appointed by the inspecting mechanism for each prison. They visit the prison, interview prisoners, record complaints and requests and act as the 'eyes and ears' of the Inspecting judge (South Africa) or Inspectorate of Prisons (Malawi) at the local level.

[1] SMR Rule 55
[2] EPR Rule 4 and note thereon in the explanatory memorandum thereto
[3] VIII.4. Making Standards Work. PRI. March 2001

promoting law reform

The laws provide the framework for the administration of justice. It is therefore essential that a country's body of law be adapted to its time, the context of the country and respect for international standards.

Certain obsolete or inappropriate laws should be modified. Punishment for crimes such as vagrancy or prostitution reflect moral values often inherited from the colonial era, or specifically target the most marginalized, in a society where they are not welcomed. By decriminalizing certain crimes, or by reducing certain sentences, legislators could have a considerable impact on prison overpopulation and reduce congestion in the courts.

Decriminalisation of Certain Offences

Agency: **Law Commission, Parliament**

Some minor offences reflect alien (i.e. colonial) moral values or outmoded public morals rather than a hurt or loss to an objective victim. Others constitute anti-poor laws designed to limit the movement of poor people in a shrinking job market.

In many parts of the world, the offence of prostitution is being abolished or down-graded such that imprisonment as a sanction is no longer permissible – similarly with simple possession of small amounts of cannabis or other 'soft' drugs.

The offences of loitering, being a rogue and vagabond, hawking or being an idle or disorderly person have been removed from the statute books as directly contravening citizens' freedom of movement. In Uganda, 50% of the young persons in remand homes were charged with 'being idle and disorderly'. Following the removal of this offence in 1999, the number of young persons on remand has fallen drastically. In the Sudan, the relatively high rate of (non-moslem) women in prison is due to offences involving the brewing and distribution of alcohol by displaced (Christian or animist) women in the north which is proscribed under Islamic law.

Many prisons in Africa are congested with offenders who fall foul of these provisions and are unable to pay the fine often levied by the court and so are ordered to serve a term of imprisonment in lieu.

The age of criminal responsibility should also be subject to review. In many countries it is very low (as low as 7 in former British ruled countries) and there may be confusion as various laws (at custom as well as statute) have different ages of responsibility and there can be a number of different statutory definitions of the age of responsibility – from 7 to 18 years depending on the issue: e.g. labour laws, sharia and criminal law. The impact of this confusion can serve to increase the numbers of young persons held in pre-trial detention.

Prison law reform: empowering prisons to draw attention to categories of prisoners who might be released

Agency: Line Ministry, Law Commission, Prison department

Prison authorities are often overly passive in discharging their primary duty (keeping people sent to them by the courts in secure custody). Amendments to the law are required to provide prison officers with the means of drawing the attention of the courts to the issue of overcrowding as seen with the 'bursting provisions' cited above and set out in more detail below.

An amendment to the South African Criminal Procedure Act (s 63A) allows prison heads to apply to court to authorise the release of people who have been granted small amounts of bail, but who have been unable to pay.

New provisions in the new Malawi Prisons Bill allow heads of prisons to approach the Chief Magistrate in their area when his/her prison is 'so overcrowded that the safety, human dignity or physical care of prisoners is being affected materially' to consider bail for any remand prisoner (s 57); or when an unsentenced prisoner is seriously ill (s58); or when his/her trial has not begun within a reasonable period (s59); or when a prohibited immigrant has been detained for longer than 120 days to bring the matter to the attention of the Chief Immigration Officer (s60).

Custody Time Limits

Agency: Ministry of Justice, Law Commission, Judiciary

As already noted above, custody time limits are useful in focusing the minds of the prosecuting and investigating authorities on the requirements of 'due process'. Complex cases (conspiracies and serious fraud) will take longer to prepare than summary matters. Time limits place the burden on the police and prosecuting agencies to speed up the criminal process and limit adjournments.

In Uganda, custody time limits have been introduced with some effect. However, they depend on enforcement by the courts and proper resources being made available to the investigating bodies if they are not to fall into misuse. For instance, when the court discharges the accused, the police should not as a matter of course promptly re-arrest the accused so that the time period starts again.

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International Organisations

- Amnesty International www.amnesty.org
- International Commission of Jurists : http://www.geneva.ch/f/ICJ.htm
- International Centre for Prison Studies: www.icps.org
- Penal Reform International www.penalreform.org

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