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## ***Ensuring Equal Access to Justice for All: Effective Legal Aid in Criminal Cases<sup>1</sup>***

### **I. Access to Legal Aid in Criminal Justice Systems – Global Efforts**

#### **1. The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* & Recent Developments at the International Level**

The right to free legal assistance for criminal defendants who are unable to afford a lawyer is an essential component of the fundamental right to a fair trial, and provides a foundation for a fair and effective criminal justice system. In line with Article 14 of the International Covenant on Civil and Political Rights, most States have laws guaranteeing the right to free legal representation for poor persons accused of crimes. However, States face challenges in implementing this right. As a result, every day and across the world poor and marginalized persons face arbitrary and extended pre-trial detention, torture, coerced confessions, wrongful convictions, health and livelihood impacts, and other abuses.

Access to legal aid is a fundamental component to ensure a fair, humane and efficient criminal justice system that is based on the rule of law. Particularly the provision of legal aid to detainees and prisoners can help reduce the length of time suspects are held in police custody and pre-trial detention centres, reduce wrongful convictions, prison overcrowding and congestion in the courts, as well as reduce rates of reoffending and victimization. In 2012, the United Nations General Assembly adopted by consensus the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* ('UNPG'), recognizing that 'legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial.'<sup>2</sup> It is the first instrument dedicated exclusively to legal aid, establishing that States should consider the provision of legal aid as their responsibility and should put in place a comprehensive system that is accessible and effective, has a nationwide reach and is available to all without discrimination. According to the UNPG, access to legal aid should be provided to persons who are detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment, and also emphasize that legal aid should be provided at the pre-trial stage, during court proceedings and at the post-trial stage.

Following the adoption of the UNPG, the Government of the Republic of South Africa and Legal Aid South Africa, together with the International Legal Foundation (ILF), the United Nations Development Programme (UNDP), and the United Nations Office on Drugs and Crime (UNODC), and in collaboration with the Open Society Justice Initiative (OSJI) hosted the first ever international conference to address global

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<sup>1</sup> Prepared in line with a presentation at the International Legal Aid Group Conference, Johannesburg/South Africa, June 2017.

<sup>2</sup> General Assembly Res. 67/187, entitled 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', annex.

challenges in ensuring access to quality criminal legal aid services for the poor, and propose practical and achievable solutions. The resulting *Johannesburg Declaration*, unanimously adopted by the participants, notes the critical importance of effective legal aid, and calls on States, legal aid providers and the international community to ensure the implementation of the instrument.

Since then, the international, regional and national focus on enhancing access to legal aid has intensified, and its importance was reemphasized, for instance, in the *Doha Declaration* adopted by the 13th United Nations Congress on Crime Prevention and Criminal Justice in April 2015.<sup>3</sup> Later that year, the *Standard Minimum Rules for the Treatment of Prisoners* were revised and adopted as the *Nelson Mandela Rules*<sup>4</sup>, which now include several provisions addressing prisoner's access to effective legal representation and aid. Finally, the importance of access to justice for sustainable development is enshrined in Goal 16 of the 2030 Agenda on Sustainable Development<sup>5</sup> adopted by Member States in September 2015, that reads 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' Of particular importance in the context of legal aid is its Target 16.3, 'Promote the rule of law at the national and international levels, and ensure equal access to justice for all.'

Legal aid in criminal justice settings continued to receive international attention also in 2016. As voiced in the outcome document of the Special Session of the United Nations General Assembly on the World Drug Problem in April 2016<sup>6</sup>, Member States jointly committed to ensure timely access to legal aid and the right to a fair trial for persons in contact with the criminal justice system in drug-related cases. Also in April 2016, the Commission on Crime Prevention and Criminal Justice (CCPCJ) adopted Resolution 25/2 on 'Promoting legal aid, including through a network of legal aid providers'<sup>7</sup>, in which it encourages Member States, *inter alia*, 'to adopt or strengthen legislative or other measures to ensure effective legal aid, including for victims of crime, consistent with their domestic legislation and in line with the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,' to continue to build networks at the global, regional and national level, and invites them to participate in the Second International Conference to be held in Buenos Aires, Argentina.

Building on the success of the Johannesburg Conference and the progress achieved since, the Second Conference took place in November 2016. As in 2014, it provided a vital platform for legal aid policy makers and practitioners, including representatives of Ministries of Justice, the Judiciary, Public Defender Offices, Bar Associations, Offices of Public Prosecution, and Intergovernmental Organizations, as well as legal aid lawyers, paralegals, members of civil society and other experts, to continue the dialogue on challenges, experiences and promising and best practices in enhancing access to legal aid across the globe. The *Buenos Aires Declaration* focuses on the

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<sup>3</sup> General Assembly Res. 70/174, entitled 'Thirteenth United Nations Congress on Crime Prevention and Criminal Justice', annex.

<sup>4</sup> General Assembly Res. 70/175, entitled 'United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)', annex.

<sup>5</sup> General Assembly Res. 70/1, entitled 'Transforming our world: the 2030 Agenda for Sustainable Development'.

<sup>6</sup> General Assembly Res. S-30-1, annex.

<sup>7</sup> CCPCJ Res. 25/2, entitled 'Promoting legal aid, including through a network of legal aid providers'.

unremitting importance of implementation of the UNPG and the need for technical assistance, exchange of information and best practices among legal aid service providers, ensuring meaningful access for groups with special needs, as well as sharing of expertise on efforts made towards achieving Target 16.3, in particular in reducing excessive, arbitrary and unlawful pre-trial detention. The Conference also continued consultations on the establishment of an international network for legal aid service providers as envisaged in the Doha Declaration and CCPCJ Resolution 25/2, and the promotion of national and regional networks.

## **2. The Current State – the *Global Study on Legal Aid***

During the Buenos Aires Conference, UNODC and UNDP launched the *Global Study on Legal Aid*. Initiated in 2014 after deliberations in Johannesburg resulted in the agreement that more data was needed to enable the UN and civil society organizations to support countries in their efforts on implementing the UNPG and reform and enhance overall legal aid service delivery in a targeted manner, this Study represents the first comprehensive global stocktaking exercise on the availability and accessibility of legal aid services in criminal, civil and administrative proceedings. Based on the definition of legal aid in the UNPG, it covers all three areas of proceedings, and addresses all aspects of legal aid delivery, including the legal framework, the legal aid providers, and its administration and management. The data and findings of the Global Study are based on survey responses from UN Member States and independent national experts – who range from legal aid providers, civil society organizations, researchers to other experts with experience in providing legal aid – from 106 countries, representing more than half of the world's countries across all regions and development contexts. With this many countries participating, it became evident that it is possible to gather useful data on access to legal aid – even without resources that allow for additional capacity building and advice on how to respond to the survey, as has been the case for other UN global studies in different substantive areas – including as a means of measuring progress towards achieving peaceful, just and inclusive societies as part of the 2030 Agenda. That being said, another clear finding of the Study is that the data that is currently available is insufficient, and that building capacity to collect and analyse data to measure access to justice for all is indeed necessary to inform evidence-based diagnosis and inform sustainable and efficient policymaking.

While progress can be observed in establishing national legal and policy frameworks on legal aid in a number of countries, challenges remain across all regions in implementing plans and enhancing the scope and quality of services, embedded in wider justice reform programmes. As mentioned in the Study, 'effective delivery of legal aid services is but one of many aspects of broader reforms that are necessary to ensure wider access to justice. It is only when concerted efforts are made towards other crucial reforms, such as reducing excessive and arbitrary pre-trial detention, improving the capacity of States to respond to violence against women and children, or enhancing the independence of judges and lawyers, that access to justice for all can truly be achieved.'

Furthermore, the Global Study focuses on particular areas and challenges, and showcases innovative approaches and lessons learned on delivering services. By

way of example, some findings and recommendations on criminal legal aid are highlighted, but there are many more that give valuable input on success and gaps.

First, while nearly every responding country recognizes the right to legal aid, either expressly or under the umbrella of the right to a fair trial, close to one third of responding countries had not yet enacted specific legislation until 2015, and while it is critical to have the right enshrined in the constitution, it is equally important to breathe life to this right through dedicated legislation. This ideally covers all critical aspects of access and delivery of legal aid, such as eligibility, regulation of providers, procedures for requests and provision, and additional safeguards for those groups who require specific attention when in contact with the criminal justice system, such as women and children. In this regard, the recently published *UNODC Model Law on Legal Aid in Criminal Justice Systems with Commentaries*, which contains a set of minimal provisions on establishing a national legal aid system, aims to be a useful tool for countries seeking to develop new or amend existing legal aid legislation.

Second, even where sound legal frameworks exist, ensuring that beneficiaries can enjoy the right to legal aid must be translated into reality, particularly in the context of criminal proceedings. Although nearly every country recognizes the right to legal aid for criminal defendants who cannot afford a lawyer, there is a substantial gap between this guarantee and actual practice. For instance, in many countries access to a lawyer or, more specifically, a legal aid provider must be granted from the moment a person's freedom is restricted by law enforcement. Study results show that the implementation of this right is limited. Enabling prompt and efficient access to legal aid providers in criminal settings should be prioritized, particularly in the early stages, because without a lawyer or legal aid provider present, the risk of human rights violations substantially increase, such as coerced confessions, arbitrary or excessive pre-trial detention, torture or other inhumane and degrading treatment, and wrongful convictions. For groups such as women, children or minorities, this risk is even higher and safeguards must be put in place for their additional protection. However, there are also positive developments regarding protection of rights of those who require special attention from the system. For instance, globally, 61% of responding States reported that legal advice and services are provided in all legal proceedings to female victims of violence, including victims of SGBV.

Third, more attention should be given to monitoring and enhancing the quality of services provided by legal aid providers. In most responding countries, the State legal aid authority is responsible for monitoring quality of services delivered. However, in the majority of these countries, monitoring equalled reviewing of complaints lodged by legal aid recipients. This approach, if used as a sole monitoring mechanism, is not effective, because, for example only the most egregious cases tend to be reported. Also, most legal aid clients are poor, marginalized and have limited resources, so they may not be inclined to file complaints, or even know that they are entitled to file a complaint even when receiving substandard services. A good review mechanism in this regard could be to develop and apply performance and qualifications standards for all legal aid providers. These should cover minimum qualifications, such as some years of experience in legal practice, regular training requirements for providers, and routine performance reviews. The use of peer reviews, random case file reviews and court observations could supplement this quality monitoring.

Fourth, it is essential that States allocate an adequate and sustainable budget not only to meet the demand for legal aid, but also to enhance and improve the provision of legal aid services. The extent of demand and priorities can be identified through needs assessments, which, as mentioned before, can well inform evidence-based policymaking and other government action.

Finally, there continues to be a growing interest among States to learn from each other on how to address common challenges they are facing in establishing well-functioning legal aid systems. As called upon in the aforementioned CCPCJ Resolution 25/2, Member States encourage active sharing of experiences in delivery of legal aid and exchange information on lessons learned and good practices.

Since its launch, the significance and usefulness of the Global Study and its recommendations has been recognized by various stakeholders across the world, including Member States, academia and initiatives that seek to promote the implementation of the 2030 Agenda. This momentum should be built upon.

## **II. The Way Forward**

### **1. Strengthening the Evidence-base**

One of the most significant initiatives in continuing to implement the UNPG is the 2030 Agenda on Sustainable Development, and mechanisms created and assistance provided in its context.

While the Millennium Development Goals showed a notable success, many challenges remained – in particular through the destabilising effects of transnational organized crime, terrorism, corruption, and violence – regarding efforts and progress made in good governance and meaningful delivery of aid and assistance. The 2030 Agenda therefore explicitly affirms that development requires peaceful and inclusive societies. The aforementioned SDG 16 – 'Promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels' – places the rule of law as an integral part of the framework. The international community agreed on a set of indicators to measure progress in achieving the individual goals, and the monitoring framework provides a unique opportunity not only to collect data across the globe and enable comparison and analysis of individual countries' efforts, to exchange experiences and lessons learned, but also, as it is an international streamlined undertaking, to highlight the importance of evidence-based policy development and implementation and the need to build capacity to follow up in a sustainable manner. This is also in line with the recommendation of the Global Study on Legal Aid to improve data collection and strengthen the evidence base on legal aid, and to undertake legal needs assessments every 3 to 5 years; and also for each country to have an integrated domestic plan for the provision of legal aid with a focus on areas that require special attention, such as rural areas or marginalized populations.

The current indicators of Target 16.3 already have a lot of value to inform the international community on progress or setbacks in access to justice, namely on victims' crime reporting rates, and on the number of unsentenced detainees as a proportion of overall prison population. They can inform on the legal aid situation in

countries – covering areas from early access to legal aid, the application and success of gender-sensitive and other measures to care for groups with special needs, citizens' trust in the criminal justice system, to the success of applying models that work particularly well in certain legal or political and cultural settings, such as the use of paralegals in pre-trial detention settings.

UNODC has a vast experience in supporting Member States with collecting information and data and building related capacity. For many years, the Office has been reporting to the CCPCJ on 'World crime trends and emerging issues and responses in the field of crime prevention and criminal justice', and the Office furthermore prepares the Annual 'United Nations Survey on Crime Trends and Operations of Criminal Justice Systems (UN-CTS)'. The UN-CTS represents a simplified and improved reporting system on crime trends and the operation of criminal justice systems, and it has, in recent years, increased collaboration with other institutions carrying out international collections of data on crime and criminal justice issues to increase input and geographical coverage. The experience gained in the process of preparing these reports has shown that there is a constant need for development – both at the international level in terms of standardization of concepts and methodology, and at the national level in terms of structuring data collection and analysis, and giving those areas more attention that have proven to be difficult to measure, but are, at the same time, crucial to provide sound insight into the functioning of the criminal justice system. One of these areas is access to justice, of which access to legal aid is an important element.

While there is an intense debate on which areas exactly the indicators of Target 16.3 should be expanded to, there is general agreement that the current indicators would need to be expanded to allow for a better assessment of both the criminal and civil justice system. Global measures should be based on agreed global standards, and ideally built around the highest levels of adherence with the rule of law and human rights. Monitoring access to legal services has proven to be difficult. Given the diversity of legal systems and traditions across the world, it is a complex undertaking to identify an indicator that can be universally applicable, yet is easy to interpret. Attempts to introduce access to free legal aid in criminal justice systems into the UN-CTS in the past generated feedback from only a small number of pilot countries and very heterogeneous data at that, which proved to be difficult to interpret in terms of levels and trends in the provision of legal aid. Furthermore, some studies rely on perception indicators only, and while perception is undoubtedly an important aspect of measuring on how citizens feel about the justice system, this data by itself does not allow for sound judgement on how persons are actually treated while navigating the justice system, and what effects their treatment has. Annually, UNODC collects detailed data on prisons across the world, in order to inform the world crime trends report. In the context of the 2030 Agenda, UNODC seeks to expand its analytical research on prisons, to strengthen the global understanding of prison trends and issues with a focus on relevant SDGs, and the *Nelson Mandela Rules*. In all of this, legal aid is a possible indicator with the potential to provide insights on several important issues in the prison context.

Whilst the international community is debating expanding the indicators, countries have begun to realize more and more the need for evidence-based approaches, and have started to put in place new mechanisms or are debating how to strengthen



existing efforts to collect and analyse data, also so they can report on progress on the existing indicators in 2019. This is an important development, because as the Global Study shows, a majority of responding Member States (62%) have indicated that they have not conducted any form of a needs assessment; and even ‘recent reformers’ are not any more likely than others to have carried out such assessments. Measuring access to justice and particularly legal aid at the domestic level requires a comprehensive and standardised statistical framework to monitor the functioning of the justice system, with inputs and outputs indicators. This could work, for example, by using a combination administrative data, surveys on persons in contact with the criminal justice system, such as population surveys, specific surveys on the existing indicators, as well as regular updates on court, prosecution and police records, ideally divided by gender and age. Also the Global Study identified a significant gap in systematic data collection on legal aid, which is critical not only for identifying where problems are rooted, but also to inform and develop streamlined and targeted solutions to address these problems. Data collection on various points is recommended, such as on the number of cases for which State-funded legal aid is provided, preferably broken down by type of case, the number of lawyers and paralegals providing legal aid services on a full-time basis, and on the types of specialized legal aid services available.

Without taking a methodologically sound approach, it will be difficult for States to determine the functioning of their systems and develop evidence-based policies and strategies and allocate resources accordingly, and it will also hinder the ability of the international community to identify common indicators that can be applicable globally and easy to understand.

## **2. Exchanging Experience and Information and Strengthening of Partnerships**

As highlighted in significant agreements such as the 2015 Doha Declaration and other UN resolutions, as well as, most recently, the *Buenos Aires Declaration*, a constant and detailed exchange of information on lessons learned, promising initiatives and projects is crucial for States to be able to learn from each others’ experiences to minimize risks and avoid mistakes and setbacks, and also to save resources and make informed choices on activities and approaches. This can be achieved through closer cooperation at the bilateral, regional and global level and there are successful examples to learn from, for instance from successful regional networks such as the Inter-American Association of Public Defense Offices (AIDEF).

Furthermore, it is of utmost importance to also exchange experiences, and form strong partnerships at the national level. First of all, there is a strong need for government institutions to work together in a concerted approach and include all stakeholders that need to provide input when considering reform and action – these may range from judges to police officers and prison administrators. In addition, in order to maximize the impact of efforts and dedicated financial and human resources for improving access to justice and legal aid, and to keep up-to-date with developments in improving services, there is also a need to exchange experiences and coordinate activities in an efficient manner among government actors and non-governmental actors who provide legal aid services, undertake advocacy campaigns and contribute to reforms with policy and other advice, or mobilize private sector contributions. The Study recognizes the important role of civil society, especially in



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less developed countries. Civil society actors in the least developed countries responding to the survey provide an estimated 69% of legal aid services. Working with academia can also be very beneficial, both in terms of resources for research and analysis, and also by making use of law students as a resource to assist legal aid service providers and gain valuable practical experience to improve legal services as a whole.

A key finding of the Global Study on Legal Aid is that this is an area of considerable and continuous innovation, with 'a massive wave of reforms' in the past 15 years, in which 'the pace of reforms remains high' – as many as 40% of responding countries have launched a reform of their legal aid system between 2012-2015. This is very good news and allows to hope for promising developments in future years, with the SDGs functioning as a catalyst for further reform.