

Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: Follow-up on the Johannesburg Declaration

Co-hosted by the Government of South Africa, UN Rule of Law Coordination and Resource Group, The Open Society Justice Initiative, and the International Legal Foundation

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I am truly honored to be here. I thank all of you for taking time out of your busy day to participate in this important discussion on legal aid at this high level meeting at the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice.

I am not overstating the fact when I say that the lack of access to effective criminal defense services for the poor is a global crisis that is under-addressed everywhere in the world,

Just 14 years ago, when the International Legal Foundation (ILF) was founded, this discussion was not happening at such a high level. Around the world, while there was increasing awareness of the need to strengthen and reform justice institutions, and increasing recognition that weak justice institutions often lead to violence and instability in a fragile country, criminal defense services for the poor were almost always overlooked.

The ILF came out of its founders work in Rwanda –

In 1997 in the aftermath of the Rwandan genocide, the world was focused on prosecuting those responsible for those horrific crimes. Entirely left out of the conversation were the rights of the nearly 150,000 men and women in pre-trial detention. Startlingly, there were only a handful of attorneys available to represent them.

Motivated by the urgent need for defense lawyers to represent the poor in post-conflict countries, the ILF was established with the goal to help the forgotten millions who are accused of ordinary crimes and languish in detention without access to a lawyer.

There have been enormous strides made since the ILF was founded --- the adoption of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems by the UN General Assembly in 2012, increasing focus of governments on drafting and adopting legal aid laws, establishing legal aid institutions, and a gradual increase of funding.

Despite these efforts,

There still today exists a global crisis in access to legal aid.

Around the world, all too often, the poor and most vulnerable will not receive access to a lawyer if charged with a crime --- and even when they do, the legal services provided to them are often completely ineffective. In many countries, state-funded legal services are non-existent, or else they are narrow in scope, legal aid is meagrely funded, and is often of low quality.

If the accused gets a lawyer, that lawyer is often not trained or doesn't have the experience to handle criminal cases, won't have met the client until the day of trial or shortly before, and won't have the resources necessary to provide an effective defense.

This is an important and critical issue for such a high level discussion -- Why?

- (1) It is a legal obligation of States, and human rights obligation to provide criminal defense services to the indigent accused.

There is global consensus that the right to free legal assistance for criminal defendants is a fundamental right necessary to ensure the right to a fair trial, the right to defense and the fundamental human rights of life and liberty.

More importantly, governments own laws provide for the right to counsel.

- (2) Because we know the devastating impact of not having counsel ---

Detention, torture, wrongful conviction and execution

Too often, whether a defendant lives or dies, whether incarcerated or not has to do with whether one is poor and vulnerable, not the merits of the criminal case.

This is not an issue of sovereignty -- While States can decide what is a crime, in order to convict and sentence the criminally accused, the process has to be fair.

- (3) It is a truly global crisis that is under-addressed everywhere – it is a problem in every country, and the challenges to providing effective legal aid are common to every country not just post-conflict, poor or new developing legal systems,

A couple of years ago, the U.S. celebrated the 50th anniversary of the seminal right to counsel case – Gideon v. Wainwright. Instead of congratulating ourselves for how far we have come, there was much debate about the lack of quality criminal defense services available to the poor. The U.S. Attorney General, Eric Holder, publicly stated that there is a “crisis in indigent defense” in the U.S.

I want to talk about two practical issues impeding implementation of the right to legal aid for the criminally accused, and suggest practical ways in which these obstacles can be overcome.

- (1) **Prioritization/ political will** --- While right the right to counsel for the indigent accused exists in law in most countries, governments are not prioritizing its implementation in practice. This right is overlooked, ignored and not prioritized.

I often hear governments, Ministers say ---

We cannot afford to provide criminal defense services to the poor,

Interestingly, do not hear, cannot afford to arrest, or prosecute

Despite laws --- somehow seen as a choice, somehow not as important as the police services, prosecution services and courts. This has to change.

The message has to be --- right to counsel is essential component of a fair and effective criminal justice system. This has to be the message from our leaders, governments, communities.

If you cannot afford to defend, cannot arrest, detain or in some cases even prosecute.

A few years in the State of Massachusetts where I practiced as a public defender, U.S. indigent detainees were often not getting timely access to lawyers. Lawyers were refusing appointment because of the low fees authorized by the legislature. As a remedy, the highest court in the State of Massachusetts ordered that detainees could not be held for more than 7 days on bail or under preventative detention without access to a lawyer.

This should be a remedy that all States should consider as in Massachusetts it pushed the government to resolve the issue and ensure the accused had timely access to counsel.

International community also contributing to failure of governments to prioritize legal aid --- Donors should fund reform of government legal aid – proportional as prosecution, courts.

Interesting statement by a World Bank guidance note a few years back that I think has not been take forward strongly enough – funding prosecution services in a particular country and not funding defense contributes to an imbalanced system.

In post-conflict and transitional countries around the world, we see millions of dollars going into reconstruction of courts, prosecution services, police services, and relatively speaking, very little goes to funding legal aid – almost an afterthought.

(2) Capacity ---

Too few lawyers are providing criminal legal aid services. Those that are, are often providing ineffective services. Many lawyers providing legal aid services are inexperienced and lack resources and motivation to proactively and skillfully represent the accused.

For over a decade, the ILF has been working to build strong culture of defense in post-conflict and transitional countries. In our experience, lawyers NEED technical capacity, and it takes time --- they will NEED support for years, not short term – and not in the form of one off or short-term training programs. Also in the ILF's experience, all countries face common challenges, so the sharing of lessons, good practices between countries about how to build a strong, proactive culture of defense is invaluable.

I was a criminal defense lawyer, a public defender in the U.S. and so I know the importance of having the necessary knowledge and skill to represent the indigent accused well. In many countries, no opportunity to learn skills --- and local lawyers need technical assistance from practitioners, not academics, policy makers. Also important to consider is the way people learn --- same everywhere in the world. I did not learn to become a good defense lawyer in law school, or by going to a training workshop. I learned through day to day practice, supervision, feedback, support from senior lawyers who provided me with mentorship, feedback and ideas. Same has worked in countries in which the ILF works, Afghanistan, Nepal and the West Bank. The ILF has provided sustained mentoring to lawyers over a series of years --- incrementally these lawyers have become

skilled, proactive advocates for the indigent accused. They are providing high quality representation to their clients, using local laws to defend their clients' rights.

This approach works everywhere in the world.

I often hear, we can't fix the problem, our country doesn't have enough lawyers, we don't have enough money, we don't have enough capacity. I am here to say it can be done, countries just need the right kind of support and we have to understand that change takes time, but can be done anywhere in the world.

In Afghanistan In 2003 there was effectively no right to counsel. Lawyers never appeared in court on behalf of the accused. Now lawyers are appearing in court on behalf of the indigent accused every day in court, and they are having successes. Their clients are being released on bail and are acquitted. This would not have happened 10 years ago. There are still challenges and people don't have access to a lawyer everywhere in the country. But there has been enormous progress.

To build capacity, we need to start with the lawyers. Build a true culture of defense, and then focus on build their numbers and skills.

We then focus on building management capacities; how to structure legal aid institutions, how to pay for it, what are cost-effective lessons to learn from.

During this time of institution building, particularly in post-conflict and developing countries it is critical that governments rely on support from civil society to fill gaps ----

As stated in the 2011 World Development Report, “[p]rovision of local level justice services is important to maintain confidence in institutional reform efforts, and partnering with communities of civil society to do so can be an important link between early results and later institution-building.”

I want to conclude with a key message and recommendations ---

The only way to resolve abuses in the criminal justice systems, is to provide access to counsel to all accused persons, and to establish legal aid programs to represent the poor and vulnerable.

Access to counsel -- Will reduce pretrial detention -- Will reduce illegal and arbitrary detention -
- Will reduce instances of torture -- Will reduce illegal and arbitrary actions of authorities -- Will ensure that the innocent, vulnerable are not convicted because they are poor and ignorant of their rights. Lawyers guarantee implementation of all other rights ---

Recommendations ---

- (1) Governments and the international donor community need to devote more money to legal aid --- as stated in the UN Principles and Guidelines, there should be fair and proportional distribution of funds between prosecution and legal aid agencies.

Legal aid needs to be a core part of the rule of law development agenda and needs to be funded by donors – indigent defense – post-conflict and transitional countries desperately need funding to rebuild or build their legal aid systems.

Funding needs to be long – term, predictable --- if we have a commitment to build strong legal aid institutions --- we must understand that this will take time.

- (2) Legal aid should be an indicator of access to justice goal in post-2015 agenda, access to criminal defense services for the poor is an essential component of access to justice.

Access to justice --- equality --- those with money, will hire, poor can't

All the resources of State, take life or liberty against poor/ vulnerable

- (3) There needs to be better monitoring of States compliance with their obligations to provide criminal defense services to the poor under the ICCPR and their own laws --- Universal Periodic Review not adequately monitoring. Should be included.

- (4) There needs to be greater technical assistance provided to post-conflict and developing countries, exchanges, and best practices, --- the 2014 international conference on Access to Legal Aid in Criminal Justice Systems held in South Africa was an enormous success because countries could discuss their common challenges, learn from others.

Participants included legal aid providers and highest level support from governments – including Ministers of Justice, Attorneys General and Chief Justices

As a follow up to 2014 conference --- I propose holding biannual international conferences on legal aid, with new countries hosting each one. The next conference would be in 2016 and we are looking for a host country.

- (5) Finally we can look at forums within the UN to discuss this critical issue – consider expanding mandate of IEGM tasked with drafting the UN Principles and Guidelines, holding discussions in the 6th committee of UNGA that would provide an exchange of best practices – look for opportunities to exchange at highest levels and that will address how countries can best to implement UN Principles and Guidelines in practice.

One final word on the sharing of technical assistance and exchanges --- we need to keep in mind that assistance does not need to come from those in the region, from south-south cooperation --- common challenges/ good practices in legal aid delivery can be learned from every country, countries should have the opportunity to learn from countries who have been doing this the longest, who have had decades of experience, who have learned from trial and error what works, and what doesn't work. They should be able to look to countries, organizations and individuals that have the specific expertise that they need. And there should be regular exchanges of information – at the country level between the government and civil society, at the regional level between countries with similar legal cultures and practices, and at the international level.

THANK YOU!!