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International Access to Justice: Legal Aid for the Accused and Redress for Victims of Violence

A Report by the Bingham Centre for the Rule of Law

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The Bingham Centre for the Rule of Law was launched in December 2010. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. The Bingham Centre is an independent research institute devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law, considering the challenges it faces, providing an intellectual framework within which it can operate and fashioning the practical tools to support it. **www.binghamcentre.biicl.org**

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Executive Summary

The International Bar Association (IBA) provides assistance to the global legal community with the aim of influencing the development of law reform and promoting the highest professional standards and the rule of law throughout the world. As part of that mission, the IBA Access to Justice and Legal Aid Committee, formed in 2013, has undertaken and commissioned research into issues it sees as being of prime contemporary importance. This study, the Committee's second project, focuses on legal aid in criminal cases and redress for victims of violence. These issues are of global importance now as the United Nations agrees on a set of Sustainable Development Goals for 2015-2030, which will include access to justice and the rule of law. The Bingham Centre for the Rule of Law conducted the research and wrote this report with contributions and comments from the Committee.

This report uses a comprehensive concept of access to justice that covers different stages of the process of obtaining a solution to civil or criminal justice problems, including: the existence of rights enshrined in laws and awareness thereof; access to both formal and informal dispute resolution mechanisms; the availability of, and access to, counsel and representation; and the ability of such mechanisms to provide fair, impartial and enforceable solutions.

The report focuses on access to justice in relation to violent criminal acts, considering the positions of both offenders and victims. Access to legal advice, assistance and representation for alleged perpetrators, and redress for victims of crimes are core elements of a justice system based on the rule of law and respect for human rights.

The report primarily adopts the definition of 'legal aid' employed by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which define legal aid as assistance provided free of charge. It slightly expands on the UN definition by including in the analysis legal services that may be provided at low cost, as part of access to justice programmes, capturing a wider range of legal support. Similarly, it adopts a broad definition of redress for victims of violence, which encompasses: economic reparation, rehabilitation, different schemes of victim involvement in criminal proceedings and mechanisms allowing victims to have an impact in sentencing.

The Committee's goals in undertaking and presenting this work are to:

- Raise awareness of the different types of barriers to access to justice regarding legal aid and victim redress.
- Provide a valuable tool for lawyers, practitioners, civil society organisations and others who are engaged in reform processes, to ensure that rights are enjoyed in practice, rather than existing solely on paper.
- Provide a basis for further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice in the criminal sector, especially in times of austerity.

The report consists of six chapters. The introduction (Chapter 1) explains the aims and structure, Chapter 2 outlines the methodology, before the three core chapters of the report (Chapters 3 – 5) address groups of obstacles to achieving access to legal aid for the accused and redress for victims of

violence, and related examples of projects and best practice adopted to surmount them. In order, these examine:

- *Access to legal aid for the accused in a criminal case*, including: access to legal information; access to free legal advice, assistance and representation; due process, fair procedures and an efficient judiciary.
- *Redress for victims of violence*, including: access to legal information; access to legal aid; access to a fair dispute resolution mechanism and participation in the process; enforcement of decisions and types of redress.
- *Dualities*, referring to a situation where the paths to justice intersect when an accused also becomes a victim, or a victim also becomes an accused. Barriers to achieving access to justice operate in complex ways for a person with this dual status.

The concluding chapter (Chapter 6) looks at directions and pathways ahead.

In examining the strategies that are used to tackle different types of barriers to accessing justice, two important considerations arise:

- There is a degree of universality about access to justice and the rule of law, which should be balanced against context-specificity.
- The multi-dimensional nature and impact of access to justice highlights the importance of measuring progress, which is a core component of the UN Post-2015 Development Agenda.

The research suggested some general guidelines with regard to the conceptualisation, formulation, and application of solutions for overcoming barriers to access to justice, with both universality and particularity in mind as follows:

- The international context for access to justice and legal aid is likely to be profoundly influenced by the UN Sustainable Development Agenda for 2015-2030, and particularly Goal 16 of that Agenda, which identifies access to justice and the rule of law as core aims to be achieved. There will thus be a clear and strong point of reference against which the commitments of states to improve access to justice and the rule of law might be measured.
- The legal profession can play a strategic role in the context of the achievement of Goal 16 with regard to promoting the rule of law and ensuring equal access to justice for all, such as through cooperation with other stakeholders, including from civil society, academia, and international organisations.
- The successful involvement of other stakeholders rests on two important pillars: a formal recognition of the role to be played by non-state, non-professional actors in providing legal aid services; and the establishment of mechanisms (including monitoring and evaluation mechanisms) that guarantee quality standards for legal aid services.
- The effectiveness of the legal aid system for both the accused and victims can be maximised through coordinated action between justice agencies and legal professionals, and professionals from other sectors, such as health, social services and victim support workers.

- Training and education are important aspects of access to justice and enable effective functioning of the legal aid system.
- Regular collection, monitoring and publication of data enables the identification of problems and best practice to overcome them. Sharing the findings internationally enhances the process.
- Multiple and complex barriers to access to justice need to be addressed carefully, especially where they involve dualities that render a person both accused and victim. There is a need to understand how these barriers operate in a specific context and to identify solutions that work for the particular circumstances.
- Across all jurisdictions there is room for improvement in standards and practices in access to justice, access to legal aid and redress for victims of violence. An approach that cuts across all these areas, and which identifies good and effective practices, provides opportunities for constructive cooperation, especially between though not limited to, states and legal professional bodies.

Chapter 1: Introduction

1.1 Context: Legal aid as an essential element of access to justice

Access to justice for all is a key priority for development and one of the 17 Sustainable Development Goals (SDGs) that in September 2015 will be formally adopted by UN members at the General Assembly as part of the Post-2015 Sustainable Development Agenda.[1] The SDGs and their associated targets set out a clear relationship between the reduction of poverty and sustainable economic and social development on the one hand, and respect for human rights, the rule of law, justice, equality and non-discrimination, on the other.[2]

Ensuring effective access to justice serves two complementary functions: a redress function when laws and rights are violated by public institutions and/or private parties, and a preventive function against further violations, including through increased public trust in the justice system. Accordingly, access to justice is both an essential precondition for the effective functioning of institutions governed by the rule of law, as well as an individual right that is constitutionally guaranteed and part of international customary law and human rights principles.[3] Effective access to justice is at the same time essential for the realisation of a range of other civil, cultural, economic, political and social rights and is an invaluable tool for empowering the most vulnerable groups to escape the 'vicious circle of impunity, deprivation and exclusion'.[4]

This report uses a comprehensive concept of access to justice that covers different stages of the process of obtaining a solution to civil or criminal justice problems.[5] It starts with the existence of rights enshrined in laws and awareness and understanding of such rights. It embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (ie, institutions established by the state) and informal (eg, indigenous courts, councils of elders and similar traditional or religious authorities, mediation and arbitration). Effective access includes the availability of, and access to, counsel and representation. It also encompasses the ability of such mechanisms to provide fair, impartial and enforceable solutions.[6]

The report focuses on access to justice in relation to violent criminal acts, considering the positions of both offenders and victims. In this regard, access to legal advice, assistance and representation for alleged perpetrators, and redress for victims of crimes are core elements of a justice system based on

1 The United Nations summit for the adoption of the Post-2015 Sustainable Development Agenda will be held in New York, 25-27 September 2015. This report was finalised shortly before the Summit.

2 United Nations General Assembly, *Draft outcome document of the United Nations summit for the adoption of the Post-2015 Development Agenda - Transforming our world: the 2030 Agenda for Sustainable Development,* A/69/L.85, 12 August 2015, § 8.

3 Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed) *Access to Justice as a Human Right, Collected Courses of the Academy of European Law* (OUP 2007).

4 Magdalena Sepúlveda (Special Rapporteur on Extreme Poverty and Human Rights), Equality and Access to Justice in the Post-2015 Development Agenda, c2013, www.ohchr.org/Documents/Issues/Poverty/LivingPoverty/AccessJusticePost2015.pdf. All URLs in this report are current at September 2015.

5 Such a comprehensive approach is suggested by a number of studies: Mauro Cappelletti & Denis Tallon, Fundamental Guarantees of the Parties in Civil Litigation (Oceana 1973); Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey, Volume 1*, (Sijthoff & Noordhoff 1979), Part 1, General Report; Hazel Genn, *Paths to Justice, What People Do and Think about Going to Law* (Hart 1999). See also American Bar Association Rule of Law Initiative (ABA ROLI), www.americanbar.org/advocacy/rule_of_law/thematic_areas/access_justice_human_rights.html

6 This definition was also used in the first report for the IBA Access to Justice and Legal Aid Committee: Julinda Beqiraj and Lawrence McNamara, International Access to Justice: Barriers and Solutions (Bingham Centre for the Rule of Law Report 02/2014) (International Bar Association 2014), 8.

the rule of law and respect for human rights. Their importance for the enjoyment of other rights is clearly established in the main international human rights instruments.[7]

We primarily adopt the definition of 'legal aid' employed by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Principles on Access to Legal Aid') under which legal aid comprises:

> 'legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.'[8]

Although the Principles are 'soft law' (ie, not legally binding for UN members), they take into account the great variety of legal systems and socioeconomic conditions in the world and therefore provide 'a useful framework to guide Member States on the principles on which a legal aid system in criminal justice should be based.'[9]

We expand slightly on the UN definition, which defines legal aid as assistance provided free of charge. We include in our analysis legal services that may be provided at low cost as part of access to justice programmes, capturing a wider range of legal support. The responsibility to provide legal aid rests primarily with governments and delivery schemes may involve, for instance, public defenders, private lawyers, contract lawyers, pro-bono schemes, bar associations and paralegals, among others. While the first provider of legal aid is generally the legal profession, states may (often to good effect) put in place incentives to increase involvement of a wide range of stakeholders, such as non-governmental organisations, community-based organisations, religious and other charitable organisations, and the academic community. With governments facing shortages of resources and capacity, and in some cases political will, to provide legal assistance for those suspected or accused of a criminal offence, or prisoners, victims and witnesses, such additional input may be essential for the proper functioning of the criminal justice system and access to justice within it. The legal community is well placed to contribute to multi-stakeholder and interdisciplinary initiatives, and this report takes account of those contributions.

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7 Universal Declaration of Human Rights, Article 11, paragraph 1; International Covenant on Civil and Political Rights, Article 14, paragraph 3 (d).

8 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Principles on Legal Aid'), adopted by unanimous consent by the UN General Assembly (Resolution A/RES/67/187) 20 December 2012, para. 8, available at: http://bit.ly/1NRQ0T0. That definition also follows the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and the Lilongwe Plan of Action (Official Records of the Economic and Social Council, 2007, Supplement No 10, (E/2007/30/Rev.1), chap. I, sect. B, draft resolution VI, annexes I and II).

9 UN General Assembly Resolution A/RES/67/187, § 2.

Similarly, we adopt a broad definition of redress for victims of violence. It encompasses here economic reparation, rehabilitation, different schemes of victim involvement in criminal proceedings, mechanisms allowing victims to have an impact in sentencing and other forms of satisfaction.

This report is part of a research project undertaken by the International Bar Association (IBA) Access to Justice and Legal Aid Committee ('the Committee').

As part of its mission, the Committee has undertaken and commissioned research into issues it sees as being of prime contemporary importance. Its first project in 2014 looked at general barriers to and solutions for achieving access to justice.[10] This, the Committee's second project, is more narrowly focused, addressing legal aid in criminal cases and redress for victims of violence.

The IBA is an organisation of legal practitioners, bar associations and law societies whose mission is to provide assistance to the global legal community, with the aim of influencing the development of law reform and promoting the highest professional standards and the rule of law throughout the world.

Since 2013 the IBA Access to Justice and Legal Aid Committee aims to gather information from around the world on the barriers to access to justice in each jurisdiction and any ways in which these barriers are overcome, with specific emphasis on statutory schemes such as legal aid, and with a view to sharing and spreading good practice.

www.int-bar.org

In both projects the research was undertaken for the Committee by the Bingham Centre for the Rule of Law. The Committee also participated directly in the research. Under the research brief, the Bingham Centre designed a survey (in consultation with the Committee), the Committee distributed it to garner responses and the Centre analysed the data. This report has been written by the Bingham Centre, with the Committee commenting on drafts.

The Committee's goals in undertaking and presenting this work are to:

- Raise awareness of the different types of barriers to access to justice regarding legal aid in criminal cases and redress for victims of violence and of different ways of addressing those barriers.
- Provide a valuable tool for lawyers, practitioners, civil society organisations and others who are engaged with the design of reforms, projects and programmes that address key problems affecting access to criminal justice, thus ensuring that rights are enjoyed in practice, rather than existing solely on paper.
- Provide a basis for further discussion and research into how the legal community, working with civil society and governments, can be involved in maintaining or improving access to justice in the criminal sector, especially in times of austerity.

The Committee sees this project as part of its ongoing activities that will gather, publicise and coordinate information from around the world on barriers to access to justice in different jurisdictions, and ways in which these barriers can be overcome.

Over the course of the project the Access to Justice and Legal Aid Committee have engaged with other parts of the IBA, including the Public and Professional Interest Division (PPID) - in particular the Bar Issues Commission (BIC), the Human Rights Institute (IBAHRI) and the Legal Practice Division (LPD) Criminal Law Committee.

10 Beqiraj & McNamara, above n 6.

1.2 Aims

The research pursued three complementary aims:

- To identify barriers to the availability and effectiveness of legal aid for those charged with violent crimes and to redress mechanisms for victims of violence, across jurisdictions;
- To draw together examples of strategies and solutions that have been used to overcome those barriers; and
- To provide insights into how examples of good practice may be transferable internationally to inform access to justice practice.

The focus of the study is on access to a fair justice system that guarantees adequate protection of the rights of both alleged perpetrators and victims in the context of violent crimes, including comparative consideration of whether certain groups of individuals in different countries are differently or particularly affected in these regards. It feeds into the international debate on efforts to improve access to justice through sharing information, raising awareness and spreading good practice.

1.3 Structure of the report and further resources

This introduction explains the project context and aims. Chapter 2 outlines the methodology, the data gathered and issues relating to interpretation of the data. The next three chapters comprise the core of the report. Each addresses groups of obstacles in access to legal aid for the accused and redress for victims of violence, and related examples of projects and best practices adopted to surmount them. Each chapter identifies common trends, approaches and solutions for achieving and improving these two elements of access to justice by eliminating, reducing or side-stepping the identified obstacles. In order, these chapters examine:

- *Access to legal aid for the accused in a criminal case*, including: access to legal information; access to free legal advice, assistance representation and due process, fair procedures and an efficient judiciary.
- *Redress for victims of violence*, including: access to legal information; access to legal aid; access to a fair dispute resolution and participation in the process and enforcement of decisions and types of redress.
- *Dualities, referring to a situation where* the paths to justice intersect when an accused also becomes a victim, or a victim also becomes an accused. Barriers to achieving access to justice operate in complex ways for a person with this dual status.

Throughout the report there are text boxes with examples and case studies relating to the issues discussed. The sources for these are cited in short form with details listed by chapter in the bibliography section.

This report will be available online from the websites of the IBA Access to Justice and Legal Aid Committee and the Bingham Centre for the Rule of Law.

The IBA Committee site will provide further resources relating to practices on access to legal aid for the accused and redress for victims of violence, which are referred to in the examples cited in this report. The Committee intends that the site will be updated on an ongoing basis, serving as a hub that will provide information and resources about access to justice internationally, with a particular focus on the role of the legal profession.

Chapter 2: Methodology

This report draws on an online survey, desk based research, and an expert workshop, mirroring the methodology used for the IBA Access to Justice and Legal Aid Committee's first project in 2014.

2.1 Research methods

Survey

A survey was designed by the Bingham Centre for the Rule of Law in consultation with the Committee. It retained the essential structure of the 2014 survey (allowing some comparison with earlier findings), though some sections were revised and amended to reflect the more specific focus of this project.

1. The survey asked 31 multiple choice and open-ended questions, structured in eight sections:
2. Introduction and general information
3. The legal framework and awareness of rights
4. Access to free legal advice, assistance and representation for perpetrators and victims of crime
5. Access to dispute resolution in criminal matters involving violence
6. Due process, fair procedures and the judiciary
7. Enforceable decisions and outcomes for victims
8. Access to free legal advice, assistance and representation and victim redress: barriers and change
9. Thank you and contact details[11]

The survey was designed to take 30–40 minutes, to be completed with responses submitted online using Survey Monkey. The intended respondents were mainly legal professionals who were targeted through the Committee's networks. With the exception of one compulsory question that required participants to state their country, all questions were optional. Responses could be made anonymously.

The survey was distributed by the Committee, which asked its affiliated professional bodies and regional committees to forward it on to country experts who would be well placed to complete it. The survey was open for eight weeks. It was available in English only.

When data was returned, it was analysed by the Bingham Centre.

11 The survey and other project material will be available at the IBA Access to Justice and Legal Aid Committee homepage: www.ibanet.org/PPID/Constituent/AccesstoJustice_LegalAid/Default.aspx.

Desk based review

A review of access to justice literature was undertaken with three particular aims:

1. To inform the design of the survey;

2. To gather data about access to justice, particularly in relation to countries represented in the survey responses, focusing both on justice issues and the wider social, legal and economic context; and

3. To gather further examples of how barriers to access to justice have been addressed, both in countries represented in the survey responses and in countries where there were no survey responses. This data would provide additional and complementary examples to encompass a broader range of samples than could be captured by the survey.

To provide the widest possible access to resources, we have referred as much as possible to open source material available free of charge on the internet.

Expert workshop

On 13 July 2015 the Bingham Centre hosted an expert workshop, 'Criminal Legal Aid and Redress for Victims of Violence: International Perspectives on Access to Justice.'[12] The event aimed to gather and discuss examples of best practice, their effectiveness and the portability of such solutions to other jurisdictions and/or circumstances. Four presenters spoke about work concerning access to justice and legal aid internationally. Two were from non-government organisations (NGOs): Olivia Rope, Penal Reform International spoke on access to legal aid for women in detention, particularly in Sierra Leone, and Carla Ferstmann, REDRESS, examined redress and representation of victims before the International Criminal Court. A third speaker was Jonathan Stuart Mitchell, a barrister who had been working on an international project as part of an NGO and looked at legal aid in the context of extradition following a European arrest warrant. The fourth speaker, Richard Meeran of Leigh Day, had acted in numerous cases for victims of violence alleged to have been perpetrated at the instigation of, or in the interests of, corporations. He discussed legal hurdles in exposing and punishing corporate misconduct, and ways to overcome those hurdles. The chair and moderator was Stephen Grosz QC (Hon), the Chair of the Human Rights Committee of the Law Society of England & Wales. Over 40 people attended, many of whom had engaged with access to justice work internationally.

2.2 Survey data and interpretation

There were 47 responses to the survey, coming from 26 countries. More than two-thirds of these respondents answered every question. It should be noted that different criminal laws and procedures might operate in different parts of a country, depending on its territorial and constitutional organisation, for example, in Australia, the UK and the US. Respondents did not always specify an internal jurisdiction. There was a very good response rate from some countries, though most had only one or two responses.

12 The event programme and materials are available on the Bingham Centre for the Rule of Law website: www.biicl.org/bingham-centre/projects/accesstojustice-iba-2015.

Table 1: Survey responses by Country

COUNTRY	COMPLETE RESPONSES	PARTIAL RESPONSES
Australia	●	
Austria	●	
Belgium	●	●●
Canada	●	
Denmark	●	
Germany	●	●●
Ghana	●	
India	●	
Ireland	●	
Japan	●	
Latvia	●	●
Lebanon		●
Lesotho	●	
Malawi	●●●	●
Malta		●
Nigeria	●●	●
Norway	●	
Pakistan	●	●
Poland	●	
Singapore	●●●	●
Spain	●	
Sweden	●	
Uganda	●	
United Arab Emirates	●	
UK (England & Wales)	●●●●	●●
United States	●●	●

Respondents generally had substantial experience in the law: almost 50 per cent had over 20 years' experience and a further 22 per cent had over ten years' experience. Just 13 per cent had less than five years' experience. The majority of respondents were males (31 of 47, or 66 per cent). Most respondents were lawyers (34 of 47, or 72 per cent), while the remainder included civil servants, academics, independent consultants and NGO staff.

In interpreting and using the survey data we have primarily focused on the examples provided by respondents. These have been useful both of themselves and as indicators of the kinds of work on access to legal aid for the accused of violent crimes and victim redress we have sought to identify in desk-based research. Where possible, we have verified respondents' examples by checking them against sources in the public domain. We have not made generalisations based on the quantitative data – the survey responses simply do not provide an adequate basis on which to do so – but we have been alert to the ways responses offer insights into the environment in which efforts to improve access to legal aid and victim redress are undertaken, especially where those responses are consistent with data available in the literature.

2.3 Themes: categorisation and connections

In analysing the data one of the most significant considerations that arose was how to categorise issues that could be characterised as both relating to facilitating and improving access to legal aid for those accused of violent crimes and to redress for victims of violence. There are perhaps two key issues that warrant attention in this case. First, and perhaps unsurprisingly, it is often apparent in the report that those accused of crimes and those who are victims share circumstances of similar disadvantage.

Secondly individuals can almost simultaneously be victim and offender. It is perhaps the distinctive contribution of this report to draw attention to this fact. In particular, the dualities identified in chapter 5 and the case studies used – women who kill their violent partners, and suspects of offences who are assaulted or tortured by police – are representative of both some of the most significant steps forward in recognising the complexity of crime and justice, and of some of the most challenging territory ahead.

Chapter 3: Access to Legal Aid for the Accused in a Criminal Case

3.1 The legal framework and access to legal information

The concept of legal aid includes legal empowerment through legal education and access to legal information.[13] Legal empowerment is an important means by which the poor and marginalised are able to understand their rights and claim those rights in practice. Women, indigenous groups and other minorities in particular benefit from this.

Responses from the survey strongly indicated that the law making process in the covered jurisdictions is public and transparent (78 per cent of respondents agreeing or strongly agreeing) and that laws can be generally accessed by the public (almost 87 per cent agreeing or strongly agreeing). However, respondents from Belgium, Singapore, Nigeria, Pakistan and Malawi strongly disagreed with the proposition that the law making process in their jurisdiction was public and transparent. Statements from the last three countries find solid confirmation in the World Justice Project, 2015 Rule of Law Index ('WJP Index') regarding publicised laws and government data - they rank among the bottom 15 countries - while Belgium and Singapore are much better ranked (respectively scoring 0.56 and 0.68 out of a maximum of 1.0 – the highest score being for New Zealand at 0.8).[14]

A slightly smaller majority (68 per cent) agreed and strongly agreed that civil society organisations or individuals have a meaningful opportunity for input when laws are made. Notable exceptions include again survey responses from Nigeria and Singapore, although these countries are mid–ranked in the WJP Index with regard to civic participation.

13 The definition of legal aid is discussed above in chapter 1, section 1.1 (n 8 and accompanying text).

14 World Justice Project, 2015 Rule of Law Index: http://data.worldjusticeproject.org

With respect to equality of laws and their equal application in practice, 35 of 45 respondents agreed or strongly agreed that laws do not allow formal discriminatory treatment and 30 of the same group affirmed that laws in their jurisdictions are applied and enforced equally for all people. However, the survey also recorded some important dissenting views and shed light on some examples of discriminatory laws (responses from Pakistan and Singapore) and unequal application of laws in practice (responses from Malawi, Nigeria, Pakistan and Singapore).

Criminal and prison statistics may cast light on patterns of discriminatory application of laws in practice.

In the United States people of colour are arrested and detained at a higher rate than others. The US prison systems in some jurisdictions records 8 out of 10 detainees as people of colour.

In Australia, indigenous people are overrepresented in prisons.

Source: IBA survey.

In countries where modern laws are applied alongside traditional ones, discriminatory practices against women that are prohibited by state laws may be still allowed to operate under customary law. Some of these issues have been raised in the context of international human rights monitoring mechanisms, such as the Universal Periodic Review (UPR), and have prompted constitutional reform.

Section 18 of the Lesotho Constitution prohibits discrimination by law but exempts it in the context of the application of customary law.

Analogously, in Zambia, a hybrid jurisdiction where state courts apply customary law, the Constitution exempts customary law from the guarantees for equal treatment for women.

Source: IBA Survey; Informal Justice Systems (UNDP, UN Women, UNICEF 2012).

According to The Economist, today homosexual sex is legal in at least 113 countries. Although discriminatory practices against LGBT people take place in many jurisdictions, openly discriminatory laws are less frequent, especially among developed countries. Singapore is an exception.

When the Penal Code was amended in Singapore in 2007, criminalisation of heterosexual anal and oral sex was removed, but Section 377A of the law, which dealt with gross indecency between consenting men, remained in force. As a result homosexual sex between men is punishable by up to two years of imprisonment. In October 2014, the case was finally brought before the Singapore Supreme Court, but the ruling upheld the ban and rejected all claims of unconstitutionality.

Sources: IBA Survey; The Economist (2014)

In Jamaica, anti-sodomy laws prohibit same-sex conduct between consenting adult males. This crime is punishable by imprisonment and hard labour for a maximum of 10 years. These laws date back to 1864 when Jamaica was a British colony. The Sexual Offences Act of 2009 requires convicted men to register as sex offenders. Same-sex relations between women are not criminalised in Jamaica.

Source: Human Rights Watch 2014 (Jamaica).

In Malaysia, discriminatory laws against transgender people prohibit cross-dressing and 'a male person posing as a woman'. In November 2014, an appeal court in Putrajaya held that these laws violated constitutional rights, including the right to freedom of expression. The laws however continue to operate in the remaining States and Federal Territories.

Source: Human Rights Watch 2015 (Malaysia).

On the level of understanding by the general population of individual legal rights and the powers and functions of the public institutions involved with the delivery of justice, over 75 per cent of respondents indicated that ordinary citizens have a basic understanding (51 per cent) or little or no understanding (24 per cent) of their legal rights in the criminal justice system. The response was similar regarding levels of understanding of the powers and functions of government officials, of the police and of the courts, including informal justice institutions and alternative methods of dispute resolution.

Among the factors having a particularly detrimental effect upon awareness of legal rights, the

survey highlighted low levels of literacy and language skills. Responses showed that low literacy and education affect awareness of legal rights by the accused and victims in general, while poor language skills undermine legal awareness among non-citizens. The latter suffer from a particularly serious lack of awareness of legal rights which is also determined by other factors, such as lack of governmental resources and will to provide them with adequate legal information, as well as de facto discrimination. As a case in point, the respondent from Poland reported the lack of awareness of legal rights by asylum seekers and underlined that the situation is further aggravated by a lack of funding and the discouraging attitude of authorities in practice.

In focus: criminalisation of violent conduct and beyond

Specific and more severe criminalisation and/or lack of criminalisation of certain types of violent conduct speak to social concerns at the level of government and society. Criminalisation sends a strong message that the behaviour in question is unacceptable. However, criminal law alone may not be sufficient to tackle the problem in practice. At the same time, an absence of legislation may be viewed as tacit approval of, or acquiescence in, intolerant behaviour, discriminatory practices and impunity. Violence against women and hate crimes are two examples where specific criminalisation may be considered.

Criminalisation is neither efficient nor sufficient if it does not take into account the root causes of violent practices, or lacks a support structure for the enforcement of rules.

In 2012, Kyrgyzstan amended the Criminal Code by classifying torture as a serious or very serious crime: this would exclude the possibility that perpetrators could avoid prosecution if they reach reconciliation with the victim. Nevertheless, torture continues to be commonly used by law enforcement agencies and impunity is the norm. How is this possible? Persistence of such practice can be explained in light of the quota system under which law enforcement officers work. They are ranked and assessed by the number of crimes successfully solved, which creates incentives for resorting to torture to obtain a confession.

Source: Torture in Kyrgyzstan (OSF 2015).

Violence against women, including in the domestic context, provides a telling example of the advantages and limits of distinct criminalisation as a tool for addressing such practices. Survey responses indicated a significant number of jurisdictions where specific and more severe penalties are applied for crimes involving violence against women (24 of 39 responses) and violence in the domestic environment (21 of 39 responses) and jurisdictions where these acts are not punished as distinct crimes. A recent World Bank study found that 127 countries of 173 studied have laws on domestic violence, with 118 of those having introduced laws since 1990.[15] However, criminal legislation as such is just one element of an effective response to the problem of domestic violence. Both perpetrators and victims of domestic violence often need more support than criminal prosecution can offer and this can be reflected in different ways in the justice mechanisms available - both criminal and civil – as well as in social, medical and educational services that go beyond legal solutions.

The UK, with its three constituent jurisdictions (England and Wales, Scotland and Northern Ireland), was recently reviewed by the UN Special Rapporteur on Violence Against Women and the issues are well-illustrated there.[16]

15 World Bank,Women, Business and the Law 2016 (World Bank 2015), 20-23.

16 Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences – Addendum – Mission to the United Kingdom of Great Britain and Northern Ireland*, Human Rights Council, 29th Session, 19 May 2015, A/HRC/29/27/Add.2 http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/29/27/Add.2&Lang=E

While recognising that the UK has made the issue of violence against women and girls a policy priority, the Special Rapporteur concluded that efforts in practice have resulted in 'isolated pockets of good practice' that are compromised by the 'lack of a consistent and coherent human-rights based approach in the government's response to violence against women and girls.' One of the reasons for this is a gender-neutral approach to violence, which disregards the need for special measures acknowledging that women are disproportionately affected by violence, inequality and discrimination. Similarly, the report points to the importance of acknowledging that women and girls face multiple forms of discrimination on the basis of their race, ethnicity, class, sexuality, and other factors, including their immigration status, and that these have an impact on their ability to seek and receive support. Addressing the problem of violence against women within cultural and religious frameworks is also important, to understand how different cultural contexts facilitate and perpetuate discrimination and violence against them. However, as the Special Rapporteur notes, it is crucial that any such analysis does not occur as a process of stigmatisation of certain communities.[17]

Domestic violence remains a profound problem in the UK with crime surveys for England and Wales showing that 28.3 per cent of women reported having experienced some form of domestic abuse since the age of 16, and 8.5 per cent reporting that it had happened in the last year. Domestic violence and abuse rates in the UK are also higher than the EU average.

The issue of violence against women is addressed in various legal instruments, including: the Equality Act 2010, the Domestic Violence Crime and Victims Act 2004, the Sexual Offences Act 2003, the Policing and Crime Act 2009, the Crime and Security Act 2010, the Forced Marriages (Civil Protection) Act 2007, the Female Genital Mutilation Act 2003 and the Protection from Harassment Act 1997. The Domestic Violence Immigration Rule was also introduced in 2002. In terms of harmful practices, new offences were recently introduced to criminalise forced marriage through the Anti-Social Behaviour, Crime and Policing Act 2014.

Source: Office for National Statistics (UK) 2013/14; Report of the Special Rapporteur on Violence against Women (2015); Fundamental Rights Agency (2014).

Indeed, the depiction in the media of certain groups of a population being perpetrators of particular types of crimes may signal a stigmatisation trend that can eventually result in unequal application of laws. Responses from the survey raised concerns that gangs and minority ethnic or indigenous communities are commonly portrayed in the media as having a high criminal record of homicide, kidnapping, robbery, sexual offences, physical assault, threats of violence, hate crimes and street crimes (including theft, property damage and antisocial behaviour).

Hate crimes are a second area in which the problems of specific criminalisation arise. Hate crimes can be generally understood as violent, prejudice-motivated crimes where the perpetrator targets a victim because of his or her perceived membership of a certain social group defined, for instance, by ethnicity, gender identity, disability, language, nationality, physical appearance, religion or sexual orientation. Of the jurisdictions for which responses were received, ten (around 40 per cent) reported that specific and more severe penalties applied for hate crimes, though it was not possible to break these down by the categories (race, etc) for which they applied. The policy debate and academic literature on this topic indicates the breadth of the problems, the complexity of the issues and varied legal approaches to addressing hate crime.[18] On the one hand, justifications for harsher punishments are based on the consideration that hate crimes cause greater individual and societal harm, including through attacks to personal identity, degradation, dehumanisation and disempowerment of a group of the population. On the other hand, the introduction of specific provisions for hate crimes is criticised for being in conflict with rights of free speech and free

17 Rashida Manjoo, Statement - Special Rapporteur on violence against women finalizes country mission to the United Kingdom and Northern Ireland and calls for urgent action to address the accountability deficit and also the adverse impacts of changes in funding and services (Office of the High Commissioner for Human Rights, 15 April 2014) www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14514&LangID=E.

18 Paul Iganski and Jack Levin, Hate Crime: A Global Perspective (Routledge 2015).

thought, and for exacerbating conflicts between groups and fear of persecution. State practice (including within the EU) varies on the presence of specific legislation on hate crime and on mechanisms of data collection.[19]

The economic crisis and increased immigration flows following armed conflicts in Africa and the Middle East have generated a mounting wave of violence targeting asylum seekers, immigrants and ethnic minorities in many European countries. However, reliable data on the incidence of racist violence is hard to collect because few EU member states have arrangements in place to record hate crime within a broad range of bias motivations, types of crimes and characteristics of incidents.

Among EU members, Finland, the Netherlands, Sweden and the UK stand out as positive exceptions for having in place comprehensive mechanisms. Ten other member states – Austria, Belgium, the Czech Republic, Denmark, France, Germany, Lithuania, Poland, Slovakia and Spain - operate good mechanisms of data collection, while the remaining members have limited recording processes.

Source: Fundamental Rights Agency (2013).

3.2 Access to free legal advice, assistance and representation

Access to free legal advice, assistance and representation for the disadvantaged accused at the different stages of the criminal process (whether arrested, prosecuted or detained) is a precondition for the enjoyment of other rights and a core element of a functioning, fair and reliable criminal justice process respectful of the rule of law.[20] A functioning legal aid system may reduce the length of time suspects are held in police stations and detention centres, alleviate overcrowding of the prison population and court congestion and consequently discourage recidivism [a relapse into criminal behaviour].[21]

In *Salduz v Turkey* [2008] ECHR] 1542, the European Court of Human Rights established that people detained at police stations have the right to access a lawyer. Denial of the benefit of legal assistance during police interrogations could amount to a violation of the fundamental right to a fair trial.

Since this decision, and consistent with ECtHR jurisprudence, a number of European jurisdictions (including France, the Netherlands, Scotland and Belgium) implemented reforms to bring their justice systems in line with the decision.

Source: IBA Survey, response by Belgian respondent; Cape et al. (2010).

Survey responses indicated that the right to legal aid in the covered jurisdictions is mainly enshrined in either the constitution or ordinary law. This reflects one of the UN Principles on Access to Legal Aid: 'States should guarantee the right to legal aid in their national legal systems at the highest possible level, including in the constitution.' The survey also showed that, provided financial thresholds are met, legal aid is readily available to persons accused and/or charged with a criminal offence punishable by a term of imprisonment or the death penalty (where applicable), but availability is much reduced for persons generally detained by the police, arrested or imprisoned on other grounds. Nevertheless, responses indicated that, in line with the UN Principles on Access to Legal Aid, free legal assistance can also be provided at the court's discretion (even if the economic threshold is not met) if the interests of justice so require, depending on the urgency, gravity or complexity of the case.

The UN Principles underline the primary obligation of states to ensure that a comprehensive legal aid system is in place and that it is accessible, effective, sustainable and credible. They should enact

19 Peter Grant (ed) State of the World's Minorities and Indigenous Peoples 2014: Events of 2013 (Minority Rights Group International 2014) 10.

20 See above chapter 1, section 1.1 (n 8 and accompanying text) on the definition of legal aid.

21 UN Principles on Access to Legal Aid, above n 8, §3.

specific legislation to guarantee this and allocate the necessary human and financial resources while restraining from interference with the defence of the accused or with the independence of his or her legal counsel.

Different models for the provision of legal aid are employed in different jurisdictions, including but not limited to public defenders, private lawyers, contract lawyers, pro-bono schemes, bar associations and paralegals.

While legal aid is mainly provided by lawyers, delivery schemes are often diversified and a wider range of stakeholders step in under different schemes to complement state efforts where the latter lack the necessary resources, capacity or will to provide effective legal aid.

In focus: Beyond de jure legal aid - addressing effectiveness in practice

A problematic issue that emerged from survey responses is that despite rights to legal aid being available in law, information concerning its availability is not always provided officially, in a written form and/or in a manner that corresponds to the needs of the accused. The result is that there is not effective access to legal aid.

Legal aid budgets across countries are quite varied and comparing legal aid expenditures, whether per case or per inhabitant, is very difficult. Factors that can explain variances include: differences in the scope and eligibility for legal aid; the legal services provided; procedural differences between justice systems (eg, inquisitorial/adversarial); frequency of use of Alternative Dispute Resolution (ADR) systems.

Among the Council of Europe (CoE) membership, Denmark, Finland, Iceland, Ireland, Netherlands, Norway, Sweden, and Switzerland and the UK spend the highest budget for legal aid per inhabitant (from €11 to €53 per inhabitant). Support is very low (less than €1 per inhabitant) in some states of Southern Europe (Greece, Malta, Spain) and in Central and Eastern European states, which did not have such systems before joining the CoE (Albania, Croatia, Azerbaijan, Hungary, the former Yugoslav Republic of Macedonia, Georgia, Slovakia, Republic of Moldova, Romania, Latvia, Russian Federation, Poland, Bulgaria).

Source: European Commission for the Efficiency of Justice (2014).

According to the United Nations Office on Drugs and Crime (UNODC) there are broadly five types of legal aid models in operation in Africa:

Public defenders: the State employs and pays lawyers to provide legal aid services.

Judicare: private lawyers make an agreement with the Government to represent accused persons for a set fee.

Contracting: the Government contracts a lawyer, a group of lawyers or a nongovernmental organisation to provide legal services for a set fee.

Community legal services: a range of private service providers offer legal advice and assistance to poor people.

Mixed delivery: the State employs a mixture of various service delivery models.

Source: PASI, Legal Aid Systems in Africa (UNODC 2011).

Entering into agreements with private legal aid providers to supplement national legal aid services is common in Western countries and is increasingly being used in Africa.

The World Justice Project Rule of Law Index 2013/2014 exposed the lack of pro bono available lawyers to represent poor clients as one of the serious challenges to developing a formal justice system in Malawi.

Malawi's Legal Aid Act of 2010 planned the transformation of the Legal Aid Department (a branch of the Ministry of Justice) into an independent Legal Aid Bureau benefitting from both support from the state and assistance from donors. The Bureau only started operating in 2015 but, while still struggling with the lack of resources, it is in the process of linking up with other stakeholders to improve access to justice. This includes cooperation with the Irish Rule of Law Programme to improve representation in criminal matters and to establish community meetings to enhance legal education in criminal matters. The Ministry of Justice also has a cooperation agreement with paralegals to provide legal aid services in police stations, prisons and courts.

At the same time, the not-for-profit organisation, Citizens For Justice (CFJ) Malawi is implementing a project that involves conducting camp courts aimed at bringing justice to accused persons being held in pre-trial detention. The project builds on the involvement of key partners such as: Women Judges Association of Malawi (WOJAM), Malawi Judiciary, Paralegal Advisory Services Institute (PASI), Malawi Police Services, Malawi Prison Service and the Women Lawyers Association (WLA). Although the public and witnesses are not present because the trial takes place inside the camp, the court is set as usual and involves a magistrate, a court clerk, a community service officer, the prosecutor, a paralegal and the accused.

Source: IBA Survey; Citizens for Justice (2015).

For instance, a respondent from Malawi stated that a person accused of capital offences may not meet the assigned lawyer until the day of the trial. The respondent from Ghana reported that

although the police are required to inform suspects about the availability of legal aid, this does not usually occur in practice. Even when information is officially provided in written form, it may not be effective because (according to the respondent from Lesotho) the majority of the accused are illiterate. Studies from other countries emphasise the relationship between anti-social behaviour and educational disadvantage showing that poor literacy restricts the available range of life-choices, such as employment, and thus becomes a pre-dispositional factor in criminal activities. A 2003 study in Irish prisons also shows a strong relationship between poor literacy skills and certain kinds of crime but not others: violent offenders and property offenders tended to have major problems regarding literacy while sex offenders tended to have better literacy scores.[22]

Respondents from Canada, the UK (England and Wales), Ghana, Japan, Lesotho, Latvia, Malawi, Pakistan, Singapore, Uganda and the US, reported that it is often the case that there is a lack of timely provision of legal aid. Responses from Canada, Malawi and Pakistan reported that legal aid is often wrongfully denied.

In Bulgaria, a pilot public defender project was launched in 2003 by the Open Society Justice Initiative to achieve the goals of quality and equality in legal representation.

Prior to this project, legal aid cases were often assigned to attorneys with no active criminal practice. A programme of training and seminars for staff attorneys was provided with the aim of improving the quality and quantity of written documents and the overall calibre of representation offered to poor people. The project also aimed to develop case management standards by recording information about ongoing case activity and creating a system for evaluating attorneys' performance and caseloads.

The staff intentionally consisted of relatively inexperienced lawyers as they were expected to be more responsive to changes and familiar with computer skills.

Source: Kranev, 'Needs Unmet: Legal Aid in Bulgaria' (2004).

In addition to these general institutional problems survey responses also pointed to factors that have a detrimental effect on the ability of certain groups of alleged perpetrators to access legal aid. Among such factors: poor language skills, lack of trust in lawyers and informal discrimination in practice mainly affect non-citizens, minorities and/or indigenous peoples. Geographical distribution of legal services has a more severe impact on people living in rural areas, and discriminatory laws affect the ability of these groups, and women in particular, to access legal aid. Indeed, survey results indicated that access to free legal advice, assistance and representation has remained either static or has deteriorated for these groups in the last five years. Substantial improvements, however, were reported in relation to children and, perhaps remarkably, to high income earners.[23] It is perhaps also noteworthy that where a person has particular needs, such as cultural or language support for indigenous people, then in family violence cases the perpetrator may receive assistance as an accused, but the specialist service may not be able to provide support for the victim due to a possible conflict of interest for the service, perhaps leaving a very significant gap in appropriate and needed service provision.

Ethnic Uzbeks, who make up Tajikistan's largest minority (about 15 per cent of the population), are often subject to discrimination and marginalisation. The 2009 law on the state language establishes that all citizens must speak Tajik and the wording leaves room for citizens who seek public legal aid to be fined for not knowing Tajik.

In practice this affects mainly the Uzbek minority and Uzbek women in particular. While many courts accept citizens' applications in Russian, and in Kyrgyz-language, Uzbek-language documents are accepted less frequently. This state of affairs compromises access to legal aid for Uzbek women in particular because they are less likely to speak Tajik or Russian than their male counterparts.

Source: Grant (2014).

22 Mark Morgan and Mary Kett, *The Prison Adult Literacy Survey: Results and Implications* (Irish Prison Service 2003) 9.

23 With regard to improved legal aid access for high income earners, the survey question did not distinguish between the position of accused and victim. It is quite possible that improvements for high income earners relate to wider support for victims, without means-testing applying, whereas legal aid for the accused may not have improved.

3.3 Due process, fair procedures and the judiciary

Access to effective criminal legal aid for disadvantaged suspects and the accused is a fundamental precondition of the right to a fair trial. However, the impact of effective legal aid is maximised if this is provided in a system of sound justice institutions that operate on the basis of, and are respectful of, rule of law principles. Such a system would involve, among other things, legal guarantees on the independence of the judiciary, transparency in the appointment of judges, adequate levels of qualifications of judges at all levels, including in lower courts, lack of corruption and the presence of effective mechanisms for dealing with judicial and public authorities' corruption. Trust in all justice institutions involved in the criminal process (police, judiciary, administration of justice) and an independent judiciary are critical for the development of quality legal aid services.

When there is a shortage of qualified lawyers providing legal aid, adequate oversight and accreditation mechanisms, including by involving judges, must be put in place.

In South Africa the establishment in the Ministry of Justice of a quality assurance unit composed of experienced lawyers and the close involvement of the judiciary in monitoring the quality of legal aid have been successfully used to ensure the quality of legal aid services.

Source: UN Rule of Law, 'Enhancing Access to Legal Aid in Criminal Justice Systems' (2014).

There is a critical relationship between security, access to justice and legal aid: restoring the rule of law and trust in the institutions of justice is key to stability and sustainable peace.

The Ebola emergency exacerbated the shortcomings of Sierra Leone's courts leaving fragile judicial institutions weaker and less effective. The suspension of court sittings and operations from August 2014 increased the backlog of cases, resulting in a growing remand and pre-trial detention. With attention focusing on stopping the virus and aiding affected communities, legal aid, primarily provided by civil society organisations, was severely cut back.

Ensuring sustainability and long-term enhancement of justice services is considered to be a key element in preventing future conflict and preserving peace. An 18-month UNDP project, engaging UNICEF and the UK Department for International Development is aimed at reviving Sierra Leone's justice sector by supporting:

the reactivation of mobile courts with a focus on reducing the backlog of remand cases;

the implementation of the Legal Aid Act by developing rules of procedure for provision of legal aid and strengthening cooperation with paralegal services;

the development of a strategy to attract and retain qualified professionals to serve as judges, magistrates, prosecutors and judicial support staff, as well as to improve conditions of service for these;

the improvement of monitoring capacities to provide oversight of the justice, legal aid and security actors.

Source: UNDP, 'Ebola recovery in Sierra Leone' (2015).

Consistent with the findings from the 2014 IBA report,[24] responses from the survey suggested that criminal proceedings are mostly fair in the jurisdictions covered. The majority of respondents reported that a defendant in criminal proceedings has a genuine prospect of acquittal if evidence is inadequate or if there was a procedural irregularity. Respondents also indicated that an independent complaints mechanism is generally in place to deal with complaints that have not satisfactorily been dealt with through criminal justice procedures.

While there is much in the survey responses to confirm the presence of a functioning justice system and the importance of the broader context in which legal aid is provided (process, procedures and characteristics of the judiciary), there are undoubtedly shortcomings in a number of jurisdictions. Respondents from Pakistan and Nigeria reported that in criminal matters where a violent crime has been committed and the alleged perpetrator identified, action by police without proceeding to court

24 Beqiraj & McNamara, above n 6.

is used frequently or very frequently. Respondents from Japan, Lesotho, Malawi, Norway, Pakistan and Singapore disagreed with the statement that the appointment of judges is transparent in their jurisdiction.[25] Responses from Ghana and Norway raised doubts about the adequate legal qualification of judges operating at lower courts. A respondent from the US highlighted the low representation of people of colour in the judiciary as a pattern of de facto discrimination. The problem of corruption of the judiciary and the lack of effective mechanisms to deal with it was reported in responses from Pakistan, Ghana, Lesotho and Malawi. The respondents from Pakistan also expressed strong concerns about the prospects for acquittal of a defendant in the presence of inadequate evidence or procedural irregularities. On a general note, the majority of respondents considered the average timeline in the criminal justice system to be inadequate.

To address the problem of impunity for extrajudicial killings by the police, an effective system of external police oversight mechanisms can provide an important complement to internal police investigations, the criminal justice system, and legislative oversight. Brazil and Northern Ireland provide two examples:

In Brazil, police response to violent crimes, often related to drug trafficking, also threatens security: there were over 11,000 killings by police from 2003-09. Oversight of military and civil police is carried out by internal affairs departments (corregedoria) with no external input. In some states an external police Ombudsman (ouvidoria) has been established. However, its powers are limited to requesting further investigations, which are then conducted by the police; no power to bring charges and decide sanctions is foreseen.

In Northern Ireland, the Police Ombudsman is a non-departmental public body tasked with providing an independent, impartial police complaints system. The Ombudsman can receive complaints coming directly from a member of the public, collect evidence and conduct forensic analysis. Legal prescriptions guarantee collaboration from the police forces, and the Chief Constable has a legal duty to comply with the recommendations given by the Ombudsman. Where a criminal offence is suspected, the Ombudsman can directly refer the case to the Director of Public Prosecutions.

Source: Alston (2010).

With regard to enforcement of decisions, survey respondents agreed that there was overall compliance with court decisions, though problems may arise at later stages because of an overcrowded and/or ineffective prison system. For example, a respondent from England and Wales reported the common practice of early releases from prison being granted due to detention facilities' overcrowding. The respondents from Australia and the US also highlighted the problem of overrepresentation in prison of specific groups of the population - indigenous people and people of colour respectively.

In focus: Informal justice institutions

In many jurisdictions, the formal state-administered justice system coexists with one or more informal systems of justice, including criminal justice, and community dispute resolution. It is estimated that in many developing countries around 80 per cent of cases are resolved through such mechanisms.[26] These institutions and mechanisms have different levels of formalisation and institutionalisation, and their relationship to the state can range from integration and regulation, to prohibition and sanctioning.[27] Community based mechanisms often address issues of personal security and local crime and play an important role in community cohesion. They are usually more available and affordable, and often enjoy greater legitimacy with the local population than the formal system. In other cases however, exercise of criminal jurisdiction may be prohibited. The respondent from Ghana, for

25 For a study of over 50 countries in the Commonwealth, see Jan van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law) (BIICL 2015), http://bit.ly/1DkO7vL

26 See 'Informal Justice', United Nations Rule of Law, www.unrol.org/article.aspx?article_id=30

27 Informal Justice Systems: Charting a Course for Human Rights-Based Engagement (United Nations Development Program, UN Women and UNICEF, 2012), 7-9.

example, commented that dealing with criminal matters by informal justice institutions is prohibited and constitutes an offence. A similar system operates in practice in Mozambique, where the state police have communicated 'informal rules' regarding the distribution of caseloads and litigation between the informal and formal courts, including a prohibition on informal courts settling criminal cases.[28]

The 1994 genocide in Rwanda caused many deaths and left the country's population traumatised and its infrastructure decimated. To deal with an overwhelming number of perpetrators, justice and reconciliation processes involved a judicial response on three levels:

- the International Criminal Tribunal for Rwanda;
- the national court system; and
- the Gacaca courts.

Between 2005 and 2012 the traditional community court system called 'Gacaca' was re-established. Communities at the local level elected judges to hear the genocide trials. The courts gave lower sentences if the person was repentant and sought reconciliation with the community. The Gacaca trials also served to promote reconciliation by providing a means for victims to learn the truth about the death of their family members and relatives. They also gave perpetrators the opportunity to confess their crimes, show remorse and ask for forgiveness in front of their community.

Source: United Nations (Rwanda Genocide) (2014).

Where informal justice institutions (such as religious bodies, councils of elders, customary courts or the like) regularly deal with criminal matters, survey responses generally confirmed that participants in the proceedings are able to present their case effectively. A majority of respondents also indicated that participants will be usually treated fairly and that decision-makers regularly explain the reasons for their decisions. These findings are in line with those from the 2014 IBA report. However, concerns were raised about the lack of consistency in decision-making and the relatively limited access to the proceedings by the broader public. The respondent from the United Arab Emirates, for instance, commented that these proceedings are habitually conducted behind closed doors and limited to the members of a specific community.

Informal justice is often criticised for reinforcing social hierarchies and discriminatory practices, especially against women. However, fairness of the system can be increased and patterns of discrimination can be combatted through wider participation of women as adjudicators.

To these ends, Local Council courts in Uganda and Village courts in Bangladesh and Papua New Guinea, have minimum quotas for female representation.

Source: Informal Justice Systems (UNDP, UN Women, UNICEF 2012).

While formal and informal justice systems coexist in many jurisdictions, factors influencing people's choice of informal mechanisms include the ineffectiveness and lack of trust in the formal justice system and a preference for less formalised settlement procedures, such as voluntary participation and the reaching of decisions on the basis of mutual consent. The respondent from Lesotho stated that with adherence to procedures causing delays in formal institutions, informal justice institutions deliver quicker justice, although at times the end result may be unfair. People's choice of an informal system can additionally be motivated by a preference for reconciliation, restoration, compensation and reintegration over the typical custodial sanctions in formal criminal justice. Because of these characteristics, informal justice mechanisms can also operate effectively to prevent the escalation of smaller disputes into more serious violence.

Local disputes have the potential to escalate to criminal activity and violent crimes and cause wider sectarian or tribal conflict: seeking 'retribution', or vengeance.

In Egypt, volunteer committees of mediators and arbitrators were created in 2013 to meet the need for fast, low-cost and simple interventions for such disputes. The volunteers are well trained – they are chosen among retired professionals, business leaders, judges or teachers, on the basis of their experience and social status within the community. The focus is on the 'natural authority' they already hold within the community, which provides strength and 'finality' to their decisions.

Source: HIIL Innovating Justice, 'Street Arbitrators' (2013).

28 Ibid, 68.

3.4 Reducing barriers: possible reform strategies and solutions

Access to legal aid for the accused is enshrined in human rights instruments giving broad recognition of its fundamental role in the right to a fair trial. However, countries across all levels of development, regardless of the model through which legal aid is provided, face common challenges, including the need for sustained political will and sufficient budgetary resources to guarantee legal aid. These issues are central to the realisation of the Post-2015 UN Development Agenda, which (through Goal 16) aims to 'promote the rule of law at the national and international levels and ensure equal access to justice for all'.

This chapter has drawn attention to the need to address barriers to access to legal aid at different levels, both on the provider and recipient side.

- Legal empowerment through education is an essential precondition of access to justice and of access to legal aid. Strategies in this regard comprise two core elements: strengthening a human rights culture by means of enhanced legal knowledge, and promoting dissemination through free mechanisms and the use of various formats to address the needs of different groups.
- Legal reform needs to take into account, address and correct common patterns of de facto discrimination, including through the use of positive discrimination measures. It is important to acknowledge that criminalisation is not going to be an effective deterrent or a preventative measure unless it takes into account the root causes of violence and is accompanied by a support structure that will see rules enforced.
- Effective access to legal aid involves the delivery by legal aid providers of high quality services, ensuring that those providing services have skills and expertise appropriate to the issues, and adequate time, including preparation time, to deal with the matter. Building on quality standards, lawyers, judges and other justice system staff can all play a crucial and active role in providing fair and impartial solutions to barriers to access to justice.
- States employ different models for the provision of legal aid (including public defenders, pro-bono schemes, bar associations, paralegals), and although solutions need to be inherently connected to specific national contexts, the models and good practices in different jurisdictions may often be flexible enough to be transferred and employed elsewhere.

Chapter 4: Redress for victims of violence

Alongside access to legal aid for the accused, redress for victims of violence is a core element of a sound justice system based on the rule of law and respectful of human rights. The strong relationship between reduction of violent practices, provision of redress for victims and access to justice is made clear in the UN Post-2015 Development Agenda. Pursuant to Sustainable Development Goal 16 of the Agenda, governments are committing to '[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' Goal 16 has specific targets associated with it, which aim to:

- Significantly reduce all forms of violence and related death rates everywhere;
- End abuse, exploitation, trafficking and all forms of violence against and torture of children;
- Promote the rule of law at the national and international levels and ensure equal access to justice for all.

Read in the light of the cross-cutting objective of the Post-2015 Development Agenda to 'leave no one behind', these three targets point to the importance of guaranteeing effective redress for victims of violence.

4.1 Access to legal information regarding victim rights

Increased awareness of legal rights and of available remedies can contribute to better protection of victims' rights during the crime reporting stage and in the course of proceedings, as well as helping to avoid repeated victimisation.

The survey responses relating to the level of understanding by the general population of individual legal rights and the powers and functions of the public institutions involved with the delivery of justice (discussed above in section 3.1) also apply to victims of violence. In particular, low levels of literacy and education, language skills and informal discrimination in practice are the main factors hindering victims' awareness of rights and remedies. There was much in the responses to suggest (although with some strong divergent views – eg, respondents from Singapore and Nigeria) that victims' interests are generally considered in law-making processes in the respondent jurisdictions, including through, for example: public consultation, advisory roles of victim organisations, research and piloting. However, wider publicity and dissemination can increase awareness and help break victims' silence, which is crucial to breaking the cycle of violence where repeated abuses thrive. Survey results indicate that governments and civil society groups employ a range of methods and strategies to enhance legal knowledge about violence prevention and reporting of the violence suffered. These include: radio and television, educational programmes in schools, outreach programmes involving lawyers and/or the

In Cameroon, Dignity Television aims to create effective healing opportunities for victims of abuses, including domestic violence, rape and incest. Dignity Television consists of an open online platform that compiles incidences of violence as they occur. Dignity Television streams victims' testimonies, provides ongoing paralegal support and calls for action worldwide. The aim of the project is to contribute to the global momentum around naming and shaming and enable victims in local communities to speak out and denounce the perpetrators.

Source: Dignity Television (2014).

police in communities, and prevention initiatives with local communities that respond to the needs of disadvantaged groups by, for example, adopting user-friendly formats in local languages and informing those who face substantial physical, cultural or economic barriers.

The UN Trust Fund to End Violence Against Women was established by the UN General Assembly in 1996 with the aim of addressing violence against women and girls through financial support of effective initiatives.

'Expanding Opportunities of Rural Girls to Prevent and Respond to Threats of Violence' in Kyrgyzstan is one of the funded projects for 2015.

Bride-kidnapping and early and forced marriages are widespread practices in Kyrgyzstan that affect countless girls. A school-based education programme in two schools will be piloted to build leadership skills and teach girls how to prevent and respond to threats of violence. The intervention will also work with boys to promote respectful relationships and gender equality and support girl survivors of violence through the establishment of self-support groups.

Source: UN Women (2015).

In Singapore, about 1 in 10 women have experienced violence from a man in their lifetime. The Ministry of Social and Family Development works with multiple agencies to address the problem of family violence.

One of the approaches to tackling underreporting has been to look at public education as a way of overcoming silence. The strategy is to educate the public and raise awareness about family violence so that victims know what to do to get help.

Outreach to the public has involved avenues such as media (TV, radio); printing and distributing marketing collaterals; organising talks, seminars and roadshows. Dissemination has been conducted through schools, hospitals, family court, the police and Family Service Centres.

Source: Ministry of Social and Family Development, Singapore (2014).

In focus: Legal empowerment for victims of trafficking

Following the entry into force of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, under the United Nations Convention against Transnational Organised Crime, more than 90 per cent of states have strengthened, modified or introduced new legislation criminalising human trafficking.[29] Nevertheless, trafficking in persons still remains a serious concern: it can too often be done with impunity and that makes it an appealing opportunity for offenders.

A recent UN Office on Drugs and Crime (UNODC) report on trends in trafficking of persons draws attention to the fact that a majority of victims are foreigners in the country where they are identified by the police or social services as being trafficking victims, and that women are significantly represented. Between 2004 and 2011 the share of trafficked adult women declined significantly (from almost two thirds to approximately half of the total of detected victims), but this trend has been partly counterbalanced by increased numbers of victims who are girls.[30] The report also shows that trafficking cases involve limited geographic movement, often within a sub-region or between neighbouring countries, and that domestic trafficking is also widely detected. While a majority of trafficking victims are subjected to sexual exploitation and forced labour, trafficking for other purposes is also increasing. Some of these other practices, such as trafficking of children for armed combat, while still relatively limited from a global point of view, can be a significant concern in some locations.

In Colombia, thousands of boys and girls are believed to be currently engaged in armed conflict. Reintegration policies and programmes that properly address the needs of these children are necessary to support them as they leave the groups and re-enter civil society.

Formal reintegration programmes began in 1999 under the auspices of the Colombian Family Welfare Institute. Reintegration and redress, however, are particularly complex because child soldiers do not necessarily see themselves as victims and are at risk of being left out of the peace process between the Government of Colombia and the Revolutionary Armed Forces of Colombia-People's Army (FARC–EP).

Source: Watchlist on Children in Armed Conflict (2012, 2015).

29 United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons 2014 (UN E.14.V.10, 2014), 1, 12.

30 Ibid, 6, 10.

Where victims of trafficking, especially women and girls, but increasingly also boys, are able to return to their families and communities, they are frequently rejected, marginalised, vulnerable to being trafficked again, and also face the risk of being prosecuted. The plight of victims of trafficking can be eased through raising awareness of existing legal protections and mechanisms available to obtain justice and redress, especially where support and cooperation structures are in place to guarantee the participation of a wide array of services and institutions to secure in practice the protection and enforcement of victims' rights.

In India, the state of West Bengal is a major source, destination and transit point for victims of trafficking.

In 2010 a legal empowerment project was undertaken by the International Development Law Organisation (IDLO) in partnership with SANLAAP (a local NGO) aimed at preventing and combating child trafficking in the region (including cross-border trafficking). The strategy involved ensuring that rescued girls were provided with prompt, efficient and effective legal assistance as soon as possible, providing advice in shelters, hospitals or similar rescue points. The objective was to make girls more aware of their rights under existing laws, make legal assistance available to them, and ensure that their procedural rights were guaranteed during all the stages of the legal process in which they were involved.

Source: International Development Law Organisation (2013).

4.2 Access to legal aid

A functioning legal aid system plays an important role in protecting and safeguarding the rights of victims. Access to legal aid should be guaranteed to both the accused and the victims of crime. This is broadly reflected in the UN Principles on Access to Legal Aid, which establish that without prejudice to, or inconsistency with, the rights of the accused '[s]tates should provide legal aid to victims of crime, especially victims of serious crime and vulnerable victims, in the form of legal information on their rights and of legal representation.'[31]

Survey responses from almost half of the respondents show that free legal advice, assistance and representation is made available to victims of violent crimes in the criminal justice system. The jurisdictions covered by these responses were: a majority of European states, Australia, India, Japan, Lesotho, Latvia, Malawi and Nigeria. Occasionally legal aid is also guaranteed to witnesses. The respondent from Denmark reported that while both victims and alleged perpetrators are entitled to and benefit from legal aid if the conditions are fulfilled, legal aid expenses must be refunded by an accused who is found guilty.

The UN Principles on Access to Legal Aid also encourage states to take measures to ensure appropriate advice, assistance, care, facilities and support for victims of crime throughout the criminal justice process, in a manner that prevents repeated victimisation. However, as the survey responses indicate, numerous factors operate as barriers to achieving this in practice. These include language skills, which have a particularly detrimental effect on minorities, indigenous peoples and non-citizens. Low levels of literacy and education affect mostly women, minorities and people living in rural areas. Informal practices of discrimination particularly affect minorities, indigenous peoples and non-citizens.

The survey and the related research have identified a number of strategies that have been undertaken to improve access to legal aid for victims of violence. The respondent from Poland provided the example of a programme run by the Ministry of Justice in cooperation with the Polish legal profession called '[t]he week of legal aid for victims' where free legal advice is provided to

31 UN Principles on Legal Aid, above n 8, Principle 4, see also Guideline 7.

those identifying themselves as victims of a crime.[32] Initiatives of this kind are conducted by non-governmental organisations and other organisations. A respondent from Malawi pointed to a programme run by the Centre for Human Rights Education Advice and Assistance (CHREAA) aimed at protecting sex workers from police abuses.[33] Although prostitution is not a crime in Malawi, sex workers are exposed to persistent abuse and violence at the hands of the police and often face undue convictions and detention because of a lack of awareness of their rights. The programme includes human rights training for police officers and sex workers, a toll-free line for telephone assistance and advice, and advertising on local radio.

Both the UN Convention against Transnational Organized Crime and the Trafficking in Persons Protocol make specific references to compensation of trafficking victims and the possibility of using confiscated proceeds for these purposes. However, compensation remains one of the weakest rights of trafficked people. The reasons include low numbers of convictions combined with limited use and capacities of financial investigations.

Source: UNODC (2014).

In focus: free and low cost legal assistance for victims

As resources committed to free legal assistance diminish, states must promote avenues and mechanisms capable of maximising the impact of the resources that are available. Some strategies identified in the UN Principles on Access to Legal Aid include: promoting and sponsoring provision of legal aid services by paralegals and by other organisations; encouraging and supporting provision of legal aid services through university legal aid clinics; employing incentives for lawyers to work in economically and socially disadvantaged areas, such as tax exemption or travel and subsistence allowances; using funds recovered from criminal activities to cover legal aid for victims; promoting the growth of the legal profession, and removing financial barriers to legal education.[34] Alongside these government-supported solutions individuals who do not qualify for legal aid are increasingly making use of low-cost schemes in the private sector.

One development, which is facilitating access to justice in Council of Europe states for those who are not granted legal aid, is the availability of private legal expense insurance. Individuals in 34 member states or entities are able to use a system of private insurance for costs concerning legal advice, legal assistance and representation in court proceedings. There is no equivalent available in Armenia, Bulgaria, Croatia, Ireland, Latvia, Malta, Republic of Moldova, Montenegro, Romania, Russian Federation, Serbia, Macedonia and Turkey.

Source: European Commission on the Efficiency of Justice (2014).

Solutions for coping with restricted resources available for legal aid are being tested and supported in Canadian provinces:

'Unbundled legal services': allows lawyers to provide limited representation to a client by taking on only part of a matter (e.g. drafting a statement of claim, but not representing the client further). This kind of service is aimed at lowering the cost of obtaining legal services, and Canadian professional bodies are working to allow broader flexibility on conflicts of interest rules.

'Low bono': the provision of legal services to low and middle income clients at reduced fees. These types of initiatives are specifically designed for clients who do not qualify for legal aid but cannot afford standard legal service fees.

'Alternative Billing Models': the classic billable-hours model carries uncertainty about the anticipated costs and of unnecessary protraction of cases. Alternatives include competitive tendering and fixed tariff billing.

Source: Federation of Law Societies of Canada (2014).

32 Ministry of Justice, Poland, 'Dzisiaj rusza Tydzień Pomocy Osobom Pokrzywdzonym Przestępstwem 23-28 lutego 2015 r' 23 February 2015, http://ms.gov.pl/pl/informacje/news,6778,tydzien-pomocy-osobom-pokrzywdzonym-przestepstwem.html (in Polish).

33 Centre for Human Rights Education, Advice and Assistance, 'Protection of Sex Workers Project Winds Up', 5 June 2014 http://chreaa.org/?p=259. The programme was funded by the Australian government.

34 UN Principles and Guidelines on Access to legal Aid, above n 8, Guidelines 11, 13.

4.3 Access to fair dispute resolution mechanisms and the role of victims in the process

The survey explored the involvement and role of victims during the different stages of proceedings (both criminal and civil) through which they try to obtain justice. While the evidence from the survey is of course far from comprehensive, the responses nonetheless highlighted some interesting practices and solutions implemented to address obstacles that hinder victims' ability to access fair dispute resolution mechanisms.

Responses reported that, at the stage of reporting crimes, police have different degrees of responsiveness to incidents, depending on the types of violence and motivation. A majority of respondents considered police to be generally receptive to reports of domestic violence. Survey responses also indicated an overall receptiveness by the police to cases involving violent acts against businesses. However, responses indicated that far less sensitivity is shown in cases involving violent acts against lesbian, gay, bisexual and transgender (LGBT) individuals. Training for staff in the criminal justice institutions that interact with victims and witnesses is strongly recommended in the UN Principles on Access to Legal Aid, but less than one third of the respondents reported that training is mandatory in their jurisdiction (Austria, Australia, India, Japan, Malta, Nigeria, Sweden, UK, and the US). The survey and complementary research identified a number of instances of training programmes organised by NGOs and other organisations, whether autonomously or in cooperation with government.

In England, judicial office holders at the Mental Health Tribunal are required to undertake two days of training from an annual choice-based programme of events, covering a range of relevant topics.

Source: European Commission on the Efficiency of Justice (2014).

In the US in 2011 the state of Rhode Island established the Rhode Island State Victim Assistance Academy, aimed at providing training to individuals who work directly with victims and survivors of crime. Attendees include detectives, advocates for the homeless and for domestic violence victims, hospital interpreters, elder affairs workers and others within the public and private sectors. Sessions at the Academy cover topics such as: gay, lesbian and transgender issues, victims' rights, elder issues and victim compensation. The programme is the result of a partnership between the Family Service of Rhode Island and Roger Williams University.

Source: Family Service of Rhode Island (2011).

In Kosovo, a 2009-2013 UNDP/Netherlands-funded project 'Women's Safety and Security Initiative' aimed to enhance 'preventive and responsive services' across all sectors of activity relating to victim services (including justice, security, social welfare, health and education). The project supported the implementation of the legal framework on domestic violence; the establishment of the Domestic Violence Secretariat in the Ministry of Justice; and a civil society network, monitoring the government's implementation of the National Action Plan on Domestic Violence.

Source: UNDP in Kosovo (2013).

Whether mediation should occur in domestic violence cases is a much-debated question.

In Finland, the Act on Conciliation in Criminal and Certain Civil Cases (1015/2005) standardises mediation services, including victim-offender mediation (VOM) in intimate relationship violence.

Although the mediation is not a formal part of the criminal justice process, the criminal code establishes that in the event of an agreement or settlement, it can be used to waive charges by the prosecution, waive punishment by the court, or as a grounds for mitigating the sentence. Through VOM, victims can have a role in the sentence given to the defendant, but participation is purely voluntary.

Source: Drost et al (2015).

With regard to decisions about prosecution and punishment, survey responses indicated that in the general run of cases victims rarely have a significant input, but there were responses that reported victim involvement in certain categories of cases. For example, the respondent from Lesotho pointed to a different approach in crimes such as housebreaking and assault - where the victims have a say on

whether prosecution can proceed or not depending on the form of redress offered by the accused – and sexual offences where prosecution can proceed without a complaint from the victim.

The participation of victims in formal justice processes, including at the investigative stage – and whether as witnesses giving evidence or solely as a victim with a distinct status – requires adequate guarantees of protection, such as the use of screens, video recorded interviews (with facial images obscured for anonymity where appropriate), or giving evidence in private. A majority of survey results reported that protective strategies were used, though contrary views were put forward by some of the respondents from India, Lesotho, Malawi, Norway, Pakistan and the United States.

In focus: International criminal justice

The basic role of international criminal law is to supplement state failures (inability or unwillingness to prosecute) in cases of gross violations of human rights and international humanitarian law amounting to particularly serious international crimes, such as genocide, crimes against humanity or war crimes. These cases involve by definition a multitude of victims: their participation and role during the proceedings adds value to the quality of justice offered by the international criminal justice institutions.

International criminal courts and tribunals adopt different models of involvement of victims and of recognition of redress for victims. In contrast to the practices of the ad hoc international criminal tribunals of the former Yugoslavia and Rwanda, where victims could only participate in criminal proceedings as witnesses, their partaking in the proceedings of the International Criminal Court (ICC) is quite innovative.

Under the Rome Statute, the ICC is entitled to invite and take into account representations from (among others) victims. Additionally, victims are entitled to participate in writing by putting their views and concerns to the judges when their interests are affected. The relevant Chamber can then consider which method would be most appropriate to present such views – for example, in opening and/or closing statements.[35] Moreover, and quite importantly, an order of reparations can be made by the Court upon request by the victims.

Thomas Lubanga, the first person charged before the ICC, was found guilty in March 2012 of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities in the Democratic Republic of Congo. He was sentenced to 14 years of imprisonment. Both the verdict and sentence were confirmed by the Appeals Chamber in March 2015.

During this first ICC trial, victims' participation was both challenging and innovative. Victims were allowed to lead and challenge evidence relating to the guilt or innocence of the accused by applying and being allowed to testify in person and present evidence independently of the Prosecutor.

Sources: International Criminal Court (2008, 2014); Victims' Rights Working Group (2011).

Restorative justice programmes provide for mediated encounters between victims and offenders to allow the victim to explain the impact and harm of the offence and offer the opportunity to the offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way. Common characteristics include:

- A flexible response to the circumstances of the crime, the offender and the victim;
- Can be used as an alternative or in conjunction with formal criminal justice processes and sanctions;
- A flexible and variable approach which can be adapted to different circumstances, legal traditions and criminal justice systems;
- A response that recognises the role of the community as a prime site in preventing and responding to crime and social disorder.

Source: UNODC (2006).

35 Information on the participation of victims in ICC proceedings is available on the website of the Court, including through an easily accessible information guide: www.icc-cpi.int/en_menus/icc/structure per cent20of per cent20the per cent20court/victims/participation/Pages/booklet.aspx.

4.4 Enforcement of decisions and types of redress

As noted in the introduction to this report, the concept of redress for victims of violence in this study is a broad one. Accordingly, survey responses refer to a range of forms of redress. Among them are: economic reparation, victim rehabilitation, different schemes for victim involvement in criminal proceedings, interaction with perpetrators and mechanisms allowing victims to have an impact in sentencing. To the extent that it is possible to draw a conclusion from the responses given, it appears that the effectiveness of different types of redress varies considerably. Their scope is quite broad but a snapshot of examples helps illustrate the range and variation in mechanisms.

In situations involving juvenile offenders, in which an important objective is to teach the offenders some new values and skills, restorative justice programmes provide a particularly suitable response to crime. Conferencing is an example.

Conferencing operates in all states and territories of Australia and is mostly used in juvenile cases, though some states have also introduced it for specific adult offences.

Conferences are held at different stages of the process and are run by police, courts or juvenile justice agencies. If the offender is considered suitable and eligible, and agrees to participate, a conference may be organised with the relevant parties.

The procedure may involve making an apology or reparation to the victim, doing community service or an education programme, or working for the victim or their family.

Source: Larsen, Australian Institute of Criminology (2014).

Canada has taken rehabilitation measures to address abuses committed against Aboriginal people through the Indian Residential School system. From 1874 to 1996 the system worked to suppress the cultural identity of Aboriginal children including by inflicting physical and sexual abuse. The Settlement Agreement includes:

- Financial compensation for group harms and specific harm from sexual abuse or other abuses causing serious psychological effects.
- A Truth and Reconciliation Commission offering a forum to reveal survivors' experiences.
- Financial support for healing initiatives related to memory and spiritual renewal, and for commemoration events.
- A comprehensive statement of apology to the Aboriginal groups affected at a solemn session of the Canadian House of Commons in June 2008.

Source: International Centre for Transitional Justice, Canada (2009).

Reparations for victims are a new feature of international criminal law.

The International Criminal Court (ICC) statute provides that if the accused is found guilty and convicted, an award for reparations may be made against the convicted person or through the logistical and financial resources of a Trust Fund for Victims (TFV). In its March 2015 decision in the Lubanga case, the ICC set out principles and procedures to be applied to reparations.

The Court awarded only collective reparations, stressing that the large number of victims made it the most appropriate solution. Of note, while the Court ordered the TFV to submit a draft plan for collective reparations within six months, it also referred to Court Regulation 117, providing for the ongoing monitoring of the financial situation of the sentenced person to locate and forfeit assets for the benefit of victims.

Source: ICC Judgment, 3 March 2015.

In focus: Specialist courts

Many jurisdictions use specialist courts disputes in a specific area of the law. Examples include tribunals for minors, immigration courts or family violence chambers. Drug courts are another example, which originated in the US in the 1980s as a popular response to backlogs in courts and imprisonment rates and were thereafter established in other jurisdictions. The establishment of specialist courts is generally justified by the need

In New South Wales, Australia, despite dropping crime rates, the number of detention orders has increased, affecting mostly the poor, Indigenous Australians and those suffering from mental illness: more than half are imprisoned for drug and alcohol-related crimes.

The specialised Drug Court, with its unique emphasis on compulsory treatment and rehabilitation and with a dedicated team of counsellors, psychologists, health and legal professionals seeks to interrupt this pattern. The Court now sits at three locations and the programme has become a significant part of the criminal justice system in the State.

Source: Drug Court of NSW (2014).

for a particular type of judicial expertise and/or a particular adjudication procedure. Specialist courts may provide the necessary flexibility, higher levels of efficiency and sensitivity to the peculiar concerns of the accused or victims, but they may also involve additional costs and pose risks of fragmentation of the judicial system and duplication of services. In addition, specialist courts are often established to address politically or socially sensitive issues and may therefore be at risk of abolition when political or social concerns change.

In focus: Violence by corporations

Multi-national corporations making use of local resources sometimes incite or cause violence towards protestors from local communities. When this violence is carried out by third parties, such as security guards, local police or the military, there is generally no clear causal link back to the corporation. This leaves a gap in identifying those responsible and in providing effective redress for the victims.

In securing protection for a pipeline project of oil extraction company Unocal, the military in Myanmar committed grave human rights violations, including relocation of entire villages and forced labour, employing tactics such as murder and rape. The Unocal case was successfully brought before US Federal courts in 1996. In 2005 Unocal agreed an out-of-court settlement to compensate the plaintiffs and provide funds for programmes in Myanmar to improve living conditions and protect the rights of people from the pipeline region. The exact terms of the settlement are confidential.

Source: Business and Human Rights Resource Centre (2014).

Almost half of the survey responses reported that violence or threats of violence are sometimes or often perceived to be used to protect the interests of corporations. Among these, respondents from Canada, Nigeria and Pakistan indicated that violence is often perpetrated by the police or the military. Responses also suggest also that in the lead up to the court process, victims do not enjoy strong guarantees of protection against intimidation or good prospects of obtaining effective redress and compensation.

In early 2009, members of a local community in Peru staged an environmental protest against operations by Monterrico Metals Plc (part-owned by a company incorporated in the UK, but operating in Peru) in a mine, near which they lived. Security guards on the site and local Peruvian police inflicted severe violence on the protesters – including torture, physical violence, sexual assault, and detention in degrading and inhuman conditions.

Before the case was discussed on its merits in the London High Court, the parties agreed a settlement. The claimants were given monetary compensation by Monterrico, but without admission of liability on the part of the company. The exact terms of the settlement are confidential.

Sources: IBA project expert workshop (July 2015); Business and Human Rights Resource Centre (2014).

4.5 Providing justice to victims: Reducing barriers - possible reform strategies and solutions

The survey and the related research have suggested a number of strategies that could contribute to addressing barriers to access to justice for victims of violence. Some of these parallel those that may assist offenders seeking access to legal aid; for example, where barriers emerge from institutional failures of the judicial system, then solutions may assist both offenders and victims. It is also important to highlight here the importance of policies and strategies that take account of the disproportionate effects of barriers on particular groups of victims, including those which result from persistent discrimination or disadvantage. Approaches to this issue in different jurisdictions have included both state-based and non-government driven solutions.

- Legal empowerment programmes for victims are aimed not only at enabling them to have access to a fair justice system, but also at preventing revictimisation.

- States are increasingly establishing mechanisms and procedures to ensure close cooperation and coordination between legal aid providers and other professionals (eg, social workers and health providers) to obtain a comprehensive understanding of victims' legal, psychological, social, emotional, physical and cognitive needs.
- Specific responses to victim needs also include training for providers of services related to justice (e.g. police, prison staff, court administrative personnel, judges and lawyers) and specialist courts that are competent for the resolution of disputes involving particular groups of accused or victims.
- With the reduction of legal aid budgets in many countries, recourse to private legal expense insurance is being used as a method for accessing low cost legal assistance, advice and representation where the person does not qualify for legal aid.
- Restorative justice schemes providing for mediated encounters between victims and offenders can offer a flexible and variable approach that can be successfully used and adapted, on some occasions, to the context of formal criminal justice in different jurisdictions.
- Access to legal aid, especially during the early stages of a dispute, will be very important to ensure that disadvantaged victims of violence perpetrated by multinational corporations have effective access to justice and realistic prospects of securing redress.

Chapter 5: Dualities

The analysis in chapters 3 and 4 showed that barriers to access to justice rarely operate separately for the accused and for victims. Difficulties related to access to legal aid for the accused and victims and the rights and abilities of the latter group to obtain redress often have the same roots, such as a lack of resources, illiteracy, corruption, distrust in the justice system or patterns of formal or informal discrimination. Whether of societal or institutional origin, or a combination thereof,[36] barriers have similar effects on the prospects of both accused and victims to gain effective access to fair justice. However, it happens on occasion that the two coincide – that is, there are categories of cases in which a person is both a victim of crime and also the accused in a criminal case. In these circumstances, the operation of the combination of overlapping barriers becomes more complex, as the issue of access to legal aid for the accused intersects with that of victim redress. We refer to these reciprocal interactions between the paths to justice of the accused and victims as 'dualities', and use the term 'complex disadvantage' to highlight the intensified impact of barriers on access to justice in these cases.

5.1 Complex disadvantage: access to justice and legal aid where a person is both accused and victim

Individuals who have been accused of a crime, and who are simultaneously a victim of a crime, face very substantial difficulties in gaininf access to fair justice, not only because of the compound way in which barriers operate in practice but specifically because of this doubly disadvantaged status.[37]

There are many situations in which a person may be both accused and victim:

- women who kill their violent partners;
- people with drug addictions who commit property or drug offences;
- child soldiers;
- people (most commonly women or girls) who have been victims of trafficking and have committed offences;
- people who have been victims of sexual abuse as children and then subsequently commit offences related to drugs, violence or become perpetrators of sexual abuse;
- people who have been 'groomed' to commit terrorism offences, and
- accused or suspects who are tortured at the hands of police to obtain a 'confession'.

In circumstances where a person is both an accused and a victim, criminal law may be ill-equipped to take account of the complexities of the person's situation or their needs. In human trafficking cases,

36 The report for the IBA Access to Justice and Legal Aid Committee (Beqiraj and McNamara, above n 6, chapters 3-5) examined: (i) societal and cultural barriers, including literacy, education, poverty and discrimination; (ii) institutional barriers, such as insufficient governmental resources to guarantee or facilitate access to justice, inadequate organisational structure of justice institutions, limited legal assistance and representation and the lack of enforcement of decisions, and; (iii) intersectional barriers, where societal and institutional barriers overlap, such as lack of trust in lawyers and judges, and corruption.

37 Ibid, especially Chapter 5.

for example, there may be public interest reasons not to pursue a prosecution, or to offer indemnity from prosecution. However, it is only relatively recently that people facing prosecution in those circumstances have been recognised as victims. Where a crime has been committed and the person has come to attention because they have committed a crime, there is an added complexity. The police and prosecutors may recognise that the person has been a victim of crime, however, their roles are inevitably and inherently built around investigatory and prosecutorial functions. Moreover, victim support services are typically geared towards individuals who have been victims of crime, but not also perpetrators.

The examples below help illustrate some aspects of complexities faced by a person who is both victim and accused, and some of the ways these difficulties have been addressed.

In focus: Women who kill violent partners

Female detainees are often both victims and offenders. They tend to have a background of physical and emotional abuse. In these cases, there is a strong relationship between incarceration and violence against women whether this occurs prior to, during, or after incarceration.[38] A recent report by Penal Reform International highlights, through examples from a range of jurisdictions, complex difficulties in access to justice faced by female suspects, defendants and prisoners in criminal justice systems.[39] In these regards, the adoption in 2010 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules) constituted a major breakthrough in recognising the gender-specific needs of women in the criminal justice system.[40] Bangkok Rules 60 and 62 recommend non-custodial interventions for victims of domestic violence and sexual abuse, and thus acknowledge common problems leading to women's contact with the criminal justice system. However, there is currently a lack of specific research into, for example, how and whether the interpretation of self-defence and of mitigating factors in different jurisdictions allows for the consideration of prior long-term abuses by male family members. This is particularly relevant where the violent response by the female victim is not immediate.

In Jordan, more than three out of five women surveyed in detention had experienced domestic violence and for 92 per cent of these women, this was a frequent occurrence.

In China domestic violence ranked highest among reasons women gave for committing a violent offence.

In Kyrgyzstan, 20 per cent of women cited self-defence or self-protection as the main reason for their offence.

In South Africa, almost 70 per cent of the women prisoners interviewed had experienced some form of domestic violence.

Source: Huber, Penal Reform International (2015).

In focus: Suspects and accused that are victims of torture

A similarly complex – but substantively different – disadvantage is faced by a person accused or suspected of committing a crime who is then tortured, assaulted or otherwise physically abused or subjected to psychological violence with the aim of coercing a confession. Such practices of torture or other forms of ill-treatment take place in many jurisdictions and mainly occur in the early stages

38 Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Pathways to, conditions and consequences of incarceration for women*, UN General Assembly, A/68/340, 21 August 2013, 4.

39 Andrea Huber, *Women in Criminal Justice Systems and the Added Value of the UN Bangkok Rules: Briefing* Paper (Penal Reform International 2015).

40 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules) (General Assembly resolution 65/229 of 21 December 2010).

of detention when detainees are often de facto held incommunicado. In contrast to the example of women in prison who have killed a partner after being subjected to abuse, the duality in these circumstances runs in the opposite direction: here the person is first accused of crime and then becomes a victim of violence.

Torture is an enduring problem in Tajikistan, but there have recently been some positive, if modest, steps forward. There have been court rulings holding perpetrators accountable and legislative measures aimed at reducing barriers that have made it difficult for the accused/victim of violence to meet the burden of proof required to prove harm was suffered while in the hands of police.

With the support of Open Society Foundations in Tajikistan steps have been undertaken to guarantee that medical examinations of detainees are conducted by a dedicated officer who performs examinations upon the reception and registration of detainees, rather than by the police. In addition, all medical professionals (not only a specific category) are allowed to issue documents and authorise examinations.

Source: Human Rights Watch (2014).

5.2 Reducing dual barriers: possible reform strategies and solutions

The complexity of circumstances where individuals are both victims of crime and (alleged) offenders raises issues of great significance regarding the contemporary challenges faced by individuals in relation to access to justice. These need to be addressed as a priority in policy reforms and targeted programmes and initiatives. The following factors need to be taken into particular account:

- Legal empowerment is paramount to enabling individuals to exit the vicious cycle that perpetuates their complex disadvantages in accessing justice.
- A broader multi-purpose strategy is required. It would involve a combination of approaches at different levels, including legal education, sensitisation campaigns, legislative reform, training for police and legal professionals (including the judiciary), coordination of legal services with health and social assistance, and research to build the evidence base about both problems and solutions.
- Recognising the cases in which such complex disadvantages occur is an important step towards addressing them, as it is the implementation of specific programmes that will foster context-specific solutions.

Chapter 6: Access to Justice Internationally: Directions and Pathways

The breadth and diversity of work that has been undertaken to improve access to justice and legal aid strategies for the accused and for victims is remarkable. Efforts in these regards are especially topical now at the global level in the context of the negotiations taking place at the UN on the Post-2015 Development Agenda. Building on this, the personal and professional commitment to justice on the part of people in the legal profession, civil society organisations and in wider communities is expected to soon rest on concrete political and financial support from governments – under the current version of the Post-2015 Development Agenda states affirm their determination to 'ensure that all human beings can fulfil their potential in dignity and equality' and to 'mobilise the means required to implement this Agenda through a revitalised Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people.'

Apart from occupying an explicit place in the UN Sustainable Development Goals (SDGs), access to justice and the rule of law are key to the achievement of many other goals of the Post-2015 Agenda because they are of fundamental importance for the empowerment of the poor and marginalised. Access to justice and the rule of law create the conditions that enable individuals and communities to challenge the decisions of governments and others, which affect their lives, in sectors such as education, non-discrimination, decent work, security of person, environmental protection etc. Global commitment, however, needs to be contextualised to match the characteristics and needs of justice at the local level. These considerations point to the timeliness of this project and to the importance of making informed policy choices that build on the successes and failures of solutions adopted in other jurisdictions, while adapting those to specific circumstances.

The research and survey responses confirmed the cautions highlighted in the 2014 report for the IBA Access to Justice and Legal Aid Committee that, in practice, most of the time, barriers interact with reciprocal effects that intensify their impact and that no single strategy is sufficient by itself to overcome barriers to access to justice. In examining the strategies that are used to tackle different types of barriers to access justice (including those related to the more focused topic of this report), two important considerations that are emphasised in the current SDGs debates are relevant for this report:

- There is a degree of universality about access to justice and the rule of law, which should be balanced against context specificity. Barriers to access to justice and solutions to overcome them should be conceptualised, formulated and applied with both universality and particularity in mind.
- The multi-dimensional nature and impact of access to justice highlights the importance of measurement of progress, which is a core component of the Post-2015 Development Agenda. Such measurement should rest on both quantitative data reflecting institutional performance (e.g. length of proceedings and backlog; length of pre-trial detention; proportion of resources

available for legal aid; ratio of number of cases per judge) and qualitative data providing the individuals' experience of the justice system, be they accused or victim.

In trying to find the balance between universality and context specificity in relation to barriers and solutions to improve access to legal aid for the accused and redress for victims, some general observations can be made:

- The international context for access to justice and legal aid is likely to be profoundly influenced by the UN Sustainable Development Agenda for 2015-2030, and particularly Goal 16 of that Agenda, which identifies access to justice and the rule of law as core aims to be achieved. There will thus be a clear and strong point of reference against which the commitments of states to improve access to justice and the rule of law might be measured.
- The legal profession can play a strategic role in the context of the achievement of Goal 16 with regard to promoting the rule of law and ensuring equal access to justice for all, including through cooperation with other stakeholders such as from civil society, academia and international organisations.
- The successful involvement of other stakeholders rests on two important pillars: a formal recognition of the role to be played by non-state, non-professional actors in providing legal aid services; and the set-up of mechanisms (including monitoring and evaluation mechanisms) that guarantee quality standards for legal aid services.
- The effectiveness of the legal aid system for both the accused and the victims can be maximised through coordinated action between justice agencies and legal professionals, and professionals from other sectors, such as health, social services and victim support workers.
- Training and education – both legal training and sensitisation programmes – are an important ingredient of achieving access to justice and enabling effective functioning of the legal aid system.
- Regular collection, monitoring and publication of data, especially disaggregated information by gender, age, socio-economic status and geographical distribution, allow the identification of problems and best practices to overcome them. Sharing this data internationally can make the process more effective.
- Multiple and complex barriers to legal aid provision need to be addressed carefully, especially where they involve dualities that render a person both accused and victim. There is a need to understand how these barriers operate in the specific context and the necessity of solutions that work for the particular circumstances.
- Across all jurisdictions there is room for improvement in standards and practices to facilitate access to justice, access to legal aid and redress for victims of violence. An approach that cuts across all these areas, and which identifies good and effective practices, provides opportunities for and constructive cooperation between, especially (though not limited to), states and legal professional bodies.

In the months and years ahead there are likely to be challenges – moral, legal, economic, social and political – of profound human and humanitarian significance. At the time of writing, thousands of refugees are arriving in Europe, fleeing war in Syria and elsewhere, and it is very unclear what

decisions European and other countries will make about the futures of those arriving, those seeking to leave conflict zones, and indeed of the legal and political arrangements that bind European states together and govern international commitments in relation to those seeking asylum. But what is clear is that principles of justice and compliance with the rule of law will – and must – remain of the utmost importance as these challenges are faced, and that the international commitments to access to justice and legal aid so clearly defined in UN Principles on Access to Legal Aid will be central to the security and well-being of hundreds of thousands, if not millions, of the most vulnerable people, wherever they find themselves in the world.

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Further sources for examples

The sources for a number of the examples in the text boxes in the report can be found in the selected literature above. The lists below provide sources for the remaining examples in the report's text boxes. The sources below are listed by the short form source titles used in the text boxes the report. All URLs current at September 2015.

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