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Commission on Crime Prevention and Criminal Justice

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Agenda item 5

Use and application of United Nations standards and norms in crime prevention and criminal justice

Burkina Faso and Nigeria: draft resolution

The Commission on Crime Prevention and Criminal Justice recommends to the Economic and Social Council the adoption of the following draft resolution:

International cooperation for the improvement of access to legal aid in criminal justice systems in Africa

The Economic and Social Council,

Recalling the Universal Declaration of Human Rights,¹ which enshrines the key principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, along with all the guarantees necessary for the defence of anyone charged with a penal offence,

Recalling also the International Covenant on Civil and Political Rights,² in particular article 14, which states that everyone charged with a criminal offence shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law and to minimum guarantees, including to be tried without undue delay,

Bearing in mind the Standard Minimum Rules for the Treatment of Prisoners,³ approved in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of

¹ General Assembly resolution 217 A (III).

² General Assembly resolution 2200 A (XXI), annex.

³ *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955: report prepared by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), annex I.A; and Economic and Social Council resolution 2076 (LXII).



13 May 1977, according to which an untried prisoner shall be allowed to receive visits from his legal adviser,

Bearing in mind also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁴ principle 11 of which states that a detained person shall have the right to be assisted by counsel as prescribed by law,

Bearing in mind further the Basic Principles for the Treatment of Prisoners⁵ and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules),⁶

Bearing in mind further the Basic Principles on the Role of Lawyers,⁷ in particular principle 1, which states that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings,

Recalling its resolution 1997/36 of 21 July 1997, on international cooperation for the improvement of prison conditions, in which it took note of the Kampala Declaration on Prison Conditions in Africa,⁸

Recalling also its resolution 1998/23 of 28 July 1988, on international cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing, in which it noted that the International Conference on Community Service Orders in Africa, held at Kadoma, Zimbabwe, from 24 to 28 November 1997, had adopted the Kadoma Declaration on Community Service,⁹

Recalling further its resolution 1999/27 of 28 July 1999 on penal reform, in which it took note of the Arusha Declaration on Good Prison Practice,¹⁰

Recalling further its resolution 2004/25 of 21 July 2004 on the rule of law and development: strengthening the rule of law and the reform of criminal justice institutions, with emphasis on technical assistance, including in post-conflict reconstruction, and its resolution 2005/21 of 22 July 2005 on strengthening the technical cooperation capacity of the United Nations Crime Prevention and Criminal Justice Programme in the area of the rule of law and criminal justice reform,

Bearing in mind the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice,¹¹ especially paragraph 18 of the Declaration, in which Member States are called upon to take steps, in accordance with their domestic laws, to promote access to justice, to consider the provision of legal aid to those who need it and to enable the effective assertion of their rights in the criminal justice system,

⁴ General Assembly resolution 43/173, annex.

⁵ General Assembly resolution 45/111, annex.

⁶ General Assembly resolution 45/110, annex.

⁷ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex.

⁸ Economic and Social Council resolution 1997/36, annex.

⁹ Economic and Social Council resolution 1998/23, annex.

¹⁰ Economic and Social Council resolution 1999/27, annex.

¹¹ General Assembly resolution 60/177, annex.

Bearing in mind also its resolution 2006/21 of 27 July 2006 on the implementation of the Programme of Action, 2006-2010, on strengthening the rule of law and the criminal justice systems in Africa, and its resolution 2006/22 of 27 July 2006, in which it welcomed the Programme of Action, 2006-2010, adopted by the Round Table for Africa, held in Abuja on 5 and 6 September 2005, in particular the actions on penal reform and alternative and restorative justice,

Having regard to the regional efforts in the promotion of basic rights of prisoners, as considered by the Pan-African Conference on Penal and Prison Reform in Africa, held in Ouagadougou from 18 to 20 September 2002, and the Latin American Conference on Penal Reform and Alternatives to Imprisonment, held in San José from 6 to 8 November 2002, and pursued by the African Union and the Organization of American States, as well as the Asian Conference on Prison Reform and Alternatives to Imprisonment, held in Dhaka from 12 to 14 December 2002,

Noting the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and Other Service Providers in Africa, held in Lilongwe from 22 to 24 November 2004,

Taking note of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, contained in annex I to the present resolution, and the Lilongwe Plan of Action for the implementation of the Declaration, contained in annex II to the present resolution,

Alarmed at the proportion of prisoners detained for long periods of time in many African countries without being charged or sentenced and without access to legal advice or assistance,

Concerned that prolonged incarceration of suspects and prisoners without providing them with access to legal aid or to the courts violates the basic principles of human rights,

Recognizing that providing legal aid to suspects and prisoners may reduce the length of time suspects are held at police stations and detention centres, in addition to reducing the prison population, prison overcrowding, and congestion in the courts,

Mindful that many Member States lack the necessary resources and capacity to provide legal assistance for defendants and suspects in criminal cases,

Recognizing the impact of action by civil society organizations in improving access to legal aid in criminal justice and in respecting the rights of suspects and prisoners,

1. *Notes* the progress made by Member States and the recent efforts by some in the provision of legal assistance for defendants and suspects in criminal cases;
2. *Encourages* Member States implementing criminal justice reform to promote the participation of civil society organizations in that endeavour and to cooperate with them;
3. *Commends* the initiation by the United Nations Office on Drugs and Crime of work focused at providing long-term sustainable technical assistance in the area of criminal justice reform to Member States in post-conflict situations, in

particular in Africa, in cooperation with the Department for Peacekeeping Operations of the Secretariat, and the increased synergy between the two entities;

4. *Requests* the United Nations Office on Drugs and Crime, in cooperation with relevant partners, to continue to provide advisory services and technical assistance to Member States, upon request, in the area of penal reform, including restorative justice, alternatives to imprisonment, development of an integrated plan for the provision of legal assistance including paralegals and similar alternative schemes to provide legal aid for persons in communities, including victims, defendants and suspects at all critical stages in criminal cases, and legislative reforms that guarantee legal representation in accordance with international standards and norms;

5. *Also requests* the United Nations Office on Drugs and Crime to assist African States, upon request, in their efforts at implementing the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa;

6. *Further requests* the United Nations Office on Drugs and Crime to convene a meeting of experts, selected on the basis of equitable geographical representation, to study ways and means of strengthening access to legal aid in the criminal justice system, as well as the possibility of developing an instrument such as a declaration of basic principles or a set of guidelines for improving access to legal aid in criminal justice systems, taking into account the Lilongwe Declaration;

7. *Requests* the Commission on Crime Prevention and Criminal Justice to discuss penal reform and the reduction of prison overcrowding, including through the provision of legal aid in criminal justice systems, at its eighteenth session, in the context of its thematic discussion, with a view to achieving greater international cooperation in that area.

Annex I***Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa**

Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa

Lilongwe, Malawi

November 22-24, 2004

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

Preamble

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

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

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

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system simply does not exist as it applies to the vast majority of persons affected by the criminal justice system;

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

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

Recalling the Resolution of the African Charter of Fundamental Rights of Prisoners adopted by the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice held at Addis Ababa, Ethiopia in March, 2004 and its recommendations for its adoption by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice to be held in Bangkok, Thailand in April, 2005;

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

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

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

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

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

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

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

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

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

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

All governments have the primary responsibility to recognise and support basic human rights, including the provision of and access to legal aid for persons in the criminal justice system. As part of this responsibility, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children, and in so doing empower them to access justice. Legal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.

2. *Sensitizing all criminal justice stakeholders*

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

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

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

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

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

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

Traditional and community-based alternatives to formal criminal processes have the potential to resolve disputes without acrimony and to restore social cohesion within the community. These mechanisms also have the potential to reduce reliance upon the police to enforce the law, to reduce congestion in the courts, and

to reduce the reliance upon incarceration as a means of resolving conflict based upon alleged criminal activity. All stakeholders should recognise the significance of such diversionary measures to the administration of a community-based, victim-oriented criminal justice system and should provide support for such mechanisms provided that they conform to human rights norms.

6. *Diversifying legal aid delivery systems*

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

7. *Diversifying legal aid service providers*

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

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

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

9. Guaranteeing sustainability of legal aid

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

10. Encouraging legal literacy

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

Annex II*

Lilongwe Plan of Action

The participants recommend the following measures as forming part of a Plan of Action to implement the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice system in Africa.

The document is addressed to governments and criminal justice practitioners, criminologists, academics, development partners as well as non-governmental organizations, community based organizations and faith based groups active in this area. It is meant to be a source of inspiration for concrete actions.

LEGAL AID FRAMEWORK

Institution building

GOVERNMENTS should introduce measures to:

- Establish a legal aid institution that is independent of government justice departments eg: legal aid board/commission that is accountable to parliament.
- Diversify legal aid service providers, adopting an inclusive approach, and enter into agreements with the Law Society as well as with university law clinics, non-governmental organizations (NGOs), community-based organizations (CBOs) and faith-based groups to provide legal aid services.
- Encourage lawyers to provide pro bono legal aid services as an ethical duty.
- Establish a legal aid fund to administer public defender schemes, to support university law clinics; and to sponsor clusters of NGOs/CBOs and others to provide legal aid services throughout the country, especially in the rural areas.

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- Agree minimum quality standards for legal aid services and clarify the role of paralegals and other service providers by:
 - developing standardized training programmes
 - monitoring and evaluating the work of paralegals and other service providers
 - requiring all paralegals operating in the criminal justice system to submit to a code of conduct
 - establishing effective referral mechanisms to lawyers for all these service providers.

Public awareness

Governments should introduce measures to:

- Incorporate human rights and 'Rule of Law' topics in national educational curricula in accordance with the requirements of the United Nations Decade of Human Rights Education.
- Develop a national media campaign focusing on legal literacy in consultation with civil society organizations and media groups.
- Sensitise the public and justice agencies on the broadened definition of legal aid and the role all service providers have to play (through TV, radio, the printed media, seminars and workshops).
- Institute one day a year as 'Legal Aid Day'

Legislation

Governments should:

- Enact legislation to promote the right of everyone to basic legal advice, assistance and education, especially for victims of crime and vulnerable groups.
- Enact legislation to establish an independent national legal aid institution accountable to Parliament and protected from executive interference.
- Enact legislation to ensure the provision of legal aid at all stages of the criminal justice process.

- Enact legislation to recognize the role of non-lawyers and paralegals and to clarify their duties.
- Enact legislation to recognize customary law and the role non State justice fora can play in appropriate cases (ie where cases are diverted from the formal criminal justice process)

Sustainability

Governments should introduce measures to:

- Diversify the funding-base of legal aid institutions that should be primarily funded by governments, to include endowment funds by donors, companies and communities.
- Identify fiscal mechanisms for channelling funds to the legal aid fund, such as:
 - recovering costs in civil legal aid cases where the legal aid litigant has been awarded costs in a matter and channelling such recovered costs into the legal aid fund
 - taxing any award made in civil legal aid cases and channelling the moneys paid into the legal aid fund
 - fixing a percentage of the State's criminal justice budget to be allocated to legal aid services.
- Identify incentives for lawyers to work in rural areas (eg tax exemptions / reductions).
- Require all law students to participate in a legal aid clinic or other legal aid community service scheme as part of their professional or national service requirement.
- Request the Law Society to organize regular circuits of lawyers around the country to provide free legal advice and assistance.
- Promote partnerships with NGOs, CBOs, faith-based groups and, where appropriate, local councils.

LEGAL AID IN ACTION

In the police station

Governments should introduce measures to:

- Provide legal and/or paralegal services in police stations in consultation with the Police Service, the Law Society, university law clinics and NGOs. These services might include:
 - providing general advice and assistance at the police station to victims of crime as well as accused persons
 - visiting police cells or lock-ups (*cachots*)
 - monitoring custody time limits in the police station after which a person must be produced before the court
 - attending at police interview
 - screening juveniles for possible diversion programmes
 - contacting / tracing parents / guardians / sureties
 - assisting with bail from the police station.

- Require the police to co-operate with service providers and advertise these services and how to access them in each police station.

At court

Governments should introduce measures to:

- Draw up rosters for lawyers to attend court on fixed days in consultation with the Law Society and provide services free of charge.
- Encourage the judiciary to take a more pro-active role in ensuring the defendant is provided with legal aid and able to put his/her case where the person is unrepresented because of indigency.
- Promote the wider use of alternative dispute resolution and diversion of criminal cases and encourage the judiciary to consider such options as a first step in all matters.

- Encourage non-lawyers, paralegals and victim support agencies to provide basic advice and assistance and to conduct regular observations of trial proceedings.
- Conduct regular case reviews to clear case backlogs, petty cases and refer/divert appropriate cases for mediation; and convene regular meetings of all criminal justice agencies to find local solutions to local problems.

In prison

Governments should introduce measures to ensure that:

- Magistrates/judges screen the remand caseload on a regular basis to make sure that people are remanded lawfully, their cases are being expedited, and that they are held appropriately.
- Prison officers, judicial officers, lawyers, paralegals and non-lawyers conduct periodic census to determine who is in prison and whether they are there as a first rather than a last resort.
- Custody time limits are enacted.
- Paralegal services are established in prisons. Services should include:
 - legal education of prisoners so as to allow them to understand the law, process and apply this learning in their own case
 - assistance with bail and the identification of potential sureties
 - assistance with appeals
 - special assistance to vulnerable groups, especially to women, women with babies, young persons, refugees and foreign nationals, the aged, terminally and mentally ill etc.
- Access to prisons for responsible NGOs, CBOs and faith-based groups is not subject to unnecessary bureaucratic obstacles.

In the village

Governments should introduce measures to:

- Encourage NGOs, CBOs and faith-based groups to train local leaders on the law and constitution and in particular the rights of women and

children; and in mediation and other alternative dispute resolution (ADR) procedures.

- Establish referral mechanisms between the court and village hearings. Such mechanisms might include:
 - diversion from the court to the village for the offender to make an apology or engage in a victim-offender mediation;
 - referral from the court to the village to make restitution and/or offer compensation
 - appeals from the village to the court.
- Establish a Chief's Council, or similar body of traditional leaders, in order to provide greater consistency in traditional approaches to justice.
- Record traditional proceedings and provide village hearings ('courts') with the tools for documenting proceedings.
- Provide a voice for women in traditional proceedings.
- Include customary law in the training of lawyers.

In post-conflict societies

Governments should introduce measures to:

- Recruit judges, prosecutors, defence lawyers, police and prison officers in peace-keeping operations and programmes of national reconstruction.
 - Include the services of national NGOs, CBOs and faith-based groups in the re-establishment of the criminal justice system especially where the need for speed is paramount.
 - Consult with traditional, religious and community leaders and identify common values on which peace-keeping should be based.
-