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Access to Justice: The Use of International Law Clinics to Advance the Case for Vulnerable Members of Society

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I am happy to be speaking tonight because I am involved in clinical work. While human rights and community work have always been a passion of mine, my own clinical experience as a law student as well as my experience supervising clinical students has defined and given direction to this passion. For me, clinical work is equal to human rights work. It is on that note that I want to introduce the topic of my address. I want to speak about access to justice and the use of international law clinics to advance the case for vulnerable members of society. Law clinics exist because there are people who need access to justice.

Thirteen years ago, on a date in February 1997, I ran into the office of Ms. Beverly Franks. Ms. Franks was the Director of the Legal Aid Clinic at the University of the Western Cape (UWC Legal Aid Clinic) in Cape Town, South Africa.¹ It was my final year of law school and an important time in the history of South African politics.² It was a turning point for black South Africans and by

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1. The UWC Legal Aid Clinic is one of the leading clinics in South Africa. The twin aims of the Clinic are to provide education to students and legal services to the community it serves. *Faculty of Law: Legal Aid Clinic*, U. W. CAPE, http://www.uwc.ac.za/index.php?module=cms&action=showfulltext&id=gen20Srv23Nme0_2313_1270816331&parent=gen11Srv7Nme54_8909_1210050527&menustate=faculty_law (last visited Apr. 16, 2011).

2. The 1990s marked the end of apartheid in South Africa. *Background Note: South Africa*, U.S. DEP'T ST. (Mar. 11, 2011), <http://www.state.gov/r/pa/ei/bgn/2898.htm>. The policy of apartheid, promulgated by the National Party since 1948, was a series of legislation that codified and enforced racial separation in South Africa. *Id.* By the late 1980s, it became clear that apartheid was

extension, black Namibians.³ It was an opportunity for the younger generations of Namibians, such as myself, to study law as our own university in Namibia did not yet have a law school. In any event, the UWC Legal Aid Clinic was part of an Advanced Civil Procedure course and an elective at the University of the Western Cape. Only those who made it through the tough interview with Beverly Franks, who had received her LL.M from Georgetown University, could get into the clinical program. I was late, but I must have impressed her, because I made it into the program.

The Clinic worked primarily in the vulnerable communities of Cape Town.⁴ That year, I had my first experience dealing with real files, real clients, and real responsibilities. My time with the Clinic changed my attitude, sense of professionalism, and ideas about responsibility and ethics in legal practice. But it also made a difference in the type of law I wanted to practice. I always tell my students, everybody wants to drive the huge car and have the big house, but who will take care of the vulnerable people of our communities? The Legal Aid Clinic is the platform to hone that culture in our students.

When the University of Namibia Legal Aid Clinic (UNAM Legal Aid Clinic) was established in 2004,⁵ the idea was to make the

unsustainable. *See* LEONARD THOMPSON, *THE HISTORY OF SOUTH AFRICA* 241–44 (3rd ed. 2000). In 1990, the government lifted the ban on the African National Congress (ANC) political party, whose goals were to eliminate restrictions based on color. *Background Note: South Africa, supra*. Several days later, Nelson Mandela, one of the leaders of the anti-apartheid movement, was released after twenty-seven years in prison. *Id.*; THOMPSON, *supra*, at 247. The two main apartheid laws were repealed in 1991. *Background Note: South Africa, supra*. The country's first post-apartheid elections were held in April 1994, resulting in the election of Nelson Mandela. *Id.* In 1996, a new constitution, which guaranteed a wide variety of rights in its Bill of Rights, was approved and subsequently entered into force in 1997. *Id.*

3. In 1920, South Africa acquired full power of administration and legislation over Namibia (then called South West Africa) under the terms of Article 22 of the Covenant of the League of Nations and a League Council mandate agreement. *Background Note: Namibia, U.S. DEP'T ST.* (Apr. 4, 2011), <http://www.state.gov/r/pa/ei/bgn/5472.htm>.

4. *Faculty of Law: Legal Aid Clinic, U. W. CAPE*, http://www.uwc.ac.za/index.php?module=cms&action=showfulltext&id=gen20Srv23Nme0_2313_1270816331&parent=gen11Srv7Nme54_8909_1210050527&menustate=faculty_law (last visited Apr. 16, 2011).

5. *UNAM Legal Aid Clinic to Offer Free Services to the Poor, NAMIBIA ECONOMIST*, Sept. 3, 2004, available at <http://www.economist.com.na/index.php?>

law, legal services, and litigation accessible to the vulnerable members of our communities. The Clinic was intended to address the right to non-discrimination on the basis of status and sought to make equality and human dignity a reality for all people. Finally, the Clinic looked to ensure that people had knowledge and understanding of the law. On November 5, 2010, in the presence of the Chief Justice of Namibia, Honorable Peter Shivute, as well as a widely-known senior member of the bar, Dave Smuts, and some other luminaries of the profession, the clinical faculty of the University of Namibia took time and honored our Legal Aid Clinic students.⁶ We wanted to acknowledge the seventy students of the class of 2010 for their work on 150 cases during which they had conducted over twenty-five face-to-face consultations with clients. Recall that these clients may be hungry; they may have walked long distances to get to the office for the consultation; they may even be smelly because they do not have soap or cream. Above all, they are desperate for help. These students wrote a combined total of 224 letters of demand, responses to opponents' letters, and memorandums of advice. Our students worked on a variety of matters including unfair dismissals relating to both HIV/AIDS and unfair labor practices, contract breaches, divorces, maintenance, protection orders in domestic violence cases, succession disputes, and debt collections, to name a few. For our clients, these were bread and butter issues.

The seventy students were supervised by three clinical faculty members. I supervised a total of fifty-five students divided into six groups. I worked with them for a combined total of twenty-four hours a week in addition to my other responsibilities as a professor. It was not easy. The task was made more difficult because there were limited resources. You could not call a client because we did not have airtime for the phones. You could not travel for consultations

option=com_content&view=article&id=13738:unam-legal-aid-clinic-to-offer-free-services-to-the-poor&catid=556:archives.

6. Peter Shivute was appointed as Judge President of Namibia's High Court in 2003. *Namibia: Shivute Takes up Reins at High Court*, ALLAFRICA, INC., June 10, 2003. He obtained his first law degree at Cambridge University's Trinity Hall in 1991. *Id.* In 1996, he added a Master's degree in law from Warwick University. *Id.* Dave Smuts is the founding Director of the LAC and current Chairperson of the Legal Assistance Trust. *Trustees*, LEGAL ASSISTANCE CENTRE-NAMIBIA, <http://www.lac.org.na/trustees.html> (last visited Apr. 16, 2011). He established the LAC in July 1988 and stepped down in 1992 to practice full-time as an advocate at the Windhoek Bar. *Id.* He remained a trustee and took over as Chairperson in 1996. *Id.* In February 2011, Dave Smuts was permanently appointed to the High Court of Namibia.

because there was no transportation budget. Postage had to be paid out-of-pocket. In addition to limited resources for the Clinic, we faced our own limitations as extra work did not translate into extra pay. Despite these limitations, our work was motivated by our belief that it was our commitment in what we do that matters.

The twenty part-time Clinic students are deputy directors at the Bank of Namibia, chief development planners in various government Ministries, directors in the Office of the President, public prosecutors, legal officers, and radio personalities. Similar to the jobs held by our part-time students, our full-time students have all applied for positions to prosecute, become magistrates, work in corporate Namibia, and continue with their masters. Despite their different backgrounds and individual experiences, all of the students saw the Legal Aid Clinic as a vehicle through which to do community work and undertake social responsibility as well as gain practical legal experience. Above all, they saw what they so badly wanted to become—a lawyer with a client. The students learned the code of ethics. They learned about drafting letters and pleadings. They met international lawyers through a much anticipated DLA Piper workshop.⁷ They learned to respect each other. They learned how to work in a team even if they did not always agree. The students referred to our supervision and the Clinic as “tough love,” that “it’s business, nothing personal,” that “it was too demanding,” that it was a “full-time job,” and that “it was an eye-opener for what lies ahead.” In the end though, the students must have felt the experience was worth the effort, as they all want to come back at some point and work full-time for the Legal Aid Clinic.

The work of the UNAM Legal Aid Clinic, or any law clinic in the world, centers around the reality of the vulnerable client. Quintessentially, it is about the promotion and protection of human rights. Conceptually, human rights are no longer only about shelter, food, a clean environment, the right to vote, and political activity. Increasingly, for them to flourish, these rights also need to

7. In August 2010, DLA Piper lawyers launched a new pro bono initiative in collaboration with the University of Maryland School of Law International and Comparative Law Clinic to further access to justice, economic development, and legal education. *Namibia Economic Empowerment and Access to Justice Project*, DLA PIPER, http://www.dlapipercsreview.com/pro_bono/new_perimeter/our_work/social_and_economic_empowerment/namibia_economic_empowerment_and_access_to_justice/ (last visited Apr. 16, 2011) [hereinafter *Namibia Empowerment*].

address the issue of access to justice. Similarly, civil and political rights are no longer enough to drive the human rights agenda. There is now a need to ensure that there is protection of socio-economic rights. Without these rights the indivisible, interrelated, and interdependent nature of human rights means nothing.⁸ The debate about the role of international law clinics must, therefore, locate itself within the binary ideas of human rights protection and access to justice. While these two concepts are not mutually exclusive, they require individual mention and assessment. Justice means various things to various people, but we can safely say that it starts with a dispute that requires determination using substantive and procedural law. However, people are not aware of the processes and systems in place to protect them unless they have money for a lawyer. In a country that has been independent for twenty-one years, governed by the rule of law with a supreme Constitution based on equality, peace, and justice,⁹ access to the courts and legal advice should be a priority, but it is not. In a report entitled "Promoting Access to Justice in the High Court of Namibia," Judge President Damaseb said the following: "[T]he public expects a judicial process that is affordable, transparent, accessible, fair, impartial and easy to understand and one that dispenses justice reasonably speedily."¹⁰

Namibia has approximately 107 law firms across the country of which thirty-two are black law firms. Despite this wealth of legal expertise, many people do not have access to justice.¹¹ This is where public interest programs, such as the UNAM Legal Aid Clinic and the Legal Assistance Centre, have stepped in. Since its establishment in 1988, the Legal Assistance Centre (LAC) in Windhoek, Namibia has been the only law centre providing legal services and assistance to the vulnerable and indigent members of our

8. When human rights are described, they are often said to be indivisible, interrelated, and interdependent. DANIEL J. WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY 1* (2010). Several UN organizations describe human rights this way, including the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Population Fund (UNFPA). *What are Human Rights*, OFF. HIGH COMMISSIONER FOR HUM. RTS., [http://www.ohchr.org/en/issues/Pages/What areHumanRights.aspx](http://www.ohchr.org/en/issues/Pages/What%20areHumanRights.aspx) (last visited Apr. 16, 2011); *Human Rights Principles*, UN POPULATION FUND, <http://www.unfpa.org/rights/principles.htm> (last visited Apr. 16, 2011).

9. NAMIB. CONST. Feb. 1990, pbml.

10. Werner Menges, *Call for Court Shake-Up*, NAMIBIAN, Sept. 17, 2010.

11. *Id.*

communities.¹² Following my clinical experience at the University of the Western Cape and before assuming my current position at the University of Namibia, I joined the LAC as a candidate legal practitioner involved in human rights public interest litigation.¹³ The Centre's work primarily focuses on human rights litigation.¹⁴ In recent years, there has been a particular emphasis on HIV/AIDS issues.¹⁵ The Centre has used impact litigation, advocacy, and law reform to deal with these problems.¹⁶ Yet, the Legal Assistance Centre is increasingly faced with a funding shortage which interferes with its ability to provide services to underrepresented communities. The government has also established a legal aid program that works to create legislation to benefit unrepresented individuals but is narrowly tailored, focusing only on criminal litigation for unrepresented defendants.¹⁷ The UNAM Legal Aid Clinic similarly seeks to promote and advocate the right to access to justice on behalf of indigent, underrepresented populations but faces many challenges in the pursuit of this goal.

The biggest challenge the Legal Aid Clinic currently faces is that the idea of a legal aid clinic established within a university is still new to Namibia. There is not sufficient buy-in from higher-level University of Namibia authorities (Vice Chancellor and Pro Vice Chancellor) in the Legal Aid Clinic because they do not sufficiently appreciate its importance. Fortunately, this attitude may be changing as the Legal Aid Clinic forms a significant portion of the final year curriculum. Due to this lack of buy-in, there is a lack of financial support from the University. Moreover, the Legal Aid Clinic does not have a separate budget which is problematic for two reasons. First, because of the lack of a separate budget, the Clinic is entirely dependent on the University for all of its funding. Second, because of the nature of the work of the Legal Aid Clinic, the Clinic should have a separate budget to finance the Clinic in an appropriate manner.

12. *See About*, LEGAL ASSISTANCE CENTRE-NAMIBIA, <http://www.lac.org.na/about/default.html> (last visited Apr. 16, 2011).

13. The Legal Assistance Centre first opened on July 9, 1988, under the founding Director and now Chairperson, Dave Smuts, SC. *History*, LEGAL ASSISTANCE CENTRE-NAMIBIA, <http://www.lac.org.na/about/history.html> (last visited Apr. 16, 2011). It was first established to deal with human rights abuses by the government under apartheid. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Legal Aid Act (Act No. 29/1990) (Namib.).

In addition to financial challenges, the Clinic is also inadequately staffed. The University is reluctant to appoint a paid, full-time director for the Legal Aid Clinic, but those who currently oversee the Clinic have other commitments that interfere with their ability to devote a sufficient amount of time to student supervision. For example, the fact that University authorities have made me the Acting Director of the Justice Training Centre in addition to my role with the Legal Aid Clinic has made it very difficult to manage my responsibilities effectively.¹⁸

There are also infrastructure constraints. In addition to the fact that there are too few supervisors, the Clinic students have insufficient space to work. These constraints make it even more difficult to manage students because individual attention cannot be devoted to a student's learning, and all students cannot be comfortably accommodated in one room for group discussions and instruction.

The Law Society presents another significant challenge. The Law Society supports the concept of a legal aid clinic by paying for the clinic's administrator and allowing it to work on certain cases by using a request system. But the Society nevertheless has been reluctant to give the Legal Aid Clinic its full blessing for two reasons. The first concerns the Fidelity Fund. The Fidelity Fund reimburses clients who suffer a loss of funds or property entrusted to a legal practitioner, analogous to American malpractice insurance.¹⁹ Namibian law requires private practitioners to apply for a Fidelity Fund Certificate (FFC) and contribute to the Fund.²⁰ Namibian law,

18. See *Research, Publication: Faculty of Law–University of Namibia / UNAM*, U. NAMIBIA, http://www.unam.na/faculties/law/staff_profiles.html (last visited May 2, 2011) (indicating that I am Acting Director of the Justice Training Centre); *Faculty of Law–University of Namibia / UNAM*, U. NAMIBIA, <http://www.unam.na/faculties/law/departments.html> (last visited May 2, 2011) (noting that I am a lecturer in the Private and Procedural Law program, which includes the Legal Aid Clinic).

19. See *The Fidelity Fund*, L. SOC'Y NAMIBIA, http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=35&Itemid=30 (last visited May 2, 2011).

20. Legal Practitioners Act (Act No. 15/1995) § 68(1) (Namib.) (“A legal practitioner practicing or intending to practice on his or her own account or in partnership shall, unless he or she is exempted in terms of section 67, apply in the prescribed form to the secretary of the Law Society for a fidelity fund certificate.”).

however, considers the Legal Aid Clinic a “law centre”²¹ and therefore exempt from the FFC requirement.²² As a condition of granting an exemption to the FFC requirement, the Law Society wants the University to self-insure against any malpractice committed by students. The Clinic is unable to satisfy this requirement because of the aforementioned lack of resources. The second concern the Law Society has relates to the lack of student supervision. The Law Society’s view is that the Society needs to have some kind of oversight of the Legal Aid Clinic in terms of the types of cases taken on and the supervision of students. The Society’s fears are understandable and to some extent justified but the University and the Law Society are making significant progress toward addressing these concerns.

One possible solution to the lack of supervision is to hire a number of additional supervisors. A possible model might include a two-tiered structure. First, the Legal Aid Clinic would hire legal practitioner candidates for attachment.²³ These recent graduates would supervise students, gaining meaningful practical experience and alleviating the Law Society’s concern regarding inadequate student supervision. A second group of more experienced practitioners would supervise the first group. Such a solution, of course, would require additional resources which, as previously mentioned, poses a problem in and of itself.

Hopefully this Symposium will help us address these and other challenges. Our Legal Aid Clinic at the University of Namibia, like all law school clinics, seeks to provide the best possible service for our clients, but for the reasons cited above, we are constrained in our ability to assist everyone who needs our help. Clients call our offices

21. See Legal Practitioners Act (Act No. 15/1995) § 1 (Namib.) (defining a law centre as, *inter alia*, “a centre for clinic legal education in the Faculty of Law at the University of Namibia”).

22. Legal Practitioners Act (Act No. 15/1995) § 67(1) (Namib.) (noting that legal practitioners who work for a law centre are exempt from the requirement to obtain a Fidelity Fund Certificate).

23. After graduation, candidate legal practitioners are required to “attach” themselves to a more experienced practitioner for nine months after which the candidate then writes his qualifying exams and, if successful, becomes a licensed legal practitioner. See *Justice Training Centre (JTC): University of Namibia / UNAM*, U. NAMIBIA, <http://www.unam.na/centres/jtc/curriculum.html> (last visited May 2, 2011); *How to be admitted as a Legal Practitioner*, L. SOC’Y NAMIBIA, http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=29&Itemid=24 (last visited May 2, 2011).

all the time, but sometimes, and regrettably, we have to turn people away. However, this is not a challenge we face alone.

The world is inter-connected. Human rights issues have become increasingly complex and require combined efforts. Individual attempts to resolve human rights problems may get lost in this complexity because these abuses are no longer defined within the confines of the existing normative framework of protection; they are no longer contained within the boundaries of our countries. The issues have become cross-border. Countries are now confronted with money laundering, terrorism, human trafficking, the effects and challenges of HIV/AIDS, tuberculosis, and malaria.²⁴ These issues require a multi-disciplinary and global response. While we know about Doctors Without Borders, lawyers without borders must increase their visibility. The DLA Piper project in Namibia, which seeks to promote economic development and access to justice and improve legal education in-country, presents one such opportunity to improve cross-border legal partnerships.²⁵ Recognizing the strength and potential that legal partnerships offer, the UNAM Legal Aid Clinic needs to leverage its existing partnerships with institutions such as the University of Maryland clinical program, DLA Piper, and other partners in South Africa to better serve the needs of those who seek access to justice.

Our partnership with the Maryland International and Comparative Law Clinic has proved instrumental in the UNAM Legal Aid Clinic being able to provide services to the community in a number of ways. For example, the Maryland Clinic has assisted in teaching and operating the Justice Training Centre and helped further the Centre's mission by drafting a white paper advocating the importance of legal education in Sub-Saharan Africa, with an emphasis on Namibia. The Clinic also assists in serving the indigent, underrepresented populations targeted by the UNAM Legal Aid Clinic by helping women artisans start their own businesses and

24. U.N. Secretary-General, *High-Level Panel on Threats, Challenges and Change, Report of the Secretary-General*, U.N. Doc. A/59/565 (Dec. 2, 2004). This Panel was created by the Secretary-General to provide a comprehensive report on the critical issues relating to collective security in the twenty-first century. *Id.* at 1. The Secretary-General asked the Panel to assess current threats to international peace and security, to examine how existing policies and institutions address those threats, and to make recommendations on how to address these issues. *Id.* The report addresses the problem of HIV/AIDS and other infectious diseases, terrorism, and the proliferation of nuclear, chemical, and biological weapons. *Id.* at 11–14.

25. *Namibia Empowerment*, *supra* note 7.

providing research and advice to the LAC on a range of issues including the human right to water and the property rights of the San, an indigenous people. Finally, the Maryland Clinic also assists the Namibian Paralegal Association with administering a recently received grant and works with DLA Piper in reviewing and editing a new edition of a skills manual used to inform Namibia's disparate population about their rights. The partnership between Maryland Law and Namibian institutions at all levels, including the UNAM Legal Aid Clinic, gives practitioners and professors on the ground space to reflect, plan more effectively, and build our capacity so we can better serve more clients.

In addition to our international partnerships, we must also create local partnerships with the Law Society of Namibia,²⁶ judges, UNAM Law School, and the government. In the end, we all want to live honestly, not injure one another, and give to each person that which belongs to him or her. These values are the currency for natural justice. If a person has a right, the courts must provide the remedy.

26. *Mission*, L. SOC'Y NAMIBIA, http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=3&Itemid=9 (last visited Apr. 16, 2011).