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# **ACCESS TO JUSTICE**

## **Legal Defence and Legal Aid**

**Criminal Justice Assessment Toolkit**



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# 1. INTRODUCTION TO THE ISSUE

This tool guides the assessment of the provision of legal representation to people being investigated for or charged with a criminal offence with a focus on provision of these services to the poor or indigent accused. Access to justice is fundamental to the protection of human rights as is evidenced in numerous human rights instruments. In securing justice as a basic human right, the **Universal Declaration of Human Rights** enshrines the key principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, along with all the guarantees necessary for the defence of anyone charged with a penal offence. Article 14 of the **International Covenant on Civil and Political Rights** grants among the minimum guarantees the right to be tried without undue delay, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law and to “defend [oneself] in person or through legal assistance of [one’s] own choosing; to be informed, if [one] does not have legal assistance, of this right; and to have legal assistance assigned to [one], in any case where the interests of justice so require, and without payment” as well as the right to “have adequate time and facilities for the preparation of [one’s] defence and to communicate with counsel of [one’s] own choosing.” The **Body of Principles for the Protection of All Persons under Any Form of Detention** provides that a detained person shall be entitled to have the assistance of counsel, while the **Standard Minimum Rules for the Treatment of Prisoners** recommends that legal assistance be assured for prisoners pending adjudication.

These instruments recognize that when a person's fundamental rights to liberty and life are put at risk by the State, that person has a right to legal assistance to ensure that the State properly meets the burdens and obligations imposed by law to do so, and further, has not violated the rights of the individual in the process. As a result, the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders adopted in 1990 the **UN Basic Principles on the Role of Lawyers** making its first principle the following: “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.” The Basic Principles further place responsibility upon the government and the legal profession itself to ensure access to counsel to everyone, regardless of means or background, as a means of ensuring the right to equality before the law. As a logical extension, governments have the responsibility for funding legal representation when the accused do not have the means to pay for it themselves.

In many countries, the right to counsel at least at some point in the criminal justice process has long been established in the legal or Constitutional framework, though it may be only for the most serious of crimes. The extent to which citizens are aware of this right, as well as their other civil rights, and are able to exercise the right to counsel varies greatly, however. The delivery of legal services to criminal defendants may also vary greatly even within a country, depending on where a person lives, what resources that person has, and what mechanisms are in place to provide such assistance, whether via an appointment system, a contractual system, a legal aid/public defender service or a combination of such mechanisms. The quality of representation by lawyers is influenced by a number of factors as well, starting with the competence of counsel, a sufficient number of competent counsel, the quality of education and training, the caseload carried by that lawyer, the extent to which the duties and obligations of a robust ethical and disciplinary system functions, and whether corrupt practices within the criminal justice system have been allowed to undermine the rule of law.

Further challenging even the most dedicated and honourable of defence lawyers who work on behalf of the poor is the chronic under-funding of their function, despite the recognition of its critical importance in international human rights instruments and often in national constitutional law. Few legislators, facing an electorate that typically responds to law and order initiatives, will advocate higher funding levels for legal representation for the indigent accused as a budgetary priority. As a result, such lawyers are typically paid less than their counterparts in the judiciary and the prosecution service, and they often carry excessive caseloads, pressuring their capacity to provide zealous and effective representation of their clients. Such economic pressures may also act as drivers to yield to pressure to modify advocacy, to challenge only perhaps the most egregious procedural and legal violations in an occasional case, and in the worst scenarios, to engage in corrupt practices, including the payment of bribes to judges,

prosecutors or police officers. Even where defence lawyers do not resort to such misconduct, their status and effectiveness within the courtroom may be diminished by the lack of resources, contrary to the concept of equality of arms, a basic tenet of justice inherent to the right to a fair trial that holds for the process to be fair and just that the prosecution and defence should have access to at least approximately equivalent resources to investigate, prepare and present their cases. Where a defence lawyer has no means or sufficient time to investigate a case independently and the prosecution does not provide access to the evidence it intends to use at trial far enough in advance that the defence lawyer can prepare a defence, then even the most conscientious and dedicated lawyer will be thwarted in providing effective assistance of counsel.

And, because defence lawyers represent people who have been charged with crimes, public opinion tends to associate them with that negative behaviour rather than with the protection of the rights to liberty and justice, even when instances of innocent citizens who have been falsely accused emerge. Further, the advocacy function of lawyers tends to place them in the public eye during times of political and social upheaval. As a result, defence lawyers may even find themselves at physical risk. The response of the public and government in providing protection is less automatic, in many countries, than it might be when a judge or prosecutor is threatened. The Basic Principles mandate that lawyers must be able to carry out their professional duties without official interference, restrictions, threats, or intimidation, but in some countries, defence lawyers are faced with such challenges on a regular basis. And some pay with their freedom or even their lives.

The issues challenging both the legal profession and the mechanisms by which legal representation is made available to the poor must be evaluated when assessing the quality and extent to which criminal defendants receive the assistance of counsel guaranteed under international standards and norms and in designing technical assistance intervention that strengthens the capacity and function of defence counsel and the delivery of their services to the poor.

Technical assistance in the area of the provision of criminal defence may include enhancement of the following:

- Support legislative reforms that guarantee legal representation in accordance with international standards and norms
- Develop an integrated provision of legal assistance for criminal defendants and suspects at all critical stages in criminal cases.
- Enhance the regulatory body that governs the practice of law and the licensing/accreditation of lawyers
- Improve the quality of legal education
- Improve the integrity of the justice system
- Enhance the ethics/professional responsibility/conduct code and their practical adoption and application by lawyers.
- Develop a robust disciplinary system that supports integrity in the practice of law by effective enforcement of the ethics/professional responsibility/conduct code.
- Improve allocation of resources for criminal defence services through sound budgeting and financial management.
- Provide improved access to justice, including the use of paralegal assistance as a short-term source of limited legal services where shortages of lawyers leave the poor or rural population with no other access to legal assistance.

## 2. OVERVIEW

### 2.1 STATISTICAL DATA

Please refer to **Cross-Cutting Issues: Criminal Justice Information** for guidance on gathering the key criminal justice statistical data that will help provide an overview of the caseload, workload and capacity of the criminal justice system of the country being assessed. Listed below are additional indicators that are specific to this TOOL. Some countries may not have this information available. It is advisable to request it in advance, as it may take time to obtain it. Occasionally, officials may be reluctant to share the information that exists. If possible, the assessor should record what kind of information is available and to whom, even if the numbers themselves are not made available to the mission.

Written sources of statistical information may include, if they exist:

- Legal Aid/Public Defender Service Reports
- Court Annual reports
- Ministry of Justice reports
- Bar Association Reports
- Ministry of Interior/National Police Crime reports/Penal System reports
- Government bureau of statistics and data collection
- Nongovernmental organisation reports on the criminal justice system

The contacts likely to be able to provide the relevant information are:

- Legal Aid/Public Defender Service
- Ministry of Justice
- Senior Court personnel
- Registrars or Court Managers
- Prosecution agencies
- Bar Associations
- Non-governmental organisations working on criminal justice matters
- Donor organisations working on the criminal justice sector

In some cases, it may be that there is no integrated source of information about the representation of criminal suspects and defendants, especially where no organization exists whose mandate is to provide such representation. Even then the organization may keep statistics only on the clients it has, rather than the number of clients who need such services, so additional data collection may be necessary. The courts and prisons tend to be the next best sources for information about who is represented and who is not, though this may require hand review of court files and prison records. An assessor may need to piece together a statistical profile of who receives legal representation and how through various sources. Technical assistance interventions may include developing the capacity to collect and analyse information about representation of suspects and defendants.

Where such information is available, it will be helpful in helping identify where and what types of legal resources are needed at different stages of the criminal justice process and indicating what entry points for technical intervention opportunities might exist.

- A. How many professionally accredited/licensed lawyers are there in the country being assessed, including per 100,000 of population? How many are actively engaged in the practice of law? How many practice criminal law? Where are they distributed geographically? Are there local shortages of lawyers?
- B. On an annual basis, under rights accorded by the Constitution or national law, how many criminal suspects/defendants were entitled to legal representation during criminal investigation or court proceedings for the last three to five years?
- C. On an annual or other periodic basis, is it possible to determine how many/what percentage of criminal defendants were represented by counsel:
  - At any stage of the criminal proceedings?
  - During the investigative stage?
  - Upon arrest?
  - At their initial hearing?
  - At trial?
  - At sentencing?
  - On appeal?

- D. Is it possible to disaggregate the above information to determine how many/what proportion of the represented defendants were:
- Represented by privately retained counsel for a fee?
  - Represented by privately retained counsel acting pro bono publico?
  - Represented by private counsel appointed by the court (appointed counsel)?
  - Represented by a lawyer who is under a government contract to provide legal services?
  - Represented by a lawyer who is part of a legal aid/public defender system?
  - Represented by a non-lawyer, such as a paralegal or a lay advocate?
- E. Of the criminal defendants who were not represented, is it possible to disaggregate them by:
- Income level? What proportion is poor? Indigent?
  - Custody status (in detention or in the community prior to trial/resolution of case)?
  - Whether they requested the assistance of counsel?
  - Whether they were advised of right to counsel and waived that right?
- F. What is the typical number of clients carried by a private criminal defence lawyer? What is the typical number of clients handled by a legal aid lawyer/public defender at any one time?

### 3. LEGAL FRAMEWORK FOR ACCESS TO LAWYERS AND LEGAL SERVICES

The following documents are likely to be sources from which to gain an understanding of the legal and regulatory framework for the practice of law and the representation of criminal defendants. Please see **ANNEX 2, CRIMINAL LAW AND CRIMINAL PROCEDURE** for background on legal frameworks that support international standards and norms:

- The Constitution should contain provisions delineating the rights of criminal defendants and suspects, including the right to representation; the right not to be compelled to give evidence against oneself, the right to be brought before court within a certain number of hours after arrest, the right to be tried without undue delay, etc.
- Acts of the legislature and regulations to those Acts: The kinds of Acts likely to contain this information include laws on the administration of justice, criminal law codes and criminal procedure law, including the establishment of legal representation funding and/or a state-funded legal aid or public defender systems. Criminal procedure codes may establish the courts' obligation to appoint counsel for unrepresented defendants. Other legislative acts may include the establishment of funds held in trust to compensate victims of lawyer misconduct.
- Court Rules: There are often multiple sets of court rules with different sets of rules for each level of the court, including appeals. The Rules may be a source for determining on the established procedures for the professional accreditation of lawyers practicing before the court, the ethics code governing the conduct lawyers, the disciplinary system, and procedures for the violations of the ethics code.
- The Bar Association or Collegium's written procedures and protocols governing admission, pro bono (good works obligations) of lawyers, continuing legal education obligations, etc., bar examination protocol.
- Law school admissions policies, requirements for graduation, clinical programmatic material.
- Government policy documents, "standing orders", circulars and the like often contain the detailed information that regulates the running of the a legal aid/public defender systems on a day-to-day basis.

The essential counterpart to determining how the legal and regulatory framework provides for individuals facing criminal charges to obtain legal representation is to examine how and whether it actually occurs and what the quality of the representation is. In addition to examining the reports of the relevant government departments or ministries on the courts, law reports (reported cases), independent reports by NGOs, and academic research papers, it is important to conduct site visits to a number of representative courts and legal aid/public defender offices, including visits to courts in rural and urban settings, in both relatively well-to-do and impoverished locales.

### 3.1 RIGHT TO COUNSEL

The right to counsel when charged with a criminal act is integral to the right to a fair trial, a fundamental right recognized by the **Universal Declaration of Human Rights**, the **International Covenant on Civil and Political Rights, Article 14**; and regional human rights treaties and conventions, including the **European Convention On Human Rights and Fundamental Freedoms, Article 6**; the **American Convention on Human Rights, Article 8**; and the **African Convention on Human and Peoples' Rights, Article 7**.

**Principle 1** of the **UN Basic Principles on the Role of Lawyers** states: "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." **Principle 5** requires that all people detained or arrested or charged be immediately informed of their right to be assisted by a lawyer of their own choosing, with **Principle 7** requiring that a person who has been detained or arrested be given prompt access to a lawyer, but no later than forty-eight hours from the time of arrest or detention. **Principle 6** requires that "in all cases which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

**Principles 2 and 3** require governments to implement efficient procedures and mechanisms that allow effective and equal access to lawyers, and that such access is provided to everyone present in the country and subject to that country's jurisdiction, "without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status." Further governments shall provide sufficient funding and resources to provide legal services for the poor and the disadvantaged, with professional associations of lawyers directed to cooperate in the organization and provision of services, resources, and facilities. The need for communications between lawyer and client to be confidential is a critical to a meaningful exercise of the right to counsel and its attendant lawyer client relationship. **Principle 8** requires that all people who are in custody be provided "with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality." While such visits may be observed, they may not be overheard. Similarly, **Principle 22** requires governments to "recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

In some post-conflict countries, much of the legal profession may have been targeted and decimated by one or more of the factions engaged in the conflict. As a result, many lawyers may have been forced to flee the country or were killed in the conflict, with the result that in the post-conflict, literally a handful of lawyers remain in the country (see e.g. Cambodia or Rwanda). Even where the Constitution and laws guarantee the right to counsel, in such situations, they may simply be unavailable, requiring that alternative sources of legal assistance, including volunteers from outside the country or paralegals for limited legal assistance, be sought until the population of qualified lawyers can be restored.

- A. Is the right to counsel granted by the Constitution or the law? If yes, at what stage does the right to counsel attach or take effect? Investigation? Arrest? Charging? Trial? Appeal? When a judge determines that justice requires?
- B. Is the right to counsel guaranteed to certain vulnerable individuals, like juveniles or mentally disabled adults? Please see **CROSS-CUTTING ISSUES: JUVENILE JUSTICE** for further background on the special skills required for representation of juveniles and their special needs. Are lawyers appointed to such individuals immediately, regardless of means?
- C. Does the law require that people who are detained or arrested be advised of their right to the assistance of legal counsel? How soon after arrest? Please see the **Standard Minimum Rules for the Treatment of Prisoners (SMR), Rule 92**. Are there provisions in the law that prevent the use of admissions made after a request for a lawyer is made, but the request is not honoured?
- D. Does the law require that counsel be appointed with costs borne by the state if the defendant is not able to afford to retain counsel for him/herself? What is the legal standard used? Must the defendant be indigent? Poverty level? Working poor? Are procedures established by law or regulations for determining who qualifies for appointed counsel at no cost or nominal cost?
- E. Does the law establish a mechanism for the provision of legal services to the poor and disadvantaged? Is it a funding scheme or does it also establish a state-funded entity to provide legal services? Does the entity (often known as Legal Aid or the Public Defender)

provide only criminal representation? What other legal services/assistances may its legal staff provide? Please see also **Section 4**.

- F. If appointments are made by the court, is it at the initial detention review hearing or only upon the filing of formal charges? Are indigent defendants represented in the course of the process from arraignment through the appeals hearings, not just at trial? Once appointed, are lawyers allowed by law to be present at interrogations? Does this occur in practice?
- G. Under the law do appointed counsel merely have the obligation/authority to advise defendants on their legal rights and options or do they appear in court to represent the defendant in criminal proceedings? Do they represent criminal defendants in any corollary proceedings such as civil suits for injuries or damages? Does the law distinguish between legal advice and representation?
- H. Is there a right to choice of legal counsel, so long as they are qualified? What happens when a criminal defendant wants to change lawyers? What happens when a criminal defendant wants to change his/her court-appointed lawyer? Does the law make provisions for allowing counsel from another jurisdiction (or country) to represent a defendant? To what extent do either of these occur in practice?
- I. Does the law allow defendants to choose to represent themselves? What legal provisions/procedures/inquiries are required to verify that self-represented clients are choosing this option freely and knowingly? Does the law allow judges to appoint back-up counsel to assist a defendant where justice may require? Is self-representation in reality typically a choice or the consequence of a lack of funds or information or availability of defence counsel?
- J. Does the law create a lawyer–client privilege, protecting lawyer client communications from disclosure? Are there narrowly drawn exceptions such as criminal behaviour and disclosure to prevent serious injury or death? Does this privilege cover all the consultations between the client and his lawyer, particularly the initial consultation a client seeks from a potential defence counsel? Does this privilege extend to other employees of the lawyer? If there is no privilege, what is the impact on lawyer-client communications? Are defence counsel allowed reasonable access to their clients who are detained? Do defence counsel need to obtain the permission of the prosecutor to get access? Are conversations private and confidential even if the meeting is visually monitored?

### 3.1.1 Legal Literacy / Public Awareness

Even the most comprehensive constitutional and legal framework will not protect the rights of the people if they are unaware of or do not understand those rights and protections and either do not assert them or waive them without understanding the consequences. Such lack of understanding can be especially detrimental in the context of criminal investigations and proceedings. **Principle 4 of the of the UN Basic Principles on the Role of Lawyers** calls upon both the government and professional associations of lawyers to promote programmes to educate and inform the members of public about their rights and duties under the law and the role of lawyers in protecting fundamental freedoms, with special attention to be given to assisting the poor and other disadvantaged to enable them to assert their rights and to call upon the assistance of lawyers when necessary.

- A. To what extent have members of the public been educated about their civil (human) rights and duties? Is such education required in public schools? Have the government and/or the lawyers professional associations (bar association or collegium) developed and implemented community legal education initiatives? What avenues have been used to raise public awareness of civil rights: multi-media campaigns, community forums, public service announcements, adult education programmes)? Have such initiatives targeted poor or otherwise disadvantaged audiences? Are such initiatives conducted in minority languages as well as the official language(s)? If not, why not?

- B. Does the typical person who has been arrested or detained or questioned understand the legal rights they have and what the ramifications may be of waiving those rights? For example, when being questioned by the police, would that person have sufficient education to understand, for example, that he/she has the right to remain silent, that he/she has the right to consult a lawyer before answering questions and that to waive those rights may mean that what he/she says may be used as evidence against him/her? Are police officers legally obligated to inform suspects/arrestees of these rights? Is the burden upon the government to show that the defendant understood those rights and understood what it meant to waive them if it tries to use evidence obtained via such a waiver in a criminal proceeding?

### 3.1.2 Right to Counsel in Traditional / Customary Courts

Please see **ANNEX 1, COMPARATIVE LEGAL SYSTEMS** for further background. Please see also **Access to Justice: The Courts, Section 3.3.1**

- A. Is there a system of traditional or customary law courts? What is the basis of the establishment of the customary/traditional court, i.e. social, cultural, religious? What percentage of the population utilises such courts? Are there specific demographic and socioeconomic groups that typically rely upon these courts? For what reasons: proximity, low cost, tradition, religious faith, barriers to formal system, pressure from family or social setting?
- B. Are such courts recognised by the Constitution? Is there any legislation regarding traditional courts? If they hear criminal cases, do they have limits on their criminal jurisdiction (types of cases they can hear) and the sentences that they can pass down?
- C. Where such courts hear criminal cases, do the accused have a right to counsel? Are lawyers allowed to appear on behalf of their clients? If they are not, what level of legal assistance or advice do they provide? Are there consequential human rights or equal protection issues?

### 3.1.3 Legal Representation before Military Courts / Special Tribunals

Please see also **Access to Justice: The Courts, Section 3.3.2**

- A. Are there military courts operating in the country with jurisdiction over civilians or special tribunals outside the conventional court system? Under what circumstance do military courts or special tribunals try civilians for criminal offences? How do such civilians obtain representation? Does the military provide legal representation through a system of its own? May civilian lawyers represent these defendants? Are they represented by counsel at all?
- B. Where special chambers of courts or panels (outside the general structure of courts) have been created to deal with the aftermath of armed conflict or have exclusive jurisdiction over serious crimes such as crimes against humanity, genocide, war crimes and torture, what rights to legal counsel/representation do defendants charged with crimes handled by such bodies have? Do they differ from what is provided in the standard criminal courts? How?

## 3.2 LEGAL FRAMEWORK OF THE PRACTICE OF LAW

- A. Are there statutory provisions or rules that regulate who may engage in the practice of law? Were these promulgated by the highest court or the legislature? Who, possessing what qualifications, may hold themselves out to be lawyers authorized to practice law? Are there different types of lawyers, e.g. the British differentiation between barristers and

solicitors? What other types of legal professionals and services are recognized and/or regulated by the law and rules? Please see also **Sections 5.1 and 5.2** regarding qualifications.

- B. What statutory or regulatory provisions govern the handling of client funds and resources? Are they enforced?
- C. Are lawyers required by law to indemnify themselves so that their clients are protected against losses caused by malpractice or misconduct? Does the law provide for a fund into which lawyers must contribute to compensate clients whose funds were misappropriated by lawyers?

### 3.2.1 Professional Responsibility

- A. Do the law or rules contain a code of ethics (code of professional responsibility/conduct) for lawyers under the law or rules? If not, has one been established by the governing body of the legal profession? Has a code been promulgated? Is it available to the public? If so, does the code create standards of care or performance in the representation of clients? What obligations and duties does the code impose upon lawyers who represent criminal suspects and defendants? Are lawyers bound by the code of ethics? Is it aspirational? Is it followed in practice? What obligations does the ethics code place on lawyers who become aware of ethical breaches by other lawyers?

**Principle 26** of the **UN Basic Principles on the Role of Lawyers** requires that a code of professional conduct be established by the legal profession through its appropriate organs or by legislation in accordance with national law and custom, as well as international standards and norms.

- B. Are the obligations concerning conflicts of interest clearly explained? Are they followed?
- C. Does the law create a disciplinary system for lawyers who breach ethical or legal obligations? Who controls the disciplinary body, i.e. the bar, the courts, the Ministry of Justice? How are complaints made? Who investigates them? Are lawyers advised when complaints are made against them? Are the complaints kept confidential until there are at least some indicia that they may be substantive? Are those complained against entitled to a hearing? To representation by counsel? Who conducts the disciplinary hearing? Is there a right to appeal the decision to a court? Have disciplinary proceedings taken place? With what results? Have lawyers been reprimanded? Suspended from the practice of law for a certain time? Disbarred, that is, lost the right to practice law? Have any also been criminally prosecuted? What were the results? Are the outcomes of any of these proceedings publicized?

**Principles 27 through 29** of the **UN Basic Principles on the Role of Lawyers** require that charges or complaints made against lawyers shall be handled promptly and fairly and according to established procedures. Lawyers must have a right to a fair hearing, including the right to be assisted by a lawyer of their choice. Disciplinary proceedings are to be held before an impartial disciplinary committee established by the legal profession or an independent statutory authority or before a court, with decisions being subject to independent judicial review, with the basis for the determinations of the disciplinary proceeding being the code of professional conduct and other recognized ethical standards.

- D. Are fee disputes handled in separate proceedings?

## 4. ACCESS TO LEGAL DEFENCE SERVICES

The provision of legal defence services to people who are suspected or have been charged with committing a crime can be accomplished in a variety of ways and in many countries several or all mechanisms for the obtaining legal representation described below may be present and used in combination. The availability of legal representation for people with means is rarely an issue with the exception of those who may be in remote regions where there are no lawyers available or in the post-conflict countries where the population of lawyers has been decimated. Far more common is the challenge of providing the poor with access to defence services that are competent and sufficiently resourced. Legal assistance may be provided only by lawyers, but where they are in short supply, some limited legal services may be provided by paralegals, lawyers-in-training, law students, or lay advocates. With proper supervision and training, such assistance can be a vital resource for populations whose needs might go otherwise unmet. In systems where the provision of legal services is not regulated by law or self-regulated by the bar, however, the quality of legal services provided by anyone, lawyer or not, may be unreliable. Where such fundamental freedoms as the right to liberty are at risk, the provision of quality legal assistance to the poor is especially critical in criminal cases. Three basic approaches are summarised below:

**Appointed (*Ex officio*) Counsel:** A lawyer in private practice is appointed typically by a judge or other court official to represent an indigent (or otherwise entitled to assistance of counsel) criminal defendant. Appointment of counsel in some systems may be made instead by the bar or a legal aid agency. Appointment criteria may range from simply being admitted to the practice of law and happening to be in the courtroom to having completed training and other requirements to be included on a list of qualified criminal defence lawyers from which appointments may be made, often on a rotating basis, depending upon the complexity of the case and their level of experience, to prevent the appearance of favouritism and to reduce the pressure upon lawyers to conduct themselves in a manner that will encourage appointments to cases in the future, rather than necessarily what is in the clients' interest. Again, the latter approach may ensure a higher quality of legal representation, especially where the performance of lawyers evaluated in the context of the duties and obligations of the code of professional responsibility. Lawyers' fees are paid by state funds, ranging from a set fee per case to a set hourly rate, with the lawyer submitting a bill describing the time and effort spent. Some appointment systems provide a budget for or reimburse expenses associated with case preparation and investigation. Those systems that do not run the risk of forcing lawyers to decide whether to reduce further via out of pocket expenses what may already be quite modest fee in order to mount an appropriate defence. In some cases, lawyers may volunteer their services as a means of fulfilling the obligation to public service associated with being admitted to the practice of law (mandatory in some systems, hortatory in others). However, the need for criminal defence representation far exceeds the availability of lawyers being willing or able to work on a pro bono basis.

**Contractual Defence Lawyers:** Governments, using their contracting and procurement authority, award contracts to law firms, local bar associations, NGOs and individual lawyers to provide criminal defence representation on affixed fee basis for a geographic jurisdiction or for a pre-determined number and type of criminal case. Contracts may be awarded on a competitive or simple application and qualification basis. Many jurisdictions have provided for a number of quality control clauses that include verification of compliance with the duties and obligations of the code of professional conduct, maintenance of contact logs, records and files. Where sufficient monitoring of contract performance exists, this can be an effective means for providing criminal defence representation.

**Legal Aid (Public Defender):** Here the legislature funds a separate governmental agency whose mandate is to provide legal representation to the poor. In some Legal Aid systems, a wide range of legal services is provided. In others, especially in those referred to as the named Public Defender, legal representation is limited to criminal defence and appeals. In essence a governmental law firm whose clients are the poor, these agencies employ a staff of full-time lawyers, paralegals, and often support staff including investigators, interpreters and social workers. These agencies are challenged by inadequate levels of funding to provide sufficient staff and resources to defend the number of defendants who qualify for representation, with caseloads becoming overwhelmingly large and unmanageable. In some systems, these agencies have the ability to hire private lawyers to take on individual cases that require special expertise or where the representation of multiple defendants who may be mounting differing legal defences presents an ethical conflict. The same ethical duties and obligations of the code of professional conduct apply to legal aid lawyers/public defenders as the private bar in the vast majority of jurisdictions.

In addition to the above mechanisms for legal services, some countries support other approaches to providing legal aid to indigents, including legal clinics, pro bono and Street Law programs, which can indeed serve as supplementary means for providing legal aid. However, few provide the depth of service required in the representation of criminal clients on a sustainable basis to provide the basis for a system of providing legal services.

## 4.1 PRIVATE REPRESENTATION

- A. Does it exist? Can a person who has the means to do so obtain private counsel? What estimated proportion of criminal defendants can afford private counsel? What is the extent to which private defence lawyers are used? Other than ability to pay, what are the barriers that a person who is criminally charged may encounter to obtaining private counsel?
- B. What is the customary manner of charging clients for the private lawyer's services in criminal cases? Flat fee? Paid in advance? Over time? Hourly rate charged against a set amount? Do lawyers accept barter, i.e. goods and services in lieu of cash?
- C. In countries where no effective public appointment or legal aid public defender system exists, what sorts of economic burdens are placed upon the families of defendants in order to raise the money required for legal fees? Do they go into debt?

## 4.2 APPOINTED (EX OFFICIO) REPRESENTATION

- A. In systems where criminal suspects and/or defendants can be appointed counsel, how often is this mechanism used at the investigation stage? What is the appointment mechanism for appointing counsel prior to charges being filed in court? Must the suspect affirmatively request the assistance of counsel? How is the suspect able to demonstrate that he/she qualifies for state funded representation?
- B. What is the mechanism for appointment of counsel, if any, when a suspect is detained? Are detained suspects/charged defendants brought before the court for a detention hearing when required by law? Is counsel appointed at this time? If not, are counsel appointed at the time of arraignment? By the judge conducting the hearings? By the court? By a bar official who maintains a list of private counsel seeking appointments?
- C. Is there a screening process to determine who qualifies for state-funded representation? When is this conducted? In open court? Prior to the hearing? If there is an option for sliding scale or low cost representation for the working poor, what criteria are used to determine the fee to be paid by the defendant and his/her family? Is the balance paid via a state fund?
- D. How do appointments actually occur? Do counsel who are seeking appointments attend the detention or arraignment hearings in order to be appointed by the judge? Do established criteria exist for judges to use in appointing counsel in such a manner? What measures, if any, are in place to ensure that qualified counsel are appointed? That appointments are made equitably and fairly, rather than to a favoured few? Is there a sense in the legal community that the zealotry of defence lawyers in representing their clients is tempered by the need to maintain their standing with the judges who appoint counsel?
- E. Are appointments made instead on a rotational basis from a list of qualified counsel? Who maintains the list? What are the criteria/qualifications required to be placed on the list? Are they fair, non-discriminatory, and transparent? How are lawyers notified that they have been appointed? Do they receive enough notice to be able to attend the initial hearing? If not, is the hearing rescheduled so their clients can receive the benefit of the assistance of counsel? Do counsel routinely request a hearing to address custody status where the initial hearing was conducted without the benefit of counsel? Do such hearings result in defendants being released into the community pending trial on a regular basis?
- F. Is there any indication that the prosecution service influences the appointment of defence counsel? This may be particularly true in countries emerging from systems where the Procurator was the most powerful arm of the justice system and had a monitoring authority over the other institutions

of government. What is the impact upon the defence mounted on behalf of criminal defendants? Has the bar or a legal NGO challenges such practices?

- G. How are the services of appointed counsel compensated? Does the court receive petitions for payment and rule upon whether to pay all or a portion of them? Do lawyers need to certify that they have provided legal representation in accordance with the standards required by the code of professional responsibility? Is there a set fee paid per case? Is there a schedule of fees depending on the complexity of the case? Are the fees sufficient to cover the costs of representation? Is there separate compensation available for investigative expenses, forensic analysis, expert witnesses, including psychiatric experts, or are lawyers expected to pay this out of the fees they will receive? If so, how often are such resources utilized by counsel?
- H. Are sufficient numbers of lawyers available who speak minority languages to be able to appoint counsel who speaks the same language as the client? If not, where lawyers are appointed to represent clients who need interpretation services to communicate with counsel, how are interpreters provided? Is the lawyer expected to hire an independent interpreter? Are communications restricted to when a family member is present or at court where a court interpreter may be available? What is the impact on the confidentiality of lawyer client communications? What is the impact on the lawyer's ability to develop a defence for his/her client?
- I. Can a lawyer make a living by accepting appointments as the main source of his/her caseload? If the fees are nominal, is it common for s to accept too many appointments to provide the representation required under the code of professional responsibility? Are there indications that clients are being neglected as a result? Does the appointing authority limit the number of appointments that may be carried by a single lawyer at a time?
- J. Is there any evidence that lawyers who have accepted court appointments and their compensation scheme are demanding additional payment from the clients or their clients' families? Is the appointing authority aware of such cases? How has the system responded to such abuses, if at all? Are such lawyers charged with disciplinary violations? Are they barred from receiving further appointments?
- K. What are the greatest challenges associated with the appointment system? Does the current system consistently provide access to effective and competent representation to criminal defendants? Is the legal community satisfied with the current system? What would it change?

### **4.3 CONTRACTUAL LAWYERS**

- A. Does the government provide state-funded legal representation to indigent and otherwise entitled criminal defendants by obtaining contractual legal services via its procurement system? What agency is in charge of administering the procurement of legal services for criminal defendants? Who develops the terms of reference for such contracts? Do the terms require compliance with standards of representation provided for in the code of professional responsibility or other standards or performance? Who monitors, if anyone, performance and compliance with contractual requirements? Does the contract administrator have a background in law and understand the ethical and practical requirements of criminal defence work? How does the contracting authority balance the need to monitor contractual performance with the need for lawyer client confidentiality? Have performance indicators been designed to measure compliance in ways that do not impinge on the lawyer client relationship?
- B. How are the contracts awarded? Are awards based on a competitive bidding process or a qualifications process in which law firms, NGOs and individuals who demonstrate that

they have the qualifications, experience and capacity to provide criminal defence work are granted the criminal defence work in a geographic area or for certain types of criminal cases at specific court levels? In either case, is the process publicized, transparent and fair? Are bids/proposals reviewed by a committee using a predetermined set of criteria? From where are members of the review committee drawn? Are members of the committee made aware of their ethical obligations in awarding contracts and do they certify that their deliberations have been conducted with integrity?

- C. Upon what basis are legal contractors paid for their services? Do they receive a flat rate fee per client or is the fee predicated on certification of the services provided in accordance with the standards of performance? Is there a separate budget for investigative services, forensic analysis, and expert witnesses, including psychiatric experts, interpreters? If not, does the fee paid per client/case reflect the potential need for such resources?
- D. Are sufficient numbers of lawyers who speak minority languages under contract to be able to meet the representation needs of clients whose primary language is not the official language of the justice system? Are such lawyers/law firms/NGOs/bar associations actively recruited in the contracting/bidding process? If not, are additional resources available/ higher fees paid when representing clients who need interpretation services so that the lawyer may hire an interpreter? Where none of these options is provided for, are communications restricted to when a family member is present who is able to interpret or at court where a court interpreter may be available? What is the impact on the confidentiality of lawyer client communications? What is the impact on the lawyer's ability to develop a defence for his/her client?
- E. How many legal services contractors provide criminal defence services? Are they individual lawyers? Law firms? NGOs? Bar associations? How is the criminal caseload apportioned among the contractors? What is the typical caseload carried per lawyer? Is the caseload of a size that allows the lawyer to fulfil the obligation of the rules of professional conduct and the obligations of the contract?
- F. Have the contracts of any legal services contractors been terminated? Why? Were the reasons due to failure to perform? Political or other non-meritorious bases?
- G. What are the greatest challenges associated with the contractual system? Does the current system consistently provide access to effective and competent representation to criminal defendants? Is the legal community satisfied with the current system? What would it change?

#### **4.4 LEGAL AID / PUBLIC DEFENDER SERVICE**

- A. Does the service provide legal services other than criminal defence and appeal? Does it handle associated civil claims that the criminal defendant may be subject to? Does it provide general legal services to non-defendants? If so, does the service segregate the criminal defence staff from other legal services divisions to minimize conflicts in representation?
- B. Does the service have the ability to hire on a per case basis outside counsel to represent co-defendants in cases who may have incompatible defences?
- C. Where the legislature has created an entity whose mandate is to provide legal services for the poor, in what branch of government does the entity reside? Is it considered to be an independent agency? To which ministry or department is it accountable? How does the entity maintain its independence?

- D. How is the leadership of the service established? Appointment by the executive, legislature, judiciary, an independent oversight commission? Is the head of the legal aid/public defender service a qualified legal practitioner?
- E. How is the service funded? Who controls the budget? What is the budgetary process under the law? Does the legal aid/public defender service have a specified budget? Who is involved in planning the initial budget? Who prepares and submits the operating budget? Under the law, who manages the budget? Who oversees spending? Is the budget sufficient for the legal aid/public defender service to fulfil its mandate?
- F. Does the legal aid/public defender service actually receive the funds allocated in its budget? Are there delays, fiscal constraints, or other obstacles to gaining access to these funds? Where are the funds held? Who authorizes their disbursement?
- G. Does the legal aid/public defender service have an organizational chart that describes the lines of authority and staffing scheme? How is the service organized geographically? Do local offices exist in addition to a central office?
- H. Does the service staff reflect the population? Is any group over- or under-represented? Is the service leadership making efforts to recruit candidates to make the staff more representative? Are bilingual or multilingual staff who speak ethnic minority languages recruited? If not, why not?
- I. What other types of staff are part of the legal aid/public defender service? Are there staff investigators? Social workers who are capable of assessing clients' treatment and social service needs? Interpreters? Legal assistants/paralegals who help prepare filings, gather information? Is staffing sufficient to meet the service's mandates throughout the country? If not, why not?
- J. Are staff lawyers assigned by complexity of crime or by the court in which a defendant is charged? What is the typical caseload carried by staff lawyers at each level of court or type of assignment. Does management believe that the caseload is appropriate? If management recognizes that the caseloads are excessive, what kinds of support are they able to provide the line lawyers, if any?
- K. Do staff lawyers have sufficient substantive and material resources including statutes, codes, regulations, supplies, access to forensic service, investigative resources to fulfil the duties and obligations to their clients? Do they have offices or conference rooms in which they can meet with their clients in private?
- L. Does the legal aid/public defender service hire experienced defence lawyers? Recent admittees to the bar? How does it train its legal staff? Does it include training on the ethical issues associated with the representation of criminal defendants? On client-lawyer privilege? Do senior lawyers mentor or otherwise supervise less experienced lawyers?
- M. How does the senior management ensure that staff lawyers are providing quality representation? How does senior management deal with lawyers who neglect their clients? Commit malpractice? Who participate in corrupt acts? Is there an internal disciplinary system? Are staff lawyers referred to the lawyer grievance/disciplinary system?
- N. How does the legal aid/public defender service deal with a client who wants to discharge his/her lawyer or be represented by a different staff lawyer? Are such requests honoured? More than once?
- O. Do legal aid/public defender service legal staff act as back up counsel to defendants charged with serious crimes who insist on representing themselves? How often? Does the service do this as a matter of policy or when ordered by the court?

- P. How is the quality of representation by the legal aid/public defender service regarded by the legal community? By the public? What are the key perceived issues confronting the service? From the perspective of the leadership structure of the service? From the perspective of the line lawyers? From the perspective of the legal community? The public? The service's clients?

#### 4.5 LEGAL ASSISTANCE BY NON-LAWYERS

The American Bar Association has defined a paralegal as a "person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible." Reform initiatives involving paralegal assistance programs have been well received in countries with insufficient numbers of lawyers to meet the legal services needs of the population. While fulfilling a critical need, in the short-term, the long-term role of paralegals should be to augment legal representation by counsel in criminal cases rather than replacing it with services that are more limited. Please see Developing New Approaches to Legal Aid and the Lilongwe Declaration on Accessing Legal Aid in Africa ([www.penalreform.org](http://www.penalreform.org)) for more information

- A. Are there paralegals working in the country being assessed? What are they allowed to do in terms of criminal law? What role do they play? What kind of practical skills and training do they receive in order to work as paralegals? In many cases, these may be a special university level course of study or someone who has completed the study of law but does not have the credentials that permit the practice of law. Who provides their practical and ethical training? Law schools, NGOs, local paralegal associations? Does their training include practical exercises? Do they receive continuing legal education to keep them up with changing law? May they also pass their knowledge to others, or educate people about the law? May they train others to become paralegals? What are their ethical obligations when working under the supervision of a lawyer?
- B. Do they interview clients, take statements from witnesses, or collect evidence? Do they visit prisons and educate detainees and prisoners on their legal rights? Do they attend at interviews in the police station? Do they provide advice to victims and witnesses on court proceedings?
- C. Is there an established paralegal aid scheme? How does the paralegal aid scheme liaise with the prosecution service, the courts, and the prison service? Is there an inter-agency coordination panel or committee? Has a memorandum of agreement been agreed with the paralegal aid service and the government? Has a code of conduct been agreed upon between the paralegal aid scheme, the prisons, police and the judiciary? Have the paralegal aid service agreed upon standard forms and procedures

#### 4.6 ADEQUACY OF REPRESENTATION

- A. How conscientious and zealous are lawyers in the representation of their clients? When do most lawyers first meet their clients? Do lawyers meet with their clients before court appearances? Do they visit them in jail? Do they interview them about potential witnesses, defences they may have? Do they obtain information about their connections to the community that may convince the court to release a detained client pending trial? Do they advise their clients about what the legal options and strategies may be? Do they consult with their clients to determine their preferences and wishes? Do they appear to be prepared? Do they know the alleged facts of the case? Do they conduct their own investigations and legal research? (Do they have the resources to do so?) Have they obtained an interpreter where one is need to work with their clients? Do defence counsel keep their clients apprised of the status of their case?

- B. Do defence counsel appear in court with their clients? Is it common for lawyers to skip court appearances? Do the judges proceed without them? Are there any consequences when they fail to appear or is this the normal practice?
- C. Do lawyers routinely waive the appearance of their clients at legal proceedings? Is this custom or is it connected to difficulties in transporting detained clients to court? Do lawyers obtain the consent of their clients in waiving their appearance?
- D. How vigorously do lawyers advocate on behalf of their clients? Do defence lawyers challenge or object to motions by the prosecution? Do they object to witness testimony or the introduction of evidence? Do they challenge the reliability of evidence proffered without a proper foundation establishing its relevance? Do they challenge the admissibility/voluntariness of statements made by their own clients? Do they waive proof of critical aspects of their clients' cases?
- E. Do defence lawyers, when they have a good faith basis, alert the court to coercion, abuse, or torture experienced by their clients at the hands of the authorities? If not, why not?
- F. Do defence lawyers who represent juveniles advocate for their diversion from the criminal justice system whenever possible? Do they make a clear record of the special needs of juveniles? Please see **CROSS-CUTTING ISSUES: JUVENILE JUSTICE** for additional information on the special needs of juveniles in conflict with the law.
- G. If plea agreements are possible, or when entering a plea of guilty and forgoing a trial (where possible, as some countries require a trial no matter what the plea), does the lawyer review with the client what rights the client is waiving, such as the right to a public trial, the right to examine witnesses, the right to present evidence, the right to call their own witnesses, the right to appeal the verdict, the right to appeal the admission of evidence that has been objected to, etc.? Is this waiver of rights done on the record in court?
- H. Do lawyers typically offer evidence of their clients' history, qualities, and special needs at sentencing hearings? Do they present testimony, i.e., character witnesses, psychological assessments? Do they rely on the pre-sentencing reports? Do they verify the accuracy of the pre-sentencing reports and challenge inaccuracies?
- I. Do lawyers typically pursue appeals on behalf of their clients? Move for reconsiderations of rulings or sentences? Do defence counsel assist in parole hearings?
- J. What are the differences in the advocacy of a privately retained defence lawyer in comparison to a publicly funded lawyer? How do judges or prosecutors treat privately retained counsel or their clients in comparison to publicly funded counsel and their clients?
- K. What mechanisms, if any, are available to replace defence counsel if it becomes clear to the court or the client that the defence counsel of record is not fulfilling even the most basic duties and obligations to his/her client? What are the consequences to that lawyer?

#### 4.6.1 Challenges to Effective Representation

- A. Are the positions of judge, prosecutor, and defence lawyer career paths from university to retirement or is it possible for a lawyer to move from one role professionally to another? If movement is possible, does it occur with some regularity? What are the ramifications of this mobility or lack of it with regard to the status of defence lawyers?

- B. Is there general parity between lawyers from the legal aid office and prosecution with respect to resources and status? If not, what are the differences? Are the differences significant?
- C. What is the status of publicly compensated criminal defence lawyers? Is their remuneration consistent with their position? Is their salary reasonable when compared to the local cost and standards of living? How does it compare to that of judges, prosecutors, and lawyers in private practice?
- D. Do the prosecutor and defence counsel have “equality of arms” in presenting their cases/arguments? Is evidence/witnesses to be called appropriately shared? Is the presumption of innocence correctly applied? Is the lawyer-client privilege honoured?
- E. What is the interaction between the judge, the prosecutor, and the defence lawyers in court? Are communications mutually respectful? Does the judge defer to the prosecutor? Does the judge hear out or prematurely cut off the arguments of defence lawyers?
- F. Have defence lawyers or their families been subjected to threats or attacks? What was done to protect them? What was the source of the threat? Other criminal defendants? Political or governmental sources? Have threats against defence lawyers been systematic? Have lawyers left the country to protect themselves? Please see Principle 16, **UN Basic Principles on the Role of Lawyers**.

## 5. CRIMINAL DEFENCE LAWYERS

### 5.1 EDUCATION

**Principle 9** of the **UN Basic Principles on the Role of Lawyers** requires that governments, professional associations of lawyers and educational institutions ensure that “lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.” **Principle 10** charges these same bodies with ensuring that entry and continued practice into the profession is open to everyone regardless of “race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.” (The latter may not be the basis for discrimination in some countries, including the United States.) **Principle 11** further urges that members of groups, communities or regions that have been discriminated against or have been underserved be given special opportunities to enter the profession and also to develop the skills appropriate to represent the needs of their groups/community. In some countries, barriers to the study of law may include the cost of such an education, the lack of accreditation of law schools (or other standards that assure the quality of the education provided), or demands for bribes by university officials.

- A. To become a lawyer in the country being assessed, what course of study must be pursued and what level of education must be attained in order to be a lawyer? University level? Post-graduate study? Can one fulfil the educational requirements by reading the law under the supervision of an experienced lawyer?
- B. Are law schools/universities subject to accreditation in the country being assessed? Are there any independently accredited institutions offering the study of law? How many?
- C. On what basis are students admitted to universities/ law schools? Scholastic record? Score on a standardized test? Ability to pay? Payment of a bribe to university officials?
- D. Are law school students representative of the demographics of the country being assessed? Is any group over- or under-represented? Are women proportionally represented? Have they been historically part of the legal profession? Are efforts being

made to attract candidates from under-represented or disadvantaged groups? If not, why not?

- E. What is the approach to teaching law? Is the basic approach based upon memorization or upon analysis? Are law students given the opportunity to participate in activities like moot court competitions or work on legal journals? Are students provided the opportunity to participate in law clinics or other intern- or externships in which they learn trial skills and how to work with clients? Law clinics associated with law schools/universities allow students to develop professional skills via a combination of theoretical classroom instruction, mock trial exercises, and by working on actual cases under the supervision of a faculty lawyer. In essence a teaching law firm staffed by the supervising professor and law students, law clinics typically provide legal services to the poor, the vulnerable and the disadvantaged. In the United States, state law or the court rules authorize students to represent clients and to appear in court under the supervision of a faculty lawyer in such programs. In other countries, NGOs and lawyers' associations may provide similar opportunities for law students.
- F. Does coursework or any clinical program focus specifically on criminal defence? Can students specialise in criminal defence?
- G. Have the universities that offer the study of law or the law schools been the subjects of reform initiatives in the last five years? Is reform of these institutions an issue in the country being assessed? What changes are being advocated and by whom?

## 5.2 ADMISSION TO THE PRACTICE OF LAW

In some countries, this process may be known as being admitted to the bar. In other countries, gaining the credentials to practice law may require being elected to a Collegium.

- A. In countries where lawyers must be certified or accredited to practice law, what does the certification/accreditation process require in addition to fulfilling basic educational requirements? Is the process fair and transparent? Do qualified candidates routinely receive these professional credentials, no matter what their age, gender, religion, race or ethnic background might be? Are the qualifying criteria made available to the public?
- B. Are candidates required to pass a lawyer's or bar examination? How often and where are such examinations held? What is the cost of the examination? Are either of these barriers to candidates who live in remote areas or who are impoverished or both?
- C. Who administers the examinations? Who grades them? What is the annual pass rate? Does the examination process demonstrate integrity? How many opportunities are candidates given to pass the examination? What are the career consequences of failing to pass?  
After corruption scandals involving the sale of test questions undermined the integrity of the examination process in at least one country, officials decided publish all of the potential test questions in the newspaper prior to the examination.
- D. Does the examination include questions about ethics and professional responsibility among its subject areas? If not, is there a separate examination dealing with professional responsibility and ethics?
- E. Is there a background check or vetting of candidates? Under what circumstances, if any, may a candidate with a prior criminal record be admitted to the practice of law? Is it possible for someone who has been diagnosed with a mental illness to practice law?
- F. Is there a good character requirement for admission? Are the factors that may be used to determine good character defined? Have any of these factors been challenged?

- G. Is it possible to appeal a rejection or denial? On what grounds? Is there a procedural process for judicial review when a final appeal is lost? Have any such appeals been successful?
- H. Are there allegations that the bar/collegium/professional association is protecting established lawyers from competition by artificially limiting membership? Has the admission process become politicized? Are some candidates refused professional credentials because of their religious or political affiliations or lack thereof or on other discriminatory grounds? Have competing professional organizations emerged that certify/accredit lawyers?
- I. Does the bar/collegium/ professional association require the payment of an entrance fee to gain admission? If so, is this a nominal fee to cover administrative costs that can be waived upon application by a candidate of limited means or is it, in the context of the country's economy, a barrier to entering the profession? Do candidates go into debt to pay the fee? Is the level of debt so disproportional to the potential annual income that it may act as a driver to corrupt behaviour?
- J. How do lawyers develop a speciality in criminal defence work? May lawyers hold themselves out to the public as having special expertise in criminal defence work? In the representation of juveniles in conflict with the law? In the representation of vulnerable adults in criminal matters?

### **5.3 TRAINING**

- A. Are lawyers required to complete additional or continuing legal education (CLE) or training to maintain their membership in the bar or collegium? How many hours must they complete annually? What is the source of the training? Bar associations? Law Schools? If yes, how often do they take CLE courses? How many hours or credits must they complete annually? Must this include coursework on ethical issues? What is the potential sanction for lawyers who do not complete their CLE requirements? Suspension from the practice of law until they fulfil the requirements? Fines? Are these requirements enforced?

## 6. PARTNERSHIPS AND COORDINATION

### 6.1 SYSTEM COORDINATION

- A. To what extent do the various bodies that are able to appoint or provide criminal defence services to the poor coordinate their efforts? How do they avoid wasting resources via redundant appointments? Is there a coordinating body of such entities? Do they work cooperatively? Have they been effective in developing responses to address gaps or other issues?
- B. At what level do the criminal justice agencies co-ordinate their activities – national, regional, local? What form does this take, i.e. ad hoc working groups, formal commissions? Do the co-ordinating bodies work well together? Have they been effective in resolving issues? Is there a history or at least an instance of stakeholder participation in the development of initiatives to address the issues facing the criminal justice system? Who are the key players who have worked collaboratively in the past or who need to be brought on board in the future? Does the head of the legal aid/public defender service participate and contribute the perspective of the criminal defence bar and its clients' rights and needs to these efforts?
- C. Do user committees exist? Who sits on them? Do they include former defendants? Are members of the minority communities included? Have they been effective in contributing to the development of criminal justice initiatives?
- D. What partnerships with the legal community or the community at large (e.g. victim support, legal assistance, referral from or to traditional courts) exist?
- E. Do other civil society organizations provide support by monitoring what is happening at courts? Do some provide services that are used by criminal defendants?

### 6.2 DONOR COORDINATION

Understanding what donor efforts are underway, what have previously been implemented (successfully and unsuccessfully) and what is planned is critical to developing recommendations for future technical assistance interventions.

- A. Identify the donor strategy papers for the justice sector and amount of money set aside in support.
- B. Is this subject (provision of criminal defence services to the indigent) discussed in individual donor country action plans/or strategy papers?
- C. Where direct budget support is supplied, identify how much has been earmarked for the justice sector?
- D. Where a Medium Term Expenditure Framework is in place, indicate what is set aside for justice in general and for criminal defence in particular?
- E. Which donor/development partners are active in courts and criminal justice issues? Is the approach by donors targeted to the institution concerned (i.e. special court services, child offenders, legal assistance) and divided between donors, or sector wide (i.e. taking the issue of criminal justice reform as a whole)?
- F. What projects have donors supported in the past; what projects are now underway? What lessons can be derived from those projects? What further coordination is required?

## ANNEX A. KEY DOCUMENTS

### UNITED NATIONS

- Universal Declaration of Human Rights, 1948
- International Covenant on Civil and Political Rights 1966
- Basic Principles on the Role of Lawyers, 1990
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985
- Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters 2002
- Basic Principles on the Independence of the Judiciary 1985
- Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary 1989
- Standard Minimum Rules for Non-Custodial Measures 1990
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 1988
- Standard Minimum Rules for the Treatment of Prisoners 1955

### DRAFT

- Model Code of Criminal Procedure

***PLEASE NOTE:** The Model Code of Criminal Procedure (MCCP) is being cited as a model of a code that fully integrates international standards and norms. At the time of publication, the MCCP was still in DRAFT form and was being finalised. Assessors wishing to cite the MCCP with accuracy should check the following websites to determine whether the finalised Code has been issued and to obtain the finalised text, as referenced Articles or their numbers may have been added, deleted, moved, or changed:*

<http://www.usip.org/ruleoflaw/index.html>

or

[http://www.nuigalway.ie/human\\_rights/Projects/model\\_codes.html](http://www.nuigalway.ie/human_rights/Projects/model_codes.html).

*The electronic version of the Criminal Justice Assessment Toolkit will be updated upon the issuance of the finalised codes.*

### Regional

- African Charter on Human and Peoples' Rights 1981
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and People's Rights
- African Commission on Human and People's Rights Resolution on Fair Hearings
- African Charter on the Rights and Welfare of the Child 1990
- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- American Convention on Human Rights 1978

### Post-Conflict

- ICC, Rome Statute, International Criminal Court, 1998
- ICTR, Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations in the Territory of Neighbouring States, 1994
- ICTY, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, 1993.

### National

- Constitution
- Acts of Parliament and regulations to those Acts

- Court Rules
- Bar Association/Collegium Policy/Procedure Manuals, handbooks, circulars, annual reports
- Legal Aid/Public Defender Policy/Procedure Manuals, handbooks, circulars, annual reports
- Government policy documents, “standing orders”, circulars
- Government reports, strategy documents
- Accounting/Budget documents
- NGO reports
- Donor reports

#### **Other Useful Sources**

- Measuring Progress toward Safety and Justice: A Global Guide to the Design of Indicators Across the Justice Sector (Vera Institute of Justice 2003)
- Developing New Approaches to Legal Aid ([www.penalreform.org](http://www.penalreform.org))
- Lilongwe Declaration on Accessing Legal Aid in Africa ([www.penalreform.org](http://www.penalreform.org))



## ANNEX B. ASSESSOR'S GUIDE / CHECKLIST

The following are designed to assist the assessor in keeping track of what topics have been covered, with what written sources and with whom:

	TOPIC	SOURCES	CONTACTS	COMPLETED
2.1	STATISTICAL DATA	<ul style="list-style-type: none"> <li>▪ Legal Aid/Public Defender Service Reports</li> <li>▪ Performance Reports/Ministry of Procurement/Finance</li> <li>▪ Court Annual reports</li> <li>▪ Ministry of Justice reports</li> <li>▪ Bar Association Reports</li> <li>▪ Ministry of Interior/National Police Crime reports/Penal System reports</li> <li>▪ Nongovernmental organisation reports on the criminal justice system</li> </ul>	<ul style="list-style-type: none"> <li>▪ Legal Aid/Public Defender Head</li> <li>▪ Legal Services Contract Administrator</li> <li>▪ Bar/Collegium</li> <li>▪ Ministry of Justice</li> <li>▪ Chief Judge</li> <li>▪ Court Administrator</li> <li>▪ Registrar/Court Manager</li> <li>▪ NGOs working on criminal justice matters or providing legal services</li> <li>▪ Donor organisations working on the criminal justice sector</li> </ul>	
3.1	LEGAL FRAMEWORK/RIGHT TO COUNSEL	<ul style="list-style-type: none"> <li>▪ The Constitution</li> <li>▪ Acts of Parliament and regulations to those Acts, incl. Criminal Procedure Code, Legal Aid Act</li> <li>▪ Court Rules/ Judge's Bench Book</li> <li>▪ Government policy documents, "standing orders", circulars</li> <li>▪ Reports</li> <li>▪ Law Reports (reported cases)</li> <li>▪ Independent reports made by non-governmental organisations.</li> <li>▪ Legal textbooks or academic research papers.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Legislative offices</li> <li>▪ Legal Aid/Public Defender Head</li> <li>▪ Legal Services Contract Administrator</li> <li>▪ Bar/Collegium</li> <li>▪ Ministry of Justice</li> <li>▪ Chief Judge</li> <li>▪ Senior Court personnel</li> <li>▪ Court Administrator</li> <li>▪ Registrar/Court Manager</li> <li>▪ NGOs working on criminal justice matters</li> <li>▪ Donor organisations working on the criminal justice sector</li> </ul>	
3.1.1	Legal Literacy/Public Awareness	See above	See above Plus Street Law program personnel	
3.1.2	Right to Counsel in Traditional / Customary Courts	See above	See 3.1 above PLUS leaders of ethnic, religious or tribal communities	
3.1.3	Legal Representation before Military Court / Special Tribunals	<ul style="list-style-type: none"> <li>▪ Military Code and Procedural Code</li> <li>▪ Transitional Codes Post-Conflict</li> </ul>	<ul style="list-style-type: none"> <li>▪ Military Court and Tribunal Senior Personnel</li> <li>▪ Military Legal Services</li> <li>▪ Transitional Authority</li> </ul>	
3.2	LEGAL FRAMEWORK PRACTICE OF LAW	See 3.1 above <ul style="list-style-type: none"> <li>▪ PLUS BAR/ Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct</li> </ul>	See 3.1 above	

	TOPIC	SOURCES	CONTACTS	COMPLETED
3.2.1	Professional Responsibility	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ BAR/ Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct/ Disciplinary System Rules and Procedure</li> </ul>	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ Staff/head of the Lawyer Grievance/Disciplinary Board</li> </ul>	
4.1	PRIVATE REPRESENTATION	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ BAR/Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct/</li> <li>▪ SITE VISITS</li> </ul>	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ Private Lawyers</li> <li>▪ Former clients of private lawyers</li> </ul>	
4.2	APPOINTED (EX OFFICIO) REPRESENTATION	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ BAR/Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct/</li> <li>▪ SITE VISITS</li> </ul>	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ Appointed Lawyers</li> <li>▪ Former clients of appointed lawyers</li> <li>▪ Official responsible for the appointment of lawyers, including Court Registrars/Administrators</li> </ul>	
4.3	CONTRACTUAL LAWYERS	<p>See 3.1 above PLUS BAR/Collegium Rules/ Bylaws</p> <ul style="list-style-type: none"> <li>▪ Codes of Professional Responsibility/Ethics/Conduct</li> <li>▪ Procurement and bidding documents, contracts</li> <li>▪ Procurement regulations and certifications</li> <li>▪ SITE VISITS</li> </ul>	<p>See 3.1 above PLUS</p> <ul style="list-style-type: none"> <li>▪ Legal Services Contract Administrator Contractual lawyers/firms</li> <li>▪ Former clients</li> </ul>	
4.4	LEGAL AID / PUBLIC DEFENDER SERVICE	<ul style="list-style-type: none"> <li>▪ See 3.1 above</li> </ul> <p>PLUS BAR/Collegium Rules/ Bylaws</p> <ul style="list-style-type: none"> <li>▪ Codes of Professional Responsibility/Ethics/Conduct/</li> <li>▪ Handbooks, Manuals, Guides, Annual Reports</li> <li>▪ Acts of legislature and regulations to those Acts establishing and funding the service</li> <li>▪ Qualification guidelines</li> </ul> <ul style="list-style-type: none"> <li>▪ <b>SITE VISITS</b></li> </ul>	<p>See 3.1 above</p> <p>PLUS:</p> <ul style="list-style-type: none"> <li>▪ Head of Service,</li> <li>▪ Staff Lawyers</li> <li>▪ Former clients</li> </ul>	
4.5	LEGAL ASSISTANCE BY Non-LAWYERS	<ul style="list-style-type: none"> <li>▪ Constitution</li> <li>▪ Acts of Parliament &amp; regulations to those Acts</li> <li>▪ Court Rules</li> <li>▪ Procedure Manuals, handbooks,</li> <li>▪ Government policy documents, "standing orders", circulars</li> <li>▪ Accounting/Budget documents</li> </ul> <ul style="list-style-type: none"> <li>▪ <b>SITE VISITS</b></li> </ul>	<p>See 3.1 above</p> <p>Criminal Defence firms and lawyers who hire paralegals Paralegals Paralegal Professional Organizations, if any</p>	

	TOPIC	SOURCES	CONTACTS	COMPLETED
4.6	ADEQUACY OF REPRESENTATION	See 3.1 above PLUS BAR/Collegium Rules/ Bylaws <ul style="list-style-type: none"> <li>▪ Codes of Professional Responsibility/Ethics/Conduct Disciplinary System Rules and Procedure</li> <li>▪ Reports of Court Monitoring Groups <b>SITE VISITS</b></li> </ul>	See 3.1 above  PLUS COURT MONITORING Groups	
4.6.1	Challenges to effective Representation	See 4.6 above	See 4.6 above	
5.1	CRIMINAL DEFENCE LAWYERS: EDUCATION	<ul style="list-style-type: none"> <li>▪ <b>SEE 3.1 PLUS</b></li> <li>▪ <b>SITE VISITS</b></li> </ul>	SEE ABOVE  Plus: <ul style="list-style-type: none"> <li>▪ Deans/professors of law schools</li> <li>▪ Deans/professors Universities with law curricula</li> <li>▪ Heads of Law Clinics</li> <li>▪ Law Students/Student Leaders</li> </ul>	
5.2	ADMISSION TO THE PRACTICE OF LAW	See 3.1 above PLUS <ul style="list-style-type: none"> <li>▪ BAR/Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct</li> </ul>	SEE 3.1 ABOVE PLUS LEADERS OF ANY COMPETING PROFESSIONAL ORGANIZATIONS	
5.3	TRAINING	<ul style="list-style-type: none"> <li>▪ BAR/Collegium Rules/ Bylaws</li> <li>▪ Codes of Professional Responsibility/Ethics/Conduct</li> <li>▪ Court Rules</li> <li>▪ Court Policy/Procedure Manuals, handbooks, circular</li> <li>▪ SITE VISITS</li> </ul>	<ul style="list-style-type: none"> <li>▪ Bar Associations/Lawyer's groups</li> <li>▪ Legal assistance programs</li> <li>▪ NGOs</li> <li>▪ Public defence agency</li> <li>▪ Prosecutor's Office</li> <li>▪ Law Schools</li> <li>▪ Donor organisations</li> </ul>	
6.1	SYSTEM COORDINATION	<ul style="list-style-type: none"> <li>▪ Acts of Parliament and regulations to those Acts</li> <li>▪ Court Rules</li> <li>▪ Court Policy/Procedure Manuals, handbooks, circular</li> <li>▪ Government policy documents, "standing orders", circulars</li> <li>▪ Reports/Minutes of coordinating meetings</li> <li>▪ Reports/Minutes of community group meetings</li> <li>▪ Reports on special joint initiatives</li> <li>▪ Progress reports by donor organizations</li> <li>▪ Independent studies conducted by universities/NGOs</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ministry of Justice</li> <li>▪ Head of Legal Aid/Public Defender Service</li> <li>▪ Heads of other Criminal Justice entities: <ul style="list-style-type: none"> <li>○ Prosecutor</li> <li>○ Director of Penal System</li> <li>○ Police Chief</li> <li>○ Chief judge</li> </ul> </li> <li>▪ Court Administrator</li> <li>▪ Registrar/Court Manager</li> <li>▪ Non-governmental organisations working on criminal justice matters</li> <li>▪ Bar associations/Lawyers' associations</li> <li>▪ Legal assistance programs</li> <li>▪ Public defender agency staff</li> <li>▪ Law Schools</li> <li>▪ Donor organisations</li> </ul>	

	TOPIC	SOURCES	CONTACTS	COMPLETED
6.2	DONOR COORDINATION	<ul style="list-style-type: none"> <li>▪ Donor Strategy papers</li> <li>▪ Progress reports by donor organizations</li> <li>▪ Independent studies conducted by universities/NGOs</li> </ul>	<ul style="list-style-type: none"> <li>▪ Donor organisations</li> <li>▪ Head of Legal Aid/Public Defender Service</li> <li>▪ Ministry of Justice</li> <li>▪ Heads of other Criminal Justice entities:               <ul style="list-style-type: none"> <li>○ Prosecutor</li> <li>○ Director of Penal System</li> <li>○ Police Chief</li> <li>○ Chief judge</li> </ul> </li> <li>▪ Court Administrator</li> <li>▪ Registrar/Court Manager</li> <li>▪ Non-governmental organisations working on criminal justice matters</li> <li>▪ Bar associations/Lawyers' associations</li> <li>▪ Legal assistance programs</li> <li>▪ Public defender agency</li> <li>▪ Law Schools</li> </ul>	





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