

“ A bone for a bone.”
(Timor-Leste proverb)



RULE OF LAW

IN TIMOR-LESTE

JUNE 2007



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'Promoting the Rule of Law involves ... changing culture as much as it does creating new institutions ... Without a widely shared cultural commitment to the idea of the Rule of Law, courts are just buildings, judges just public employees, and constitutions just pieces of paper.'

-- James Dobbins, Seth G. Jones, Keith Crane & Beth Cole DeGrasse, *The Beginner's Guide to Nation-Building* (Santa Monica, RAND Corporation, 2007), 88.

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A. EXECUTIVE SUMMARY

After hundreds of years of Portuguese colonial rule, followed by 25 years of brutal Indonesian occupation, Timor-Leste voted for its independence in an UN-administered referendum process in 1999. However, what ensued was months of violence, displacement and destruction. The intervention of an international military force and the exodus of the Indonesians finally brought a very fragile peace. From late 1999 to May 2002, the United Nations Transitional Administration in Timor-Leste (UNTAET) governed the territory, with a combined function of peacekeeping and civil administration (including the establishment of a formal judicial system). A Serious Crimes Unit was also formed to investigate and, when appropriate, initiate criminal prosecutions to address the violence surrounding the vote for independence. After a long consultative process between the UN and Timorese representatives, an independent Commission for Reception, Truth and Reconciliation (CAVR) was formed to investigate human rights violations in Timor-Leste from 1974 to 1999. In May 2002, the country formally became the world's newest nation and one of the most promising constitutional democracies.

Systemic weaknesses in the political, economic, and legal infrastructure festered, in spite of pro-active efforts by international and domestic actors, causing the barely four-year-old country to descend into violence once again in April and May 2006. An Australian-led contingent of 2,200 foreign troops was deployed to reestablish some level of security. There is no doubt that the lack of substantive progress towards the Rule of Law, and the development of a competent and responsive justice system in Timor-Leste contributed to this regression, and overcoming violence has indeed proven to be among the country's most serious challenges.

In this recently deteriorated environment and in light of lingering post-conflict circumstances and crises USAID Timor-Leste requested an experienced team to travel to Timor-Leste to conduct a Rule of Law Assessment and to consider recommendations stemming from the October 2006 USAID funded Conflict Vulnerability Assessment. The United States based RIGHTS Consortium was tasked with conducting the assessment. The team was led by representatives from Freedom House and the American Bar Association (ABA) Rule of Law Initiative, and included: two representatives from USAID (one based in Washington D.C. and the other in Timor-Leste); one representative from AusAID; and two Timorese program implementers. In addition to examining the progress of Rule of Law reform efforts in Timor-Leste, the team was asked to determine whether concentration by USAID on the Rule of Law sector remains an appropriate strategy given the findings of the assessment, and to further determine whether the United States Government has a comparative advantage in this regard. The assessment was conducted through the prism of USAID's *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*.¹ Lastly, the team was asked to also provide feedback on the impact of ongoing USAID-funded Rule of Law programs, and to suggest any appropriate modifications thereto, and/or new programming.

METHODOLOGY:

The tri-national, multi-disciplinary assessment team spent three weeks conducting open-ended interviews with over 100 relevant actors at both state and local levels, including: village elders and Suco leaders; representatives from government ministries, media outlets, religious organizations, civil society, and myriad nongovernmental organizations; as well as representatives from the United Nations Mission in Timor-Leste (UNMIT) and other international agencies and missions. Though based in Dili, team members traveled to both Suai (and the nearby border with Indonesia) and Baucau. Led by its Timor-Leste assessment team members, they identified the over-arching factors and system breakdowns impeding progress toward the Rule of Law, and devised recommendations to address those breakdowns. These findings are a summary of an extremely complicated and fluid environment.

¹ USAID, Draft USAID Rule of Law Strategic Framework. 2007.

ISSUES:

The assessment team was encouraged and inspired by the dedication of many of the individuals they encountered in Timor-Leste, who endeavor to establish a Rule of Law culture and functioning systems amid seemingly overwhelming and complicated obstacles. Specific accomplishments noted by the team include: the establishment of a law faculty at the national university; a centralized national legal training center for judicial actors, and the graduation of 27 prosecutors, judges and public defenders; the high quality of legal analysis provided by several civil society groups, especially the Judicial Systems Monitoring Program (JSMP); impressive work in some districts by legal aid providers; and the passage of several key pieces of legislation, especially the criminal and civil procedure codes. Specific breakdowns in the reform efforts were also noted, but must be viewed in the context of broader issues that continue to impede systemic, comprehensive reform:

- **Order and security:** Security issues in Timor-Leste remain a key impediment to the administration of justice, even with the benefit of international responsibility for policing and peacekeeping. The security situation is further complicated by the pervasive entrenchment of gang activity and violence. Violence has increased in Timor-Leste since the 2007 parliamentary elections, though systemic insecurity and the potential for violence has been an on-going problem.
- **Legitimacy:** Despite significant intervention by the international community, Timor-Leste has not developed an open and democratic judicial process. The judicial system is plagued by unclear procedures in the law, unclear procedures in practice, and poor outreach and public education mechanisms. The Timor-Leste judicial system is not perceived to be responsive or independent. Some legislation in Timor-Leste has been “cut and pasted” by international experts from their own domestic laws, without sensitivity to Timorese culture and context.
- **Checks and balances:** In general, Timor-Leste lacks effective and coordinated oversight institutions, despite great promise in this area. Oversight mechanisms exist, such as the Superior Councils, Provedor’s Office, and Prosecutor’s office, but they are hampered by resource, staffing, and competency challenges. The Provedor’s Office in particular is a critical independent oversight mechanism and is uniquely mandated to function as an Ombudsman and Human Rights Commission by fighting corruption, promoting good governance and Rule of Law, protecting human rights, and redressing injustice. Nongovernmental organizations such as the JSMP currently provide important but limited checks and balances.
- **Fairness:** The laws in Timor-Leste are not applied equally. Women, children and other vulnerable groups have difficulty accessing the courts, and receiving fair and impartial treatment and protection. For example, there are dangerously few mechanisms and frameworks in existence to deal with juvenile offenders and victims. Human rights violations remain a concern, especially given the unprofessional and sometimes criminal or corrupt behavior of the police. The Government has been slow to establish an effective and accountable system of justice. Formal courts are effectively functioning in some districts but not others.
- **Effective application:** Without the consistent application and enforcement of effective legal frameworks by judicial actors, there can be no Rule of Law. Despite the geographic positioning of courts, the majority of judicial activity takes place in Dili. Until the recent graduation of trainee judicial actors, even the non-Dili district courts were remotely run by international actors from Dili. This has severely limited access to the courts by those living outside the capital. Effective application of the law has been hampered by the lack of proper budgeting, human resource management, and strategic planning. Finally, in addition to the shortage of trained judges,

prosecutors, private bar and public defenders, there are not enough support personnel, particularly in the regions.

In addition, the team found that several overarching issues are stifling development of Rule of Law in Timor-Leste:

- Inadequacies in infrastructure and bureaucratic systems, and a minimal level of human resources also impede the emergence of a responsive and efficient justice system.
- The extreme poverty in Timor-Leste, coupled with a high illiteracy rate, further complicates efforts to increase access to formal or traditional options for redress and justice.
- The prevalence of the Portuguese language in the courts prevents some Timorese from accessing the judicial system as complainants or as interested members of the public. Although the use of Tetun in the courts has increased over the last few months, the reliance on Portuguese for many official documents and pleadings is complicating the basic functioning, level of professionalism, and accountability of the formal judicial system.

FINDINGS/RECOMMENDATIONS:

Foreign assistance provided by the United States to advance the Rule of Law in Timor-Leste has indeed had a vital impact given the lack of institutions and shortages of qualified legal and judicial personnel after independence. Timor-Leste inherited a barely functioning legal system that was plagued by systemic weaknesses. The USAID Timor-Leste Mission has been especially adept at utilizing creative approaches for providing targeted, foundational, cost-efficient assistance to key justice actors, ministries, and agencies.

Rule of Law programming should remain a priority for U. S. Government funding. Withdrawing financial and programmatic support could have a detrimental effect on the economic development of the country, as well as security and order, democratic development, and the protection of basic human rights for the people of Timor-Leste. Continued funding for existing programs being implemented by Management Sciences for Development (MSD) and The Asia Foundation (TAF) is vital for the functioning of an effective judicial system.

In addition, we have identified the following priority areas for future assistance (several of which are currently being addressed through existing USAID funded programming):

- **Increasing access** by individuals to informal/traditional forms of justice
- **Capacity Building:**
 - Enhancing the quality of legal education by providing technical support to the National Law Faculty
 - Enhancing the technical skills and professional status of justice actors and support staff
- **Supporting land reform** and the necessary conditions for the peaceful return by IDP's to their homes
- **Empowering and supporting civil society, human rights organizations, and individual human rights defenders**
- **Increasing dissemination of public information and outreach efforts** regarding the justice sector.

B. ACRONYMS

<u>Acronym</u>	<u>Full Name</u>
AATL	Associação Advogado de Timor-Leste (Timor-Leste Lawyers Association)
ABA	American Bar Association
ADR	Alternative Dispute Resolution
AJU	Administration of Justice Unit
ASF	Advocats sans Frontier (Lawyers without Borders)
ASEAN	Association of Southeast Asian Nations
AusAID	Australian Agency for International Development
CAVR	Comissão de Acolhimento verdade e Recepção (Commission for Reception, Truth and Reconciliation)
CBF	Capacity Building Facility-- Australia-Timor-Leste
CNRM	National Council of the Maubere Resistance
CoA	Court of Appeals
CoC	Council of Coordination
CoM	Council of Ministers
CPC	Criminal Procedural Code
CRC	Convention on the Rights of the Child
CRC/OP/CS	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRDTL	Constitution of Timor-Leste
CVA	Conflict Vulnerability Report
DDC	Dili District Court
Falintil/FDTL	Timor-Leste Defense Force
FRETILIN	Revolutionary Front of Independent Timor-Leste
GNR	Guarda Nacional Republicana (Republican National Guard of Portugal)
GoA	Government of Australia
GoTL	Government of Timor-Leste
ICCPR	International Covenant on Civil and Political Rights
ICI	International Commission of Inquiry
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IDLO	International Development Law Organization
IDP	Internally Displaced Person
IFES	International Foundation for Election Systems
INAP	National Public Administration Institute
INTERFET	International Force for East Timor
IRI	International Republican Institute
JICA	Japan International Cooperation Agency
JSMP	Judicial System Monitoring Program
JSSP	Justice Sector Strengthening Project
LDRM	Local Dispute Resolution Mechanisms
LRU	Legal Research Unit
LTC	Legal Training Centre
MoI	Ministry of Interior
MoJ	Ministry of Justice
MoPF	Ministry of Planning and Finance

MSD	Management Sciences for Development
MTEF	Medium-term Expenditure Framework
NGO	Non-Governmental Organization
NZAID	New Zealand's International Aid and Development Agency
OIG	Office of Inspector General
OP	Office of the Provedor de Direitos Humanos e Justiça (Office of the Provedor)
OPD	Office of the Public Defender
OPG	Office of the Prosecutor-General
PEO	Professional Ethics Office of the Ministry of Interior
PNTL	National Police of Timor-Leste
PSA	Public Service Association
RoL	Rule of Law
RTTL	Radio-Televisão Timor-Leste
SCJ	Superior Council of the Judiciary
SCP	Superior Council for the Public Prosecution
SIP	Sector Investment Program
SPSC	Special Panels for Serious Crimes
TL	Timor-Leste
TSP	Transitional Support Program
UNDP	United Nations Development Program
UNDP-SJS	UNDP Strengthening the Justice System Program
UNFPA	United Nations Population Fund
UNICEF	United Nations International Children's Fund
UNIFEM	United Nations Development Fund for Women
UNMISSET	UN Mission in support of Timor-Leste
UNMIT	United Nations Integrated Mission in Timor-Leste
UNOTIL	United Nations Office in Timor-Leste
UNPOL	United Nations Police
UNTAET	United Nations Transitional Administration in Timor-Leste
USAID	United States Agency for International Development
USG	United States Government
VOD	Victim-Offender Dialogue
VSS	Victim Support Services
WB	World Bank

C. OVERVIEW

1. INTRODUCTION

Recent elections in Timor-Leste were generally free and fair. However, the results showed that while democracy is progressing, the country remains fragile and Rule of Law in particular remains weak. In fact, the development of Timor-Leste's justice system and Rule of Law has proven to be among the country's most serious challenges. In April and May of 2006 the country experienced an outbreak of violence and the collapse of much of the security infrastructure. In the last few months, the country has endured yet another outbreak of sporadic violence related to the parliamentary elections. The justice sector remains plagued by limited human resources, evolving levels of skill and competence, a lack of monitoring mechanisms, and the limited reach of services to the inhabitants of Timor.

The USAID-funded *Conflict and Vulnerability Assessment* conducted in October 2006 included the recommendation to curtail support to oversight institutions such as the ombudsman, the Inspector General, and the formal justice sector, to instead place greater emphasis on community-level access to justice efforts.² Nevertheless, the Timorese justice sector institutions have put out an emergency appeal to donors to increase investments in the formal justice sector to enable the judiciary to deal with the aftermath of the crisis.

In this rapidly changing environment, USAID Timor-Leste requested a Rule of Law Assessment. The RIGHTS Consortium, represented by Freedom House and the American Bar Association (ABA) were asked to conduct the assessment in order to address the following questions:

- What is the current situation in the Rule of Law sector?
- Is a concentration by USAID on the Rule of Law sector an appropriate strategy given the 2006 conflict assessment, and the USG comparative's advantage?
 - If not, in what areas might USAID be more effective and what areas deserve further review?
 - If so, provide recommendations for making the assistance more effective. In particular, discuss whether the existing programs should be extended, extended with modification, or whether a new project should be developed and put out for competitive bid. The team was also asked to review the Mission's current Rule of Law program in light of the post-crisis circumstances.

2. METHODOLOGY

The tri-national, multi-disciplinary RIGHTS assessment team was composed of 9 core members. The team was led by Mary Greer, ABA Rule of Law Initiative Senior Criminal Law Specialist. She was assisted by co-assessor Alexander Gupman from Freedom House. AusAID and USAID-DC contributed team members Paul Keogh and Susan Pologruto respectively. The team also relied extensively on local expertise. Domingos Mesquita, seconded from MSD, Tiago Sarmiento, former head of JSMP and currently at the Asia Foundation and Ana Lourenco Guterres from USAID-Dili, drove the analysis and provided the basis for recommendations in this report. Additional expertise was provided by Sidonio Freitas, formerly of USAID-Dili and currently working as a consultant. The team was assisted by support staff led by Iryna Poepsel and received support from the following persons in their Washington D.C.

² USAID, Draft USAID Rule of Law Strategic Framework. 2007.

offices: Matt Briggs, Lisa Davis, and Robert Herman at Freedom House, and Aziz Umarov, Igor Mystelman, Brenner Allen, and Simon Conté at ABA.

The assessment included a secondary source review of existing reports on the Rule of Law sector and background on the current context. The assessment incorporated the application of USAID’s *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*.³ During a 15 work-day period, the team met with over 100 individuals, including representatives from approximately 50 institutions.

The assessment team adopted a multi-faceted approach that included trips to two regions: Covalima and Baucau. In addition, the team met representatives from every region in Timor-Leste. In addition to a wide geographic reach, the team met with government officials; private citizens; journalists and media representatives; lawyers; and civil society and international development workers and researchers. Donors and Embassy staff from numerous countries were also visited. In addition, staff monitored a court trial; visited court facilities in Suai, Baucau, and Dili; visited the Indonesian/Timor-Leste border; and visited Internally Displaced Person (IDP) camps to discuss Rule of Law issues relevant to each particular circumstance.

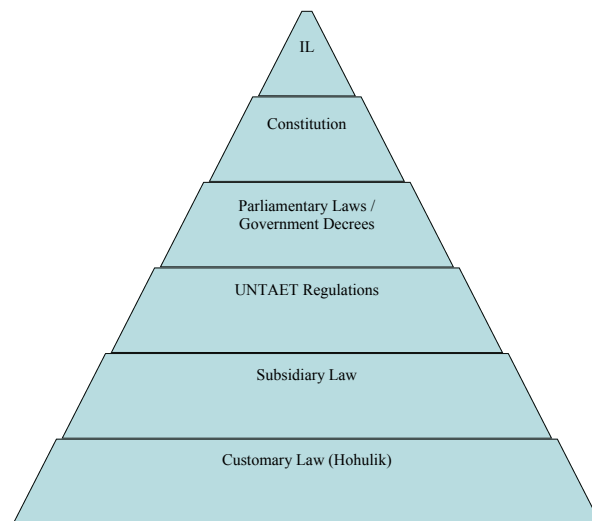
The assessment team faced several challenges while on the ground. The team had difficulty finding quality logistical and translation support due to the timing of the assessment and the demands that the presidential and parliamentary elections were putting on existing human resources in the country. The team was unable to secure a full-time logistician until the final week of the trip and quality translation was not obtained until halfway through the assessment. Several meetings were postponed or cancelled due to conflicts with election-related events. Security was also a concern with the team being advised to avoid certain areas, such as Viqueque, due to the possibility of election-related violence. Despite these challenges, the team was able to meet with most key individuals identified.

3. LEGAL FRAMEWORK OF TIMOR-LESTE

i. The Legal Structure

The Timor-Leste legal system is a complex, hybrid system of laws and regulations.⁴ Some progress is being made regarding legislative drafting, although as of the publication of this report, key justice sector legislation, including the Penal Code and Civil Code, had not been promulgated or were still in draft form.⁵

In 2000 the United Nations Transitional Administration in Timor-Leste (UNTAET) established a system of criminal laws and institutional structures designed to bring to justice those who had been responsible for the commission of serious crimes in Timor-Leste (“the serious crimes process”). The judicial arm of this



³ USAID, Draft USAID Rule of Law Strategic Framework. 2007.

⁴ Core Document Forming Part of the reports of State Parties: Timor-Leste (HRI/CORE/TLS/2007). 16 July 2007. United Nations, p. 24.

⁵ East Timor, Justice Sector Support Facility (2007) Note that to be considered by the new parliament, any pending draft legislation submitted to the previous parliament must be re-submitted.

system was referred to as the Special Panels for Serious Crimes (SPSC). It is no longer functioning, though UNMIT has mandated the completion of still pending investigations⁶.

ii. Source of Laws

The legitimate sources of law include:

- The Constitution of the Republic;
- Laws emanating from the National Parliament and the Government of the Republic;
- The regulations and other legislative instruments of UNTAET, and Indonesian law, as long as they are not repealed, are permitted to supplement the above-listed sources of law.⁷
- In addition, international law and customary law is applied in certain forums.

4. KEY ACTORS

Timor–Leste has a semi-presidential system comprised of the President of the Republic, the National Parliament, the Government, and the courts⁸. The Constitution sets forth the principle of separation including separation of church and State⁹.

- **National Parliament:** the National Parliament is the legislative body of Timor-Leste. The National Parliament may be composed of a minimum of fifty-two and a maximum of sixty-five members, elected for a term of five years. The National Parliament is primarily a legislative body; however, it also plays an important role as a supervisory and political decision-making body.¹⁰
- **President:** the President of the Republic is the Head of State and Supreme Commander of the Defense Force. He appoints ambassadors and permanent representatives and can declare war in case of effective or imminent aggression.¹¹ The President has a term of five years, which can be renewed only once.
- **Prime Minister:** the Prime Minister is the head of the Government and chairman of the Council of Ministers. It is the responsibility of the Prime Minister to guide the general policy of the Government and to coordinate the activities of the ministers.¹²
- **Government/Council of Ministers:** the Government is comprised of the Prime Minister, the Government Ministers, and the Secretaries of the State.¹³ The Council of Ministers is comprised of the Prime Minister, the Deputy Prime Ministers, and the Government Ministers. Among other things, the Government defines and implements the laws and policies of the country and prepares and executes the State Plan and the State Budget.
- **Judicial Branch:** as envisioned by the constitution, the judicial branch is composed of the following categories of courts:

1) The Supreme Court of Justice and other courts of law;

⁶ Security Council, Res. 1704, U.N. Doc. A/RES 1704 (August 25, 2006).

⁷ National Parliament Law No. 10/2003 of 10 December 2003 Interpretation of Article 1 of Law No. 2/2002 Source of the Law.

⁸ Article 67, Constitution of Timor-Leste (CRDTL).

⁹ Article 69, CRDTL.

¹⁰ Articles 92, 95 and 96, CRDTL. Organic Law of the national parliament, Law No. 4 of 2002 enacted 7 August 2002.

¹¹ Article 87, CRDTL

¹² HRI/CORE/TLS/2007. 16 July 2007. United Nations, p. 21.

¹³ Article 104, CRDTL.

- 2) The High Administrative, Tax and Audit Court and other courts of first instance; and
- 3) Military Courts.

Under the Constitution, the judicial branch is prohibited from forming courts of exception in Timor-Leste.

- **Courts:** the Constitution of Timor-Leste affirms the independence of the judiciary, subject only to the Constitutional and legal constraints.¹⁴ The Constitution also guarantees every individual access to the courts to defend their legally protected rights and interests regardless of economic means.¹⁵ Court decisions are binding and prevail over the decisions of any other authority when the court has jurisdiction.¹⁶ Although the Supreme Court of Justice is envisioned as the highest court in the land, it has yet to be constituted. In the meantime, the Court of Appeal, originally established under UNTAET Regulation, acts as the highest court of appeal for criminal and civil cases. The High Administrative, Tax, and Audit Courts are expected to monitor the lawfulness of public expenditures and audit state accounts. However, these courts have not yet been established.
- **Superior Council of the Judiciary, Prosecutor and Public Defenders:** the Superior Council of the Judiciary (SCJ), the Superior Council for the Public Prosecution (SCP), and the Superior Council for Public Defenders should be the key oversight mechanisms within the justice sector. The SCJ is the managerial and disciplinary body responsible for administering the courts, appointing, assigning, transferring, promoting, removing and disciplining judges. While the SCJ was established in June 2003,¹⁷ the SCP only started effectively in June 2007, and the creation of the Superior Council for Public Defenders is on hold, pending the passage of appropriate legislation. An international Judge Inspector, a key member of the SCJ, arrived in Timor-Leste on July 05, 2007.
- **Public Prosecutors:** Public Prosecutors are responsible for prosecuting criminal offenses on behalf of the State, and ensuring the defense of underage, absentee, and disabled persons. Public Prosecutors are judicial officers and are accountable to the Prosecutor-General. The Office of the Prosecutor-General is the highest authority in public prosecution. The Prosecutor-General is appointed by the President and submits annual reports to the National Parliament.
- **Office of the Prosecutor-General:** the Office of the Prosecutor-General is a constitutionally mandated independent organ tasked with investigation and prosecution of criminal cases and State defense in civil litigation.¹⁸ The Public Prosecution is the holder of criminal action and is legally competent to initiate criminal action. The competence to carry out inquiries rests with the Public Prosecution, though the Public Prosecution may also grant the police or court staff competence to carry out inquiries. The Office of the Prosecutor-General is headed by the Prosecutor-General who is appointed by the President of the republic. A Serious Crimes Unit previously existed within the Office, but it was dissolved in May 2005.
- **Ministry of Justice:** the Ministry of Justice (MoJ) is responsible for planning, as well as policy development and implementation, in order to ensure coherence and effectiveness of the legal system.¹⁹ The MoJ coordinates the activities of the Legal Training Centre (LTC), the Office of

¹⁴ Article 119, CRDTL.

¹⁵ Article 26. CRDTL.

¹⁶ Article 188. CRDTL.

¹⁷ Its current and transitional membership is comprised of: one representative elected by parliament; one elected by members of the profession; one appointed by President RDTL; one appointed by the Government ; and President of the highest Court in Timor-Leste (automatically appointed as President of SCJ).

¹⁸ Article 132. CRDTL.

¹⁹ HRI/CORE/TLS/2007. 16 July 2007. United Nations. P. 50.

the Public Defender (OPD), and it ensures that legal aid and assistance are available for the most disadvantaged persons, corrections services, the civil registry, the public notary service, and the Land and Property Office.²⁰

- **Legal Training Centre:** the LTC is the body responsible for training of judges, prosecutors, and public defenders. It provides a 30-month training program for professional career candidates including all judges, prosecutors, and public defenders.²¹ Its first class of 27 students graduated in April 2006 and finished their probationary tenure in June of 2007.
- **Public Defender/Legal Aid/Private Bar:** legal defense can be provided by the State, in the form of a public defender, or it may be provided by a private lawyer. According to the Constitution, the activities of public defenders are to be regulated by law. The OPD is tasked with providing legal assistance to the poor who are charged with criminal offences.²² Public Defenders on occasion also represent individuals in non-criminal matters.
- **Office of the Provedor (The Office of the Provedor de Direitos Humanos e Justiça):** the Office of the Provedor de Direitos Humanos e Justiça (OP) is a critical independent oversight mechanism. The OP functions as an Ombudsman and a Human Rights Commission. Its' mandate includes combating corruption, promoting good governance and Rule of Law, protecting human rights, and redressing violations and injustice. It acts as the intermediary between the state and the public when issues arise as to legality of government actions. The Provedor is appointed by and submits annual reports to the Parliament. The OP undertakes investigations in response to complaints from the public or requests from Government, and most importantly, can initiate its own investigations.²³
- **Informal/Traditional Justice Mechanisms:** the people of Timor-Leste can utilize local dispute resolution as a precursor or an alternative to the formal justice system. Given the challenges with accessing the formal justice system, it is not surprising that most Timorese choose local mechanisms to resolve disputes. Decree Law No. 5 of 2004 on the Authority of Local Communities grants local village officials the responsibility to provide a structure for the resolution and conciliation of lower-level disputes.
- **Civil Society:** a number of non-government civil society organizations also address access to justice and other issues including:
 - Monitoring, documenting, and reporting on policy and law reform and implementation;
 - Providing legal aid and advice to indigent, under-represented, and vulnerable groups, thus increasing overall access to justice in the country.
 - Increasing public education and awareness through trainings and outreach.

A number of national and international civil society groups are working in this area. Including The Timor-Leste Bar Association, TAF's Legal Aid Partner NGOs, The Justice System Monitoring Programme (JSMP), Pradet, Hak Association, Fokupers, La'o Hamutuk, and Avocats Sans Frontières (ASF).

²⁰ Section 2(1) Organic Structure of the Ministry of Justice, Decree Law No. 3/2003 and Section 27(1) Decree Law No. 3/2005.

²¹ "Enhancing the Justice System to Guarantee the Democratic Rule of Law – Strengthening the Justice System in Timor-Leste", Annex 19 to UNDP Timor-Leste. July 2003, p. 9.

²² Regulation No 2001/24 On the establishment of a Legal Aid Service in East Timor.

²³ Statute of the Office of the Ombudsman for Human Rights and Justice, Law No. 7/2004 of 26 May 2004 and Article 27 CRDTL.

- **The Ministry of Interior:** the Ministry of the Interior (MoI)²⁴ was one of the central organs of the State apparatus and has been responsible for leading, executing, and coordinating actions intended to keep public order and protect people and assets in conformity with government policy.²⁵
- **The National Police of Timor-Leste (PNTL):** Decree law No. 8/2004 defines the National Police of Timor-Leste (PNTL) as “the security force that has the mission to defend the democratic legality, to guarantee the people's safety and welfare and to safeguard the citizens' rights, under the terms established by the Constitution and the Law.” The PNTL is subordinate to the Ministry of Interior (MOI). Complaints against the PNTL can be submitted to the Provedor, the Office of the Adviser to the Prime Minister on Human Rights or to the MOI itself.²⁶ Depending on the complaint, the action may be brought by the Office of the Prosecutor-General or within the MoI by the Professional Ethics Office (PEO) or the Office of the Inspectorate.²⁷
- **The Office of the Inspector General:** the Office of the Inspector General (OIG) provides a vital audit and inspection function within government, to support good governance through the investigation of maladministration and corruption within government. The OIG is not an independent office; it operates under the supervision of the Office of the Prime Minister.

5. BACKGROUND²⁸

i. Pre-Independence History

Timor-Leste is one of the world's newest constitutionally democratic country. It is small in size, covering half the island of Timor, and has a population of less than one million. Timor-Leste remains a village-based society with over sixteen distinct language groups, characterized by dramatic geography, isolation, and diverse local cultural traditions.²⁹

Portugal colonized Timor-Leste in the sixteenth century but did little to develop the territory. After Portugal abruptly abandoned it in 1975, the Revolutionary Front for an Independent Timor-Leste (FRETILIN) and the right-wing Democratic Union of Timor (UDT) fought for control of the territory. Indonesia's General Suharto invaded shortly after FRETILIN issued a declaration of independence in November 1975. Timor-Leste was formally incorporated as Indonesia's 27th province in 1976.

International pressure on Indonesia began to mount following the 1991 Dili massacre, in which Indonesian soldiers killed more than 200 participants in a funeral march, and were captured on film by foreign journalists. In August 1999, 78.5 percent of the Timorese electorate voted for independence in a referendum. The military response to the referendum killed roughly 1,000 civilians, drove more than 250,000 refugees into Indonesian West Timor, and destroyed approximately 80 percent of Timorese buildings and infrastructure before an Australian-led multinational force was brought in to restore order.

²⁴ MoI is now consolidated with military defence functions in Ministry for Security and Defence.

²⁵ Organic Law for the Ministry of the Interior. Law No. 3/2004.

²⁶ Timor-Leste: Sector Investment Program, Rights, Justice and Equality, April 2005. P.18.

²⁷ Sections 11 and 13 Organic Law for the Ministry of the Interior. Law No. 3/2004.

²⁸ Adapted in part from Freedom in the World, 2007 East Timor Country Report and World Bank report, *Strengthening the Institutions of Governance in Timor-Leste*, April 2006:

<http://siteresources.worldbank.org/INTTIMORLESTE/Resources/Strengthening-Institutions-Audit-6.pdf> and

<http://www.freedomhouse.org/template.cfm?page=22&country=7168&year=2007>.

²⁹ Andrew Harrington, *Ethnicity, Violence, & Land and Property Disputes in Timor-Leste* (2007).

Two UN-appointed bodies of experts were charged with investigating the crimes committed prior to, during, and immediately after the “Popular Consultation.” The UN-appointed experts included the Independent Special Commission of Inquiry on Timor-Leste (ICI) and a group of three Special Rapporteurs. These groups visited the region in 1999 and 2000 respectively. However, their recommendations were never implemented. Instead, it was accepted that some suspects would be tried by the Indonesian courts while a parallel process was established by UNTAET in Timor-Leste. The Indonesian government tried some 18 high-level suspects by way of an *ad hoc* national tribunal sitting in Jakarta. However, these trials have been almost universally condemned. As concerns trials within Timor-Leste, UNTAET, chose to adopt the Dili District Court (DDC) as the forum. For this purpose “special panels” were created within the Dili District Court.³⁰

ii. Post-Independence History

From late 1999 to May 2002, the United Nations Transitional Administration in Timor-Leste (UNTAET) administered the territory.³¹ The Mission had a combined function of peacekeeping and civil administration.³² After approving its Constitution, transforming the elected Constituent Assembly into the first parliament, and electing its first President, the Constituent Assembly declared independence in May 2002. Since that time, Timor-Leste has been dealing with the massive challenges of nation building. The UN mission to Timor-Leste was subsequently renewed as UNMISSET (United Nations Mission of Support in Timor-Leste, May 2002-2005) and then later as UNOTIL (United Nations Office in Timor-Leste, May 2005-2006).

In April, 2006, the four-year-old country descended into violence once again. An Australian-led contingent of 2,200 foreign troops was deployed to ensure security after deep-seated political divisions culminated in the eruption of widespread clashes in the capital, threatening civil war. In late May, Timor-Leste Defense Force (FDTL) soldiers killed 10 unarmed police officers under UN protection. Ongoing clashes with the police, many of whom had worked for the old Indonesian administration, killed more than 25 people and displaced 150,000 Dili residents, nearly one-half of whom remained in refugee camps on the outskirts of the city through November.

In August, 2006 the UN Integrated Mission in Timor-Leste (UNMIT) was established, and charged with facilitating stability, a culture of democratic governance, and political dialogue aimed at national reconciliation. However, turmoil resumed in October, when the United Nations published the findings of its Special Commission of Inquiry for Timor-Leste, which had investigated the causes of national unrest. The report blamed state institutions and weak Rule of Law. Violent riots reflecting tensions between the eastern and western portions of Timor resumed almost immediately after the findings were released.

iii. Current Developments

2007-2008 is a critical juncture for Timor-Leste. The crisis of 2006 derailed much of the progress in the country and dealt a heavy blow to judicial actors, politicians, civil society, and the people of Timor-Leste. It illuminated the fragility of the State and Society and exposed fissures that were clear to some, but ignored by many Timorese leaders and members of the international community. The crisis has been felt by all in Dili, with daily reminders brought by lost equipment, case files and data, as well as new IDP camps, displaced staff members, and a lingering feeling of insecurity.

In this context, discrete events in 2007 already threaten to overwhelm the judicial system and create unrealistically high expectations for change. In fact, one of the variables, which may temper the potential

³⁰ JSMP, Digest of the Jurisprudence of the Special Panels for Serious Crimes, April (2007).

³¹ S.C. Res. 1272, U.N Doc. A/RES/1272 (Oct. 25, 1999).

³² USAID/Timor-Leste, Democracy and Governance Assessment of Timor-Leste (2004).

for problems, is a sense of cynicism that runs rampant throughout Dili. The following is a brief examination of recent events in Timor-Leste:

- **Presidential elections:** Jose Ramos-Horta was voted into power by a large percentage of the vote in an election which featured relatively high turnout. His support also came from across Timor-Leste, possibly reducing the current exploitations of tensions between East and West. While there was violence associated with the elections, it was remarkably restrained, isolated, and quickly contained, in stark contrast to the violence that occurred a year earlier. The elections seemed to raise expectations that the security situation would improve, but in fact violence and tension has escalated following the parliamentary elections, and after the assessment team's departure from Timor.
- **Parliamentary elections:** While Presidential elections were seen as a re-shuffling of the old guard, parliamentary elections were viewed by many as much more important and potentially destabilizing. Even before campaigning began, there was an impression on the street that major change was in the air and there were concerns that a new parliament would be unable to form a coalition government. There was speculation that most ministers would be replaced.
- **Graduation from the Legal Training Centre:** 27 judges, public defenders, and prosecutors graduated from the LTC and ended their probationary period in June 2007. This is expected by many to substantially increase the capacity of the judicial system to deal with the current backlog of cases.
- **UNMIT's expanded mandate:** with increased funds and an increased number of international staff, UNMIT will provide short term support to the country but also threatens to replace long-term priorities and existing developments with new priorities.
- **Oil and gas revenues:** oil and gas reserves are predicted to become even more of a revenue earner now that Timor-Leste and Australia have finally reached agreement in the January 2006 Greater Sunrise deal over long-disputed ownership rights and maritime boundaries in the Timor Sea. Timor-Leste agreed not to contest current maritime boundaries for the next 50 years in exchange for a 50–50 split in revenues from the resulting offshore energy project. The increased energy revenues have led to the possibility of decreased international donor assistance for the country.

6. DONOR ACTIVITY IN THE JUSTICE SECTOR ³³

Funding for the justice sector of Timor-Leste has largely come under UN auspices, and has supported the development of a judicial system which did not exist when the country declared independence in 1999. The following is an overview of various programs:

- **The UNDP *Strengthening the Justice System Project*:** The largest contributor to the sector has been the UNDP *Strengthening the Justice System Project*. This multi-donor, broad-ranging project commenced in July 2003 with the aim of strengthening the development of policy, legislation, human resources, and systems across the three pillars of the Justice System:
 - The Ministry of Justice, which includes the Legal Training Centre, Public Defenders Office and the Prison sector;
 - The Courts; and

³³ See Appendix for a more detailed illustrative table of Donor Activity in the Justice Sector.

- The Office of the Prosecutor-General.

Donors for the UNDP project include Australia, Brazil, Belgium, Denmark, Ireland, Norway, Portugal, Sweden, the United States of America and the UN Office of the High Commissioner. Given the limited resources available, the program currently focuses on the three key areas:

- International Judicial Placements: The core function to date has been the placement of international court actors to ensure the continued functioning of the courts, the public defenders office, and the OPG. This aspect of the program is strongly supported through provision of in-kind support (i.e. in-line judges, prosecutors and defenders) by Portugal and Brazil
 - Legal Training Centre: The establishment of the LTC is another significant achievement. The LTC provides a standardized post-graduate professional training program for judges, prosecutors and public defenders. The first 27 students successfully completed their instruction and ended a probationary period in June 2007.
 - Case Management IT System: The program has worked to develop a computer-based management system to allow case tracking across the key institutions in the justice sector.
- **United Nations Mission in Timor-Leste**: Significant support is also provided by the United Nations Mission in Timor-Leste (UNMIT). UNMIT has made a large and growing contribution to the justice sector, although it is unclear how it will work within the mechanisms and structures currently in place. The UN has a large international police (UNPOL) presence, of approximately 1600 officers, which is responsible for executive policing and the reconstitution/capacity building of the PNTL.
 - **The UNMIT Administration of Justice Unit**: the AJU will have around six international posts, headed by a Senior Judicial Affairs Officer. It will take a lead role in coordinating development initiatives in the justice sector. It will include legal affairs officers for strategic planning, gender mainstreaming, and public information.
 - **The UNMIT Human Rights and Transitional Justice Unit**: this Unit will provide support for strengthening Timorese institutional and societal capacity for the monitoring, promotion and protection of human rights. It will establish a Serious Crimes Unit to complete investigations for the crimes occurring between 1975 and 1999; and will strengthen mechanisms for human rights including the Office of the Procurator and other human rights based NGOs. There are currently 48 international posts designated for this unit.

Other multi-lateral agency initiatives are being implemented by agencies such as UNICEF, UNIFEM, and UNFPA to specifically support children's and women's rights.

- **AusAID Activities**: In late 2007 AusAID will implement a \$28.5 USD million five-year assistance program for the justice sector. AusAID will initially address gaps in the justice system that were not currently being supported by other donors or multilateral agencies. The program focuses on priority corporate functions, including budget execution, agency based procurement processes, strategic planning, and human resource management. It will also address corruption by strengthening public oversight institutions, and will build demand for justice by assisting civil society organizations.

USAID Activities: USAID's Rule of Law activities seek to improve stability and respect for the Rule of Law. Through its partners' projects, USAID works to: strengthen the formal justice sector's capacity to

deliver services; provide information to rural communities on current laws; and assist in the development of a sound legal framework for the nascent democracy. USAID provides technical assistance and training to the MoJ, courts, and prosecution services, to improve financial management, administration, and case management procedures, and to facilitate access to justice for women and other disadvantaged groups. Improving women's access to the justice system is especially important because rural women have lower literacy levels and suffer from a high incidence of gender-based violence. USAID activities addressing oversight and transparency in government include support to the recently established Office of the Provedor, technical assistance to the public broadcast service, skills development for independent media, and training for government officials to improve public access to information.

In addition, a large number of justice sector related programs are run by local and international NGOs with varying degrees of international support. These groups undertake a range of activities including support to both the formal and informal sector.

The largest USAID funded Rule of Law programming in Timor-Leste are conducted through MSD and TAF. A general description of the type of assistance provided follows:

- **Management Sciences for Development (MSD):**

- i. Technical Support to Provedor:

- Technical assistance to effectively and efficiently manage donor relationships/funding;
 - Technical support, and a dedicated staff member, to the Chief Human Resources Officer
 - Institutional strategic planning;
 - Development of complaints registration system for the Public Assistance Unit; and
 - Historic involvement in the formation of the Legal Affairs Division and Administrative and Finance Division.

- ii. Financial Management Training:

- Technical assistance in comprehensive financial management skills for the Chief administrators and staff of Court of Appeals and Dili District Courts, including basic math skills.

The strength of the MSD programs is due primarily to its targeting of two intertwined but systemic issues in Timor-Leste: the enduring lack of responsiveness of government actors/bodies to issues/complaints of the people of Timor-Leste, and the lack of administrative capacity for government actors/bodies to function effectively and therefore respond to these complaints and issues raised.

- **The Asia Foundation (TAF):**

- i. Providing the people of Timor-Leste access to village level/traditional and formal systems of justice on a country wide basis through the formation and provision of operational/technical support for six NGO “legal aid partners” who provide legal services in both civil and criminal matters, especially through the use of mobile units. The legal aid partners also engage in community education efforts to inform the Timor-Leste population in their rights, and to educate them on the operations of traditional and formal justice options. The Asia Foundation also provides an important coordinating function

between legal aid partners, domestic NGOs, and relevant judicial/government actors, including the Office of the Provedor.

- ii. Providing general technical support to the Legal Research Unit (LRU) and the Victim Support Services (VSS) of the Judicial Systems Monitoring Program (JSMP).
- iii. Conducting outreach efforts with Minister of Justice, to increase the public's access to legal information.

TAF has also strengthened the role of the legislature in legal reform efforts by providing technical support to the Parliament through the placement of a legislative advisor and through the formation of a library and progressive information and research services. In future programming, it intends to strengthen the capacity of Suco Councils to promote gender equality and address gender-based violence, especially through monitoring and public information efforts.

D. ISSUES IMPACTING RULE OF LAW REFORM

Notable progress has resulted from the technical and financial support provided by the international community to the justice sector since Timor-Leste declared itself independent in May, 2002. The Government of Timor-Leste has begun to make some advancements towards the establishment of an indigenously run justice system. In April 2006, the first class of locally trained judges, prosecutors, and public defenders graduated from the Legal Training Centre (LTC). In June 2007 these judicial actors moved from provisional to full official status, no longer working under the supervision of an international counterpart. However, with only 11 Timorese judges, 9 prosecutors, and 7 public defenders to serve the country's 4 District Courts and one High Court in Dili, the justice sector remains dependent on international in-line judges and prosecutors. Several of the District courts have a backlog of over 1,000 cases. Many of the cases currently working through the system are politically charged (including up to 140 cases from the UN Commission of Inquiry Report (COI)). Potential criminal case filings from the COI cases could not only increase the volume of cases, but creates political challenges which could threaten the already fragile public trust of the justice sector.

Despite challenges, recent specific accomplishments include:

- The graduation and full appointment of trained judicial actors (judges, prosecutors, and public defenders);
- The development and introduction of some essential legislation such as the Suco Council Law, and criminal and civil procedure codes;
- Increased coordination between the Minister of Justice, Prosecutor-General, Provedor, Inspector General and the Courts through the establishment of a Council of Coordination comprised of the Prosecutor-General, The Minister of Justice, and the Chief of the Court of Appeals .
- A functioning Legal Training Center currently training its second group of judicial actors
- The placement of judicial actors and services in some of the regions
- Increased coordination with the traditional/informal justice center and the formal justice sector, especially by some of the village chiefs known as *Chefe de Suco*.
- The establishment of a law faculty at the National University of Timor-Leste.

1. BREAKDOWNS IN THE JUDICIAL PROCESS

A significant number of serious crimes and disputes fail to be resolved in Timor-Leste. While some disputes are mediated or resolved at the local level, the ability of inhabitants to have their rights protected by the State can be interrupted at a variety of possible stages. While judges themselves have born the brunt of accusations of the ineffectiveness of the judicial system, a much more complex picture must be examined to understand that multiple actors and relevant ministry representatives which have yet to coalesce to operate an integrated system of justice.

While statistics were unavailable, it appeared from interviews with judicial sector officials that a significant number of cases fall through the cracks of the judicial system and are seldom finally resolved. A large portion of litigants are still waiting to have their day in court. Many have simply given up hope in any type of redress. Some have “learned the lesson” that general impunity is enjoyed at all levels of society and have turned to criminal activity to advance their economic or social positions, or to administer their own version of justice. However, sometimes cases stay out of the courts because injured parties are pressured to avoid the formal court system.

Breaks in the system can be categorized along five major fault lines as established by the USAID *The Rule of Law Strategic Framework*: Order and Security; Legitimacy; Checks and Balances; Fairness and Effective Application. Each of these will be discussed further below.

2. ORDER AND SECURITY

Rule of Law and economic development cannot flourish in crime-ridden environments or where public order breaks down and people fear for their safety. The judicial sector must play a vital role in protecting rights and providing for the peaceful resolution of disputes³⁴. Security in Timor-Leste is a key impediment to administering justice in the country. Lack of security can be broken into two primary issues: basic public security and judicial system security.

There is a public perception that basic public security does not exist in Timor-Leste, especially in the capitol city of Dili: “[t]he collapse of law and order accompanied by the disintegration of the PNTL in Dili has caused severe insecurity among an already traumatized population.”³⁵ Since the Crisis of 2006, and more recently in the aftermath of the 2007 elections, the UN Police (UNPOL), Portuguese (GNR) police and PNTL forces have been increasingly visible on the streets. However, many Timorese curtailed basic daily activities out of concern for security. Families often adhered to self-imposed curfews. Travel was curtailed both on certain streets as well as regions in the country. The animosity between those of Eastern background and those from the West has remained. Violence continues to be sporadic and poorly reported – increasing the perception of insecurity as acts of violence are perceived to be random.

The lack of public security has multiple causes, including:

- A broad perception of impunity, especially among youth, leading to increased violent criminal acts;
- Lack of effective policing, including perceived complicity by the PNTL in violent crime;
- Lack of adequate judicial framework to prosecute youth;
- Lack of detention facilities leading to offenders being released; and
- Participation in organized youth groups committed to violence, including martial arts groups, gangs, and other youth organizations.

As a result of the perception and reality of a lack of public security, criminal acts and civil wrongs are not always reported to authorities or addressed via a dispute resolution mechanism for fear of retribution. Many of Timor-Leste’s IDPs have not returned to their homes and remain in camps which creates unique judicial needs for those communities. According to the "Timor-Leste Coordinated Humanitarian Response," there are approximately 69,500 IDPs still living at 66 locations in Dili and nearly 79,000 IDPs in 12 other districts. IDP camps themselves remain a potential source for insecurity and violence.³⁶

Travel by parties to the courts is impeded by security concerns. Furthermore, the optic of violence and perceived impunity is itself a root cause for new violent criminal acts and insecurity. Finally, basic struggle for economic survival is the priority for many individuals and can prevent a future where a justice system is responsive to their needs, and protects their rights. A fully functioning justice sector would lead to greater stability and security through the assertion and recognition of law.

³⁴ USAID, Draft USAID Rule of Law Strategic Framework. 2007.

³⁵ “The Crisis in Timor-Leste: Causes, Consequences and Options for Conflict Management and Mitigation. USAID November 2006. p.14.

³⁶ “Timor - Leste: Movement of IDPs Out of Camps (September 06 - June 07) (pdf, 457k) 19 Jun 2007 IDMC. *See generally*, ReliefWeb Timor Leste at <http://www.reliefweb.int/rw/dbc.nsf/doc104?OpenForm&rc=3&cc=tl>.

Security within the judicial system remains a grave concern. During the Crisis of 2006 many files were intentionally destroyed (especially those from the Serious Crimes cases) or lost, and equipment was lost or destroyed, with widespread damage sustained to the judicial system's infrastructure. Currently, inadequate security exists for participants in the judicial system, whether they be judges or parties to a complaint. The lack of a witness protection law impedes the ability of complainants and parties to bring witnesses to court.

i. Police

The existence of an effective and fair police force is key to the establishment of Rule of Law in Timor-Leste. In April 2006 a Human Rights Watch cautioned that it "found evidence of human rights violations by police officers to be widespread, although not endemic" in Timor-Leste.³⁷ At the writing of this report, Timor-Leste's police force, PNTL, currently operates as part of the United Nations Police (UNPOL). UNPOL is responsible for the reconstruction and capacity building of the PNTL under the current UNMIT mandate which ends in February of 2008.³⁸ Despite the mentoring relationship of UNPOL to PNTL, public trust in the PNTL has not increased and re-screening of PNTL members³⁹ remains a top priority for the current administration. In addition, specific concerns about UNPOL were raised during the assessment, including concerns regarding the effectiveness of a non-domestic security force (and UNPOL specifically), the quality of officers and staff, and enduring continuity problems stemming from high turnover. It was recommended that improvements be made in communication and the transfer of information to incoming UNPOL staff, to ensure that investigations handled by UNPOL continued to be prioritized and addressed even after the original investigator has left the country.

The police serve as a critical entry point to the justice system. Their initial effective involvement in the judicial process can impede or enable an inhabitant to initiate a case in court or through traditional means. Anecdotal evidence points to the PNTL as a disrupting force in the legal procedure. The PNTL has been accused of inappropriately referring criminal cases back down to the community level. There was a perception expressed that such referrals happened when: 1) police were overloaded with other work and did not have the time or facilities to properly investigate; 2) police staff lacked the technical investigatory skills to collect adequate evidence; 3) personal ties to the community or other social group were benefited by keeping the case out of the courts and 4) the police officers themselves felt they were an appropriate mediator to settle the dispute but did not have jurisdiction over the case. Finally, police officers interviewed for this report did not trust the court system and believed on a personal level that community dispute mediation represented a better avenue toward resolution.

Proper criminal procedures are routinely not followed. In some cases, police in Timor-Leste do not have sufficient training and understanding of the procedures, especially under the new criminal procedure code. In other cases the lack of adherence is blamed on a lack of resources to properly fulfill the legal requirements. In particular, the 72 hour hold rule has been an issue of contention. Article 63 of the criminal procedure code provides that the police authority who arrests a person in *flagrante delicto* must present that person for judicial questioning as soon as possible, but under no circumstances shall they do so after seventy two hours from being detained following arrest. Human Rights activists in the country complained that this regulation was routinely violated. Others activists were concerned that the inability

³⁷ Human Rights Watch, "Timor-Leste Tortured Beginnings" Volume 18, No.2(c), April 2006.

³⁸ SC/RES/1745 22 February 2007.

³⁹ See generally S/2006/923 (29 November 2006) Letter dated 30 October 2006 from the Secretary-General addressed to the President of the Security Council (Special Representative for Timor-Leste and Head of the United Nations Integrated Mission in Timor-Leste (UNMIT)) and S/2006/924 (29 November 2006) Letter dated 29 November 2006 from the President of the Security Council to the Secretary-General (Special Representative for Timor-Leste and Head of the United Nations Integrated Mission in Timor-Leste (UNMIT)).

to contact a judge within the 72 hour window led to criminals enjoying impunity for their crimes. Ministry of Interior officials claimed the regulation could not be consistently enforced for a multitude of reasons, including: the lack of a sufficient number of pre-detention cells in facilities; the inability to contact the judge due to lack of equipment resources such as phones or radio; or the inability to contact the judge due to incompetence of the intermediary (in some cases the court clerk/administrator or district prosecutor).

While a general security reform project is certainly warranted, there are discrete steps that can be taken to address some of the basic deficiencies in the execution of duties by the police force. These steps include: supporting the re-screening process; increasing oversight over the institution by other judicial actors; and continued training on basic investigatory techniques, criminal procedure code changes, and targeted substantive areas (such as combating organized and financial crimes and trafficking in human beings, drugs and weapons).

ii. Land Reform

One of the over-riding issues in Timor-Leste is the need for security and land reform help to reduce the number of IDPs in the country, and to resolve current interpersonal conflicts and reduce future conflicts. Issues emanating from the lack of resolution of rights around land have been an ongoing problem for most of the last 25 years. Even though there had been a vacuum of formal property or home ownership rights during Indonesian occupation, there has at least been a record of individuals granted the right to occupy a home or parcel of land. After Timor-Leste declared independence in 1999, the Indonesian military invaded the country and left a path of destruction behind them. During this time, the Indonesians also burned land and property records. To escape this violence, and the aftermath of the crisis events of 2006, many people fled their homes. After the conflict subsided, those who returned to their communities often found squatters living in their homes or burned out shells where their house once stood. As a result, those displaced due to squatters have no legal recourse to reclaim their property.⁴⁰

In Timor-Leste, property rights are not adequately addressed under existing law, and given the history of occupation, land reform will be a difficult issue to tackle. There are many overlapping issues in this regard, including competing land claims, competing laws and jurisdictions, weak institutions for the administration of land and property rights information (e.g. land registration and titling), weak enforcement, and a lack of public education regarding land rights. There also seems to be disparate public opinion often based in misinformation, and public disagreement about rights, opportunities, and solutions to problems regarding property issues.

3. LEGITIMACY

Laws are legitimate when they represent societal consensus. There must be legitimacy regarding both the substance of the law and the process by which the law is developed. This process must be open and democratic.⁴¹ Despite significant efforts by the international community, Timor-Leste has not developed a completely transparent and democratic judicial process. The system is plagued by unclear procedures in the law, unclear procedures in practice, and poor outreach mechanisms. This creates obstacles to those trying to learn more about the law-making process.

A combination of factors has led to confusion over laws and procedures. Lack of review by the public or knowledge of the process by which government decrees are promulgated creates a perceived lack of transparency. Civil society has not had an opportunity to *systematically* review and consult on draft

⁴⁰ Timor - Leste: Movement of IDPs Out of Camps (September 06 - June 07) (pdf, 457k) 19 Jun 2007 IDMC. See generally, ReliefWeb Timor Leste at <http://www.reliefweb.int/rw/dbc.nsf/doc104?OpenForm&rc=3&cc=tlc>.

⁴¹ USAID, Draft USAID Rule of Law Strategic Framework, 2007.

legislation, and it often appears that civil society is consulted at the last minute, not being provided with translations of draft laws and given unrealistic deadlines for a response. There was concern that laws were not translated adequately for parliamentary members to review before voting. One Public Defender also expressed the concern that international judges misinterpreted codes, creating confusion as to the meaning of the text when the language of the law was clear.⁴²

Much of Timor-Leste's legal framework has been written by international experts. While there was some concern expressed by international consultants about the "cut and paste" approach, few Timorese voiced complaints regarding the source of their laws. However, there were concerns reported to the team as to whether these laws were appropriate within the cultural Timorese context. However there was not a great deal of interest in the issue of whether the laws were imported from Indonesia, promulgated by the UN, enacted by the Parliament, or issued by government decree. According to the President of the Court of Appeals, what concerns do remain regarding the sources of law will be alleviated in the next five to ten years as parliament slowly passes new laws to replace UN law. Until then, UN and Indonesia laws remain authoritative when there is a gap or a sovereign law is silent on a particular issue.

A culture of *legal pragmatism* in Timor-Leste has perhaps assisted in keeping legitimacy questions out of the fore. Judicial sector actors reported cases where this pragmatic approach to law or trying to resolve disputes in the most expeditious manner has led to courts utilizing extra-legal procedures and precepts from various traditions and cultures. Courts would rely on European legal traditions, or other developed legal traditions, as well as domestic laws that had been drafted but not enacted. In addition, there were reports that some courts disregard due process in the interest of fast-tracking cases to diminish backlogs. This ad hoc approach may create a judicial culture which will ignore domestic laws when they finally replace the current collection of legislation. It also remains to be seen whether reliance on non-legitimate sources will increase or decrease once more laws and formal judicial structures are in place.

4. CHECKS AND BALANCES

The distinct separation of governmental powers between branches and levels of government provides the foundation for the Rule of Law. An independent judiciary is seen as a vital "check" on the government, vis-à-vis the other branches, and provides for the protection of rights for those subject to its power. At the same time, checks and balances make the judiciary accountable to other branches of government and to the public.⁴³ The team closely examined the existence and effectiveness of checks and balances mechanisms within Timor-Leste.

i. Effective and coordinated oversight institutions

In general, Timor-Leste lacks effective and coordinated oversight institutions despite great progress in this area. Oversight mechanisms/institutions including Superior Councils, the Provedor's Office and Prosecutor's office exist, but are hampered by lack of resources and competent staffing. The strong legislative framework for oversight in Timor-Leste is promising; however, the overlap of duties and ambiguity has impeded efforts to provide true checks and balances. There exist some strong non-governmental organizations, such as JSMP, Hak, and Forum Tau Matan. While successful in providing checks and balances for specific cases of concern, civil society in general has not effectively monitored the government to provide a true check on potential abuse of power.

ii. The ability of courts to function as an effective check on society

The district courts in Oecusse and Suai function only sporadically. They are currently operating, but judges, prosecutors, and public defenders are not in residence and must travel to the courts for hearings.

⁴² For instance, inconsistencies with rulings and practices related to the new criminal procedure code were cited, especially around the 72 hour hold mandate.

⁴³ USAID, Draft USAID Rule of Law Strategic Framework, 2007.

The courts have developed formidable and concerning backlogs. The practice of illegal detentions and failures to detain persons who merit detention is still a significant problem. Court management is very weak. Case registration, hearings and trial schedules are badly administered. The courts lack sufficient libraries for legal research purposes. The financial management of the court system in some cases is unable to support daily operations, though MSD's financial trainings are alleviating some of these issues. Though some courts are computerized, manual systems are the prevailing norm.

iii. Superior Councils

It is envisioned that oversight of the judiciary would be accomplished through the establishment of Superior Councils. These councils will eventually include:

- **The Superior Council for the Judiciary:** the Superior Council for the Judiciary has been very slow to become operational. Both the Superior Council for the Judiciary and the Superior Council for the Public Prosecution are in dire need of staffing, technical expertise in the areas of establishing fair and transparent competency examinations, drafting and enforcing professional responsibility standards, and human resource training. Anticipated staffing of this Superior Council will likely address these issues.
- **Superior Council for Public Prosecution:** the September 2005 publication of the Organic Law for the Public Prosecution provided the legal basis for the creation of the Superior Council for the Public Prosecution, but it has only recently been convened, and therefore has not been providing any effective oversight over the Office of the Prosecutor-General. The timely establishment of the Council is vital to strengthening the independence and professionalism of the prosecution service.⁴⁴
- **Superior Council for Public Defenders:** the Office of the Public Defender is housed under the Ministry of Justice. Its organic law is currently being written. A existing draft contains provisions for the organization of the service, the nomination of the director, and the creation of the Superior Council.⁴⁵

iv. Office of the Provedor

The OP is a critical independent oversight mechanism. The Provedor will continue to require sufficient well-qualified staff to be able to conduct timely and thorough investigations, while also disseminating information. The office's independence would be strengthened if its budget were derived directly from Parliament, or were otherwise protected, and if the office was granted consistent and sufficient funds for day-to-day operations. Staffing levels and staff competence are a further concern. This will be particularly so if the Provedor assumes a large role in, for example, oversight of the armed services and/or the police, and if the OP increases its work on anti-corruption as some have recommended. Budgeting and staffing levels may need to be increased by the government once the level of demand for the services of the office increases with more effective public outreach and education.

The office's competence and functions relating to anti-corruption are underdeveloped compared to the abilities of those working on human rights in the office, especially since anti-corruption remains a significant problem. Organizations which investigate and name individual violators, have received threats because of their work. The Provedor's office has investigatory power in the area of corruption; however, its investigations have primarily dealt with human rights issues. Working with the government, the Provedor is working on a National Anti-Corruption Strategy (NCAS) which would apply anti-corruption measures to all community sectors and not just public officials. However, the Provedor noted the need to

⁴⁴ World Bank, Strengthening the Institutions of Governance in Timor-Leste (2006).

⁴⁵ World Bank, Strengthening the Institutions of Governance in Timor-Leste (2006).

strengthen the office's ability to respond to complaints and obtain greater expertise on "good governance" and maladministration issues. Significant assistance would be required before the office of the Provedor is able to undertake large scale corruption investigations, including those which may involve high level government officials or the Public Prosecutor⁴⁶. Some progress could be made by pursuing smaller corruption allegations while internal capacity develops. For instance, as noted in the most recent annual report of the OP, only two corruption related investigations were submitted to the Prosecutor-General by the OP during 2005 and 2006.⁴⁷

The Provedor exemplifies one of the more serious issues in the Timorese legislative framework in that its checks and balancing functions overlap with different agencies (notably the Office of the Prosecutor General and Inspector General). The assessment team was informed that a Memorandum of Understanding (MOU) intended to address this overlap is being drafted. A 2006 World Bank report recommended that the Inspector General be divested of its responsibility for anti-corruption and the OP be supported in undertaking its role of implementing the NCAS.⁴⁸

v. Inspector General

The OIG can be commended for its emphasis on public engagement through media releases and district visits, aimed at raising community awareness and strengthening the internal audit capacities of local administrations. Therefore, foremost amongst its priorities is the passage of the pending Organic Law for the Office.⁴⁹ Investigations in the OIG, however, and findings/recommendations from it, cannot be pursued/released without the explicit approval of the Prime Minister, and its duties of government oversight addressing issues of maladministration and/or corruption are, therefore, not purely independent.

The Inspector General advised that the recruitment process for the staff of the OIG has not often resulted in the appointment of individuals with existing skills or capacity to investigate maladministration or to conduct audits. This appears to be a systematic problem within the civil service. One must conclude that without international technical and financial assistance the OIG would fail in carrying out its duties, a proposition agreed to by the Inspector General. Of the more than 80 cases investigated, ten cases have been referred to the Prosecutor-General for criminal investigation, and recently one case was referred to the Prime Minister for disciplinary action.⁵⁰

The Inspector General advised that he does not have adequate administrative systems in place, and thus he needs continued assistance in every regard for the operation of his office.⁵¹ He further indicated he would benefit significantly from a partnership arrangement with an effectively operating IG office in the region.⁵² The delivery of much of the support provided at times has been inconsistent in its consistency and duration.

vi. The High Administrative, Tax, and Audit Court

Timor-Leste's Constitution allots the function of external audit to the High Administrative, Tax, and Audit Court, which has not yet been constituted. As an interim measure, the Ministry of Planning and Finance ("MoPF") contracts these tasks to an external private auditing company. This practice of contracting has serious shortcomings. Most concerning is that it creates an inherent conflict of interest as the audit is paid for by the entity being audited, and therefore no independent check on the scope and rigor of the audit.

⁴⁶ HRI/CORE/TLS/2007. 16 July 2007. United Nations, p. 44.

⁴⁷ Provedor for Human Rights and Justice, "Annual Report 2005-2006. Democratic Republic of Timor-Leste.

⁴⁸ World Bank, "Strengthening Accountability and Transparency in Timor-Leste," 27 January 2006, p. 36.

⁴⁹ Country Strategy Paper, European Commission. February. March 2007 *DRAFT* Aide-Memoire.

⁵⁰ Interview. Manuel Coutinho Bucar, (Inspector General), Office of the Inspector General. 5/30/2007.

⁵¹ Such assistance is currently or was formerly provided by USAID, JICA, AusAID, the World Bank and the UN.

⁵² Interview. Manuel Coutinho Bucar, (Inspector General), Office of the Inspector General. 5/30/2007.

vii. Bar Association

An independent, effectively functioning bar association can further progress toward the establishment of the Rule of Law. A strong bar association could further professionalize the legal community by providing a self-regulating accreditation system that ensures a high standard of competence in technical legal skills, substantive knowledge of laws, and internal regulation of each member's professional conduct.

While Public Defenders receive training and graduate from the Legal Training Center, there is no required formal training or licensing regime for the private bar. There is no legally constituted oversight body regulating private lawyers. The quality of legal service varies considerably. Legal aid associations, supported by the Asia Foundation, have provided an indispensable service, particularly by assisting the office of the public defender in occasionally providing legal services in criminal cases, especially during the UNDP training. Legal aid organizations also provide mediation services which parties in civil cases often use, given the slow start up of the courts and lengthy duration of court cases. However, some lawyers from the private bar and legal aid organizations are alleged to have poor professional standards, and are accused of charging inconsistent rates.

An advocate statute which would create a bar association and a regulatory framework for private legal practice was drafted by the Lawyers Association of Timor–Leste, and submitted to Parliament in 2004, but remains under consideration by a parliamentary committee. A second draft has been submitted for review by government officials. It is unknown if the new government will consider the draft legislation that was submitted in 2004. One major concern is that once regulations are in place there must be an appropriate transition period, allowing time for accreditation and training, because otherwise the public could be left without access to any legal aid. Finally, while regulation of the private bar is absolutely necessary, a cautious approach is recommended, an allowing for feedback from judicial actors, including the defense bar and the public.

viii. Ministry of State Administration (Suco Oversight)

Many Timorese prefer the traditional or informal approach to justice instead of the formal court system. The administration of justice at the Suco level, through mediation and/or arbitration, and the use of traditional or communal structures is a necessary component of the system, given the court's inability to handle its current case load efficiently, especially if all minor cases were brought to it (there currently is no small claims court). There is limited oversight of local administration of justice mechanisms, and anecdotal evidence indicates that some decisions have been made in violation of existing law. This represents a significant risk to the legitimacy and effectiveness of dispute resolution at the Suco level.

The need for better oversight at the Suco level cannot be overstated. Under existing law this oversight should be provided by the Ministry of State Administration. In some areas, oversight, or at least constructive engagement, is being provided effectively by private lawyers and legal aid associations, but according to interviews conducted in the regions, there have been cases when the State has failed to intervene when the local administration of justice does not follow the law. In one case in the Baccau District, the victim in a sexual assault case became caught in between differing advice received from actors in each system. She eventually brought her complaint to police and court authorities only after local authorities failed to act when requested. However, PNTL representatives refused to investigate her complaint and she was told to seek resolution through the local *Suco Chefe*, who continued to fail to act. Additionally, given the ineffectiveness of the police, the Timorese government is not proactive enough in setting up clear monitoring and reporting mechanisms for local disputes, in order to prevent violations of the law.

ix. Prosecutor-General

Resource issues impacting the operations of the Office of the Prosecutor General should continue to be prioritized by the government and donors. The Prosecutor-General complained that his office does not have a secure landline phone to contact the police and judicial actors out in the regions. AusAID has committed to funding the construction of temporary and eventually permanent offices for the Prosecutor-General and his staff. At the time of the assessment, three prosecutors lived in IDP camps in Dili.

The Prosecutor-General and his staff are overwhelmed with cases to review and consider, especially after the Crisis events of Spring/Summer of 2006. In January 2005, it was noted that “the Office of the Prosecutor-General faces particular challenges, including a large backlog of about 2750 cases that is reducing only very slowly given the incoming flow of new cases at the rate of 130 month.”⁵³ At the end of January 2007 the total pending caseload was 1,658 cases, which represented a significant improvement over the backlog of 2,700 in January 2005.⁵⁴ One of the causes of this is dysfunction in the administrative systems within the OPG. The OPG was vandalized and looted on May 28, 2006. Computer equipment was stolen, records damaged or destroyed, and boxes of evidence disappeared (including some from the Serious Crimes Court cases).⁵⁵ The current slow operations of the OPG are a key bottleneck within the criminal justice system. For example, the OPG complains it has difficulty in obtaining detention and search warrants. This results in matters not being investigated and alleged perpetrators being released, which in turn diminishes the public’s faith in the system, as people perceive that their complaints are not being addressed at all.

x. Civil Society

Civil society plays the necessary role of watchdog and check on government actions, which is especially necessary in light of the government’s historic propensity for abuse and maladministration. As noted by former Secretary General Kofi Annan, “by now we know that peace and prosperity cannot be achieved without partnerships involving Governments, International Organizations, the business community and Civil Society. In today’s world we depend on each other”.⁵⁶ Civil society in Timor-Leste has developed to the level where it can play a significant role in monitoring the justice sector and contributing to the public’s greater understanding of the sector. Its oversight often differs from that provided by the domestic and formal oversight agencies established under the law, as it has traditionally used international standards as the benchmark by which to measure progress in Timor-Leste.

Many NGOs do not receive sufficient technical assistance or funding from donors for capacity building or the establishment of internal management practices, and some are just not interested in receiving this type of assistance. This significantly constrains their work in the justice sector. There is no special forum for NGOs in the sector. Currently they rely on personal networks and referral pathways to provide linkage and coordination, although it was observed in a meeting of some of the NGOs that there is some duplication of effort by NGOs, caused by a failure to communicate and coordinate.

JSMP has succeeded in its systematic monitoring of the justice system by providing regular and thorough reports and updates. Experience has also shown that strategic partnerships between government and civil society can provide the basis for effective anti-corruption efforts. The role of civil society in improving governance in Timor-Leste could be strengthened further through closer links between NGOs and the media, in order to launch effective advocacy and monitoring that will result in better checks on the government.⁵⁷

⁵³ USAID, Conflict Vulnerability.

⁵⁴ Consolidated Support Program (CSP) Draft Mission Report, February – March 2007.

⁵⁵ During regional and Dili based consultations, several Ministries claimed equipment and files had been destroyed in the crisis. There was no evidence that the Office of the Prosecutor-General suffered losses more or less severe than others.

⁵⁶ <http://www.unfoundation.org/partnership/index.asp>.

⁵⁷ World Bank, Strengthening the Institutions of Governance in Timor-Leste (2006).

5. FAIRNESS

Fairness consists of four sub-elements: (1) equal application of the law; (2) procedural fairness; (3) protection of basic human rights and civil liberties; and (4) access to justice. The justice sector bears primary responsibility for ensuring that these sub-elements are in place and implemented.⁵⁸

i. Equal application of the law

According to the Timor Constitution, every citizen has the right to submit, individually or jointly with others, petitions, complaints, and claims for the purpose of defending his or her rights, the Constitution, the law, or general interests⁵⁹. The OP and the Court of Appeals (acting in the place of a Supreme Court, which has yet to be constituted) are two possible avenues where citizens can take complaints and seek redress, in addition to the trial courts.⁶⁰ However, despite an adequate legal framework and the ratification of many respected international conventions and treaties, there remains a disparity in the application of these laws and the protection of individual human rights in Timor-Leste, especially outside of Dili.

Women and other vulnerable groups have difficulty accessing the courts and receiving fair and impartial treatment and results. Respect for the human rights of complainants remains a concern, especially given the unprofessional and sometimes corrupt behavior of the police, and the impunity enjoyed by some political actors. Access to justice remains a primary concern in Timor-Leste, and as noted above, access to formal courts is often nonexistent. Lack of economic and educational opportunities contributes to a lack of fairness as often only those with economic means (i.e. access to television and radio) and those who have some level of literacy obtain information on how to access the courts. The team also documented cultural differences in the understanding of justice and fairness by the Timorese versus that of the international community. Finally, of imminent concern given the current fertility rate and demographics, is the complete lack of a functioning juvenile justice and protection system.

ii. Procedural fairness

Several concerns regarding procedural fairness arose during the course of the assessment and the accompanying review of relevant legislation. There is confusion surrounding the issue of determining the actual costs of filing a case. The team heard varying versions of how much money must be tendered by a potential litigant to initiate a civil cause of action in the courts. The team grew concerned that misinformation inflating these costs was being circulated at the local levels by village chiefs to circumvent formal courts and encourage resolution of conflicts and disagreements at the local level. The following are several examples of potentially unfair rules of procedure:

- The general rule seems to provide for judicial discretion in setting the fee to file a civil claim. While in proceedings of “immaterial interests” the value of controversy for the purpose of determining court costs shall be \$100, in situations of “illiquid, unknown, or inaccurate values,” the judge is responsible for determining such value. Since the amount of court costs ultimately depends on the discretionary “valuation” of the claim, this could prevent a sizeable number of parties from being able to afford to access the justice system.⁶¹
- “Legitimate political parties are exempted from paying the costs, but no definition of “legitimate” was included in the law.⁶² This could conceivably prevent disfavored political parties from accessing the courts to resolve electoral disputes.

⁵⁸ USAID, Draft USAID Rule of Law Strategic Framework, 2007.

⁵⁹ Article 48 CRDTL.

⁶⁰ HRI/CORE/TLS/2007. 16 July 2007. United Nations. p. 42.

⁶¹ Decree-Law No. 15/2003, Part II, Section 5.

⁶² Ibid, Part I, Chapter 1, Section 2 (c).

- The Catholic Church and all other religious denominations are also exempted from paying court costs. This is likely in violation of the constitutional effort to keep church matters separate from those of the government.⁶³

An additional concern of the assessment team was lack of access by litigants (and ultimately the public) to court documents in a timely and efficient manner. Representatives from the Public Defender's office stated that the section of the Criminal Procedure Code that mandates court approval for the release of documents is being misinterpreted. The relevant section seems to require court approval,⁶⁴ and an additional section seems to add the further requirement that individuals prove a *legitimate interest*.⁶⁵

iii. The protection of human rights and access to justice

The formal Timorese legal system remains inaccessible to a large majority of Timorese people, and this is likely to continue for a significant period. Access to justice continues to present one of the most significant challenges to the protection of human rights in Timor-Leste. Progress by the Government in establishing an effective and accountable system of justice remains slow and limited. The poor performance of the judicial system can create a disincentive for the police force to aspire to investigate cases effectively. Of the four district courts in Timor-Leste, only the Dili and Baucau courts operate regularly.⁶⁶ Except for the Baucau court, judicial personnel in the remaining districts are, more often than not, in Dili, occupied with administrative matters or training.

For many Timorese, the most readily accessible means for accessing justice is through traditional and informal processes. With modifications depending upon geography and custom, traditional justice systems and alternative dispute resolution mechanisms (ADR) exist and are in use in all 13 districts. Mediators within the police department, government agencies such as the Land and Property Unit, private lawyers, and elders all play a useful role complementing the arbitration employed by Suco chiefs. Formal justice mechanisms are seen by many as being slower and less effective than traditional or informal mechanisms.

Civil society can also play a role in increasing access to justice, particularly for vulnerable groups. Through monitoring and documenting abuses, NGO's can lead reform efforts and pinpoint structural inadequacies that need to be remedied. Through proactive advice, support, and outreach, NGOs can enhance the ability of vulnerable groups to bring cases to the courts. Effective monitoring and reporting of cases also serves to provide valuable information to the public about the justice sector.

iv. Language and access to justice

The use of Portuguese in the courts impedes individuals from accessing the formal justice system. One report notes that less than 7% of the population understands Portuguese, and even fewer persons have a developed Portuguese legal language capacity.⁶⁷ Despite this, up until the "graduation" of court actors from the LTC, the court system functioned primarily in Portuguese, often without written translation into Tetun, local dialects and other languages. Judicial actors including private lawyers, interested NGOs (and those monitoring cases) and government officials also claimed difficulty accessing information from the courts and decisions due to the predominance of Portuguese. Since independence many laws have been drafted only in Portuguese and often they are without timely official or unofficial translation into Tetun. This prevents civil society from commenting on and monitoring implementation of the laws, and it creates

⁶³ Ibid, Part I, Chapter 1, Section 2 (d).

⁶⁴ Ibid, Title IV Chapter 1 Article 75.

⁶⁵ Ibid, Title IV Chapter 1 Article 77 (3).

⁶⁶ Also discussed in the Amnesty International Annual Report 2004 dealing with the Democratic Republic of Timor-Leste <http://web.amnesty.org/report2004/tmp-summary-eng> viewed on 6 September 2004.

⁶⁷ The Asia Foundation, Law and Justice in East-Timor, A survey of Citizen Awareness and Attitudes regarding Law and Justice in East-Timor, p. 3 (2004). The 2004 Census estimates that 13.6% of Timorese speak Portuguese.

questions as to the legitimacy of the laws, and negatively impacts the ability of court actors to implement them. The reliance on the Portuguese language has been cited by some as logical result of international actors running the Timorese judicial system while their domestic partners attended the mandated trainings at the LTC. However, the assessment team was told by an UNDP representative that the Council of Coordination had in fact agreed to prioritize the use of oral and written Portuguese language in the Courts. Insufficient resources are being spent on translation and the development of the Tetun language to a point where it could be used interchangeably with Portuguese. A perception of “laws from without” has been created. In general, the choice of language has precluded the Timorese community from active participation in the processes of justice and has led to feelings of alienation toward the sector and laws. To quote a recent news article, “[t]he choice has brought a tangle of complications, disenfranchising a generation of Indonesian speakers and introducing a new language barrier to the country’s many other problems”.⁶⁸

v. Vulnerable groups: women

Women have limited access to justice due to prevailing attitudes and weaknesses of the justice system. According to a UN report, “Gender-based violence continues to be the highest reported crime in the country. Yet, less than a quarter of cases reported to the police are sent for prosecution.”⁶⁹ Lack of training among the police and prosecutors, lack of clarity in their respective roles and lack of effective investigations has often resulted in the presentation of inadequate evidence, leading to the dismissal of cases of gender-based violence. Decisions and sentences by judges fail to consistently apply international standards and lack gender sensitivity. Domestic violence is usually seen as a private matter, and reported cases are often mediated by a family or community representative. The pervading culture of patriarchy, especially strong in rural communities, has also contributed to the lack of adequate legal redress for women.

When reviewing the legal frameworks, it is apparent that progress has been made towards formalizing equal rights and integrating gender considerations. In the Timor-Leste Constitution, women and men are afforded the same rights under the law and in all aspects of society.⁷⁰ One of the fundamental objectives of the State is to “create, promote and guarantee the effective equality of opportunities between women and men.”⁷¹ It is also worth noting that Timor-Leste ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2003. This document requires the government to “take all appropriate measures to end any discrimination against women.”⁷² However, despite these legal protections, significant challenges for women continue to exist:

- Violence against women is endemic and women lack sufficient legal protection;
- Women lack of access to the courts for redress of wrongs against them;
- Trafficking of women continues to be a problem, with allegations made that the high number of international implementers, police and peacekeepers present in Timor-Leste may be a contributing factor;
- Access to education is minimal and a woman’s right to education is not observed in practice; and
- Women’s lack of financial independence can restrict their ability to utilize courts and formal mechanisms of justice for redress.

⁶⁸ Seth Mydans, *A Babel for East Timor as Language Shifts to Portuguese*, INTERNATIONAL HERALD TRIBUNE, July 23, 2007.

⁶⁹ Ibid section 103.

⁷⁰ CRDTL Part II, Title I, §§ 16-17.]

⁷¹ CRDTL Part I, § 6.

⁷² Convention on the Elimination of All forms of Discrimination against Women, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 Dec. 1979, 1249 U.N.T.S. 513 at art. 2.

vi. Vulnerable Groups: Children and Juvenile Justice

A serious area of concern in Timor-Leste (and noted as a high priority in the USAID 2006 *Conflict Vulnerability Assessment*) are issues affecting the juvenile population.⁷³ As already mentioned, Timor-Leste is not only one of the poorest countries in the world, but over 50 % of the population is under the age of twenty,⁷⁴ and the fertility rate continues to climb. The situation necessitates the immediate and consistent attention of relevant government and non-government actors at all levels (especially the local level), the international community; and the justice sector. It is also vital that these issues be approached in a holistic, multi-disciplinary manner with a maximum level of coordination and cooperation between relevant government and judicial actors, international and domestic organizations, and for the indeterminate future, peacekeepers and international police (especially given the jurisdictional/immunity issues which accompany these missions). While protection and enforcement mechanisms and domestic legislation are still evolving in Timor-Leste, of primary concern is the lack of any comprehensive juvenile justice system or protection framework. Provisions tailored toward juvenile justice are notably lacking in the new criminal procedure code. The lack of legal provisions giving competence to a special jurisdiction or court appropriate for dealing with juvenile offenders effectively allows juveniles to engage in criminal acts with impunity.

However, there are guiding standards set forth in several of the international conventions and treaties to which Timor-Leste has ratified,⁷⁵ most notably the Convention on the Rights of the Child (CRC) and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

General Protection Issues: There are a variety of issues impacting the health, education, and welfare of the juvenile population in Timor-Leste, which in turn impact the stability, safety, and security of Timor-Leste's inhabitants as a whole. Several of these issues that relate more directly to the progress of Rule of Law efforts have been noted by the assessment team, and some of the issues are also highlighted in Government reports to the UN regarding its duties under the CRC⁷⁶, including:

- Applicable domestic laws do not explicitly guarantee the best interests of the child as a primary consideration in judicial decisions and procedures;
- Investigations and judicial procedures are not adequately sensitive to the unique standing and vulnerability of children, especially when eliciting a child's statements, testimony, or opinions;
- There is no uniform practice of expediting child-related court hearings, nor of providing special confidentiality protections for children during interviews and/or testimony;
- The inability to secure legal representation (be it for an accused or victim) may lead to further delays in conducting court proceedings and may increase the length of detention or protection measures;
- Depending on the use of the UNTAET identification card (issued in early 2001 for the national Constituent Assembly elections) or a baptism certificate for formal identification of a juvenile and verification of age can be problematic or may not even be available;
- There are minimal support and protection services for child victims, primarily rendered by a small number of overstretched NGOs; this is compounded by a lack of attention to and emphasis on trafficking victims as distinct from prosecution of offenders.⁷⁷

⁷³ The Crisis in East Timor, Causes, Consequences and Options for Conflict Management and Mitigation. USAID. November 2006.

⁷⁴ Republica Democratica de Timor-Leste, Initial Report Convention on the Rights of the Child 2006 p. 212.

⁷⁵ Timor-Leste Constitution states "rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession ." (Article. 9.2 CRDTL).

⁷⁶ Republica Democratica De Timor-Leste, Initial report Convention on the Rights of the Child 2006.

⁷⁷ Ibid p 7-8.

It was not clear to the assessment team how children are protected by law enforcement and/or village representatives in cases of family violence and sexual abuse. It was also not clear under what circumstances such matters were being addressed through the traditional system or formal court proceedings. In an attempt to establish a more coordinated and multi-disciplinary approach to juvenile issues, especially those issues related to family violence, abuse, and neglect, UNICEF representatives indicated that they have been working with the relevant government ministries and enforcement agencies to design and eventually implement *Rules of Organization and Procedure* for law enforcement officers and child protection personnel.

Anti-trafficking measures have been incorporated into the draft Penal Code and there is support for the development of a national action plan on human trafficking. A recent report by the Government of Timor-Leste stated that while there is little evidence of the sale of children in Timor-Leste, there is concern that the high level of poverty, absence of proper case management and assessment for the adoption of Timor-Leste children, and the great emphasis by the government to establish vibrant bilateral relationships with nearby countries, could provide fertile ground and opportunity for this type of abuse.⁷⁸ There is also concern that the lack of intellectual property protections on DVDs increases the likelihood for the introduction of pornography,⁷⁹ and especially child pornography.

Criminal Justice Issues: While some domestic laws address juvenile issues (i.e. closed hearings for juveniles testifying in court), a comprehensive legislative framework regarding juvenile justice and procedure is needed, given the complexities involved⁸⁰. The assessment team acknowledges that underage participation in gangs create even more intricacies in the area of Juvenile Justice. Emerging research seems to indicate that a strong suppression approach needs to be balanced with the provision of social services and economic opportunities. A recently released report from the U.S. based think tank, The Justice Policy Institute, concluded that heavy-handed suppression efforts can actually increase gang cohesion and police-community tensions, and has a poor track record when it comes to reducing crime. Furthermore, such tensions deepen the rift between the community and the police. For example, in Chicago, a cycle of police suppression and incarceration combined with a legacy of segregation *sustained* unacceptably high levels of gang violence. The picture is less bleak for gang enforcement strategies seeking to combine suppression with social service interventions.⁸¹

Restorative Justice: A Timor-Leste specific model for a juvenile justice framework should include a restorative justice approach, which would fit in well with existing traditional approaches to justice. This concept focuses on the harm caused to the victim and how to repair that harm. The offender takes responsibility for the harm he/she caused and attempts to make amends. The community becomes involved on several levels, supporting the victim while holding the offender accountable for the harm. Communities also examine the conditions that might have caused the harm and then find ways to address those conditions so that the likelihood of harm is reduced in the future.⁸²

There are several restorative justice models to consider, and all three are based on similar restorative premises that are already interwoven with the Timorese village level “mediation” processes:

⁷⁸ Report on Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, June 28th, 2007, p. 3.

⁷⁹ Ibid, p 4.

⁸⁰ Criminal Procedure Code, Article 76. Paragraph 5. 13/2005 Government Decree Law. 22/11/05.

⁸¹ Judith Greene and Kevin Pranis. *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Justice Policy Institute. July, 2007.

⁸² See Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990).

- Victim/offender mediation or dialogue⁴ (VOD): this model provides an opportunity for interested victims to meet and talk with their offender in a safe and structured setting, uses a facilitator to lead the discussion. The goal of VOD is to allow the victim to express the harm done to him/her and to hold the offender accountable for his/her conduct, and to make it possible for the offender to express remorse and develop empathy for the victim.
- Family group conferencing (FGC): is similar to VOD, but also includes those in addition to the offender and the victim who are also personally affected by an offense (the victim, the offender, and the family, friends, and key supporters of both). They meet to talk about the impact of the offense and to decide how the offender should be held accountable for the harm caused.
- Community accountability board (CAB) restoration projects: these bring the offender and sometimes the victim before a panel of community members who decide how the harm of the offense will be addressed. The result of the meeting is the offender's written agreement to make reparations, often through restitution, expressions of remorse, and community service.

However, the CRC report noted that such community based mechanisms can in some cases have the effect of inhibiting free expression due to the shame experienced by the parties to a dispute. Some individuals, often the victims, reportedly feel constrained by feelings of shame and are generally reluctant to air their grievances in a community forum. Invariably these feelings afflict those most vulnerable including women and children.⁸³

Canada is considered the birthplace for the modern restorative justice movement. Since its inception there, more countries have implemented restorative justice philosophies and created practices to suit the needs of their communities. Today, restorative justice theory has come to inform juvenile justice systems globally, including Australia, Canada, Hong Kong, Israel, New Zealand, South Africa, and much of Western Europe.⁸⁴ International organizations such as the Council of Europe, the European Union and the United Nations all have policies promoting the use of restorative justice practices in criminal justice matters.⁸⁵ Interestingly, New Zealand was the first country to use legislation to redirect the focus of their juvenile justice system towards restorative justice.⁸⁶ In 1989, legislation was passed requiring all youth in trouble with the law to participate in FGC as a diversionary measure, or as a prerequisite for a judge to sentence the child in youth court.⁸⁷ FGC, which is focused on collective responsibility and community, is modeled after the Maori indigenous response to harm, and is effective in part due to its cultural significance.⁸⁸ In addition to these models, special attention should be given to establishing offender diversion processes that provide mentoring and referrals to social services, so as to both hold the offender accountable and give him/her an opportunity for transformation.

viii. Human rights: accountability

The international community has been resolute in its call for justice to be delivered, not only for crimes committed during the unrest of April-May 2006, but also for many of the unresolved serious crimes

⁸³ Republica Democratica De Timor-Leste, "Initial Report Convention on the Rights of the Child" 2006. p.112 (2006).

⁸⁴ Umbreit, Marquette at 259 (citing "Dean E. Peachey, *The Kitchener Experiment, in* Mediation & Criminal Justice 14, 14-16 (Martin Wright & Burt Galaway eds., 1989)").

⁸⁵ Ibid at 261.

⁸⁶ Gabrielle Maxwell & Allison Morris, *Youth Justice in New Zealand: Restorative Justice in Practice*, 62 J. of Soc. Issues 239 (2006). Today, New Zealand's justice system is almost entirely based on restorative justice. Retributive methods are used for murder and manslaughter. Retributive methods are also used for some offenses (e.g., arson and aggravated robbery) depending on the previous history of the child and seriousness of the crime. *Id.*

⁸⁷ Ibid at 240.

⁸⁸ Ibid at 244.

dating back to 1999. The UN has committed significant resources to this end. The message from the Timorese government has been less clear, with a number of mixed messages from political leaders.

The UNOTIL report by the Secretary General in August 2006 documents the calls for justice by the political elite and the need for cases to be re-opened.⁸⁹ That message has now been nuanced. While accountability was still seen as important, there did not seem to be desire or political will by government actors to prosecute the cases. Instead, there was a call for international courts and actors to bring perpetrators to justice so that Timorese officials would not have to be involved. The assessment team also noted concerns that the serious crimes unit might further strain the judicial sector by creating an overwhelming number of high profile, politically charged cases to be prosecuted. In the assessment interviews, there were few calls for 1999 cases to be reopened. While there was general sentiment that further investigation and prosecution be pursued regarding the Crisis events of 2006, many interviewees were concerned about whether there is adequate domestic capacity, whether Timorese courts are the appropriate forum, and lastly, whether there is true political will to investigate and prosecute. A literature review of Timor-Leste reveals wide support for accountability of those involved in human rights abuses. However, it is unclear if the current government and parliament have the political will to prosecute individuals who are guilty of these abuses. Instead, a possible future scenario is that the Serious Crimes Unit (SCU) would reopen the 1999 cases, investigate and push for criminal charges, therefore raising public expectations once again without knowing if the Prosecutor-General, the Timorese government, and the international diplomatic community will ultimately support the effective prosecution of these cases.

The passage of the recent Amnesty law⁹⁰ complicated these matters. As the JSMP recently noted,

the aforementioned law contains a number of conflicting articles. The law itself is not compatible with other legislation and is unconstitutional. This is despite the fact that all new laws are supposed to correspond with the Constitution which is the highest law in the country... It also includes articles that are vague and ambiguous... The Amnesty Law is more political than judicial in nature and appears to have been created and approved with the intention of protecting certain individuals and groups who wish to evade prosecution.⁹¹

Given the culture of impunity that exists in Timor-Leste, if implemented, the Amnesty Law of 2007 does not seem likely to increase accountability for crimes. This lack of accountability is just one of many factors that lead to the perception that the judicial sector does not protect basic human rights and civil liberties.

The Assessment team also documented the concern from human rights groups that lack of accountability for non-political crimes, in particular by juveniles, was a major concern. Recommendations on how to address this lack of accountability varied. While there was general agreement that more offenders needed to be prosecuted and detained in order to protect victims, the courts need to be attentive to due process protections. Therefore it is required that there be a careful balancing act between increasing access to the courts and diminishing the backlog while protecting civil liberties.

As mentioned above, civil society, and in particular human rights defenders, play an important role in the monitoring, advocacy, and dissemination of information about human rights. While non-governmental

⁸⁹ United Nations / Ian Martin, "Report to the Secretary-General on Timor-Leste Pursuant to Security Council Resolution 1690, August 2006. s/2006/628. 2006.

⁹⁰ Law on Truth & Measures of Clemency for Diverse Offences. Draft approved in National Parliament Plenary on 13 March 2007, in general. [Amended and passed on 4 June 2007.] Awaiting promulgation by President as at June 2007.

⁹¹ JSMP. "What will be the Effect of the Draft Amnesty Law?" JSMP Comments on the Draft Amnesty Law June, 2006. <http://www.jsmp.minihub.org/Legislation/AmnEng.doc>.

actors should not supplant the duty of the government to ensure that human rights norms are complied with, groups like Hak and Forum Tau Matan have greatly increased the government's ability to record abuses. Media attention towards human rights abuses has been lacking, but some groups like Labelh have been able to document concerns and reach out via radio and television to increase the public's awareness of abuses. However, according to the Prime Minister's Office on Human Rights, human rights defenders have been ineffective at developing and implementing advocacy strategies that can result in changes to legislation. New and creative approaches are needed.

ix. Public information about the justice system

The Timorese public does not have adequate information about the workings of the judicial sector, as the sector has not developed adequate outreach mechanisms. Media outlets and civil society organizations alike fail to have sufficient access to information, nor are they educated and trained in the workings of the justice system. Rampant illiteracy compounds the problem of information dissemination, leading some groups to resort to graphic posters and community meetings, with no written materials produced or used. Timorese reported not understanding procedure, access, definitions, basic rights and responsibilities, as well as lacking in information regarding ongoing cases. The complete lack of information gives rise to misperceptions and leads to a general mistrust of the system. Improved information delivery, in particular regarding pending or completed cases and procedures, could lead to a significant increase in the use of and confidence in the court system, as the Timorese begin to see the system as a viable dispute resolution mechanism. Political leaders, government officials, court representatives, and parliamentarians contribute to the spreading of misinformation, instead of serving as a reliable source of accurate and dependable point of contact for the public into their government and judiciary. Statements made by government officials reflect a lack of knowledge over roles and responsibilities as well as the content of laws.

The judiciary is currently in the unenviable position of providing an impartial and functioning system to its people in the face of seemingly insurmountable obstacles, including the lack of adequate resources, training, and capacity. Judicial actors, especially private lawyers, also have insufficient information about procedures and laws and thus sometimes serve as agents of misinformation by advising clients and other members of the public incorrectly. Improved training and a concerted, consistent effort to keep all actors informed of legal developments is necessary. Providing full translations of all laws and decrees from Portuguese to Tetun is of fundamental importance.

Traditional actors also were found to be poorly or misinformed. Village chiefs, the *Chefe de Suco* reported not understanding their duties and responsibilities despite numerous forums where training was provided. Interviewees identified problems with training design, language, and lack of follow through which contribute to community level legal ignorance and misperceptions.

x. Cultural concepts of justice/fairness

Different concepts of justice need to be taken into account but should not lead to an apologetic response or to the ignoring of key human rights norms. In addition, practical realities facing Timorese need to be addressed within the legal framework and administration of justice. For instance, one village chief was of the opinion that imprisonment did not resolve conflicts and instead only exacerbated them by allowing the defendant a "vacation" sentence while increasing the desire for revenge against the victim by the family of the defendant. Once released, a new cycle of violence is started as the defendant then exacts that revenge on the family of the victim. The chief opined that the traditional mechanisms of justice allowed for true resolution the conflict in its entirety, and, as such, encouraged those in his village to seek traditional resolution through his offices.

Interviewees also expressed the concern that there is a disconnect between internationally designed legislation and the reality of life in Timor-Leste. While specifics were not offered, one common

complaint revolved around the issue of the drafting of laws: the drafters (mostly internationals) “failed to take into account the Timorese cultural context.”

6. EFFECTIVE APPLICATION

This element pertains to enforcing and applying laws. Without consistent enforcement and application, there can be no Rule of Law. The judiciary is an important element of the enforcement process.⁹²

i. Dili-centered justice system: the lack of district outreach

The judicial sector in Timor-Leste is centrally located in Dili. District Courts have been established (to varying degrees) in Dili, Oecusse, Baucau, and Suai. A Court of Appeals has been established in Dili, and it currently functions as the Supreme Court as well.

Despite the geographic spread of courts, the majority of judicial activity takes place in Dili, and until the recent graduation of trainee judicial actors, even the non-Dili District courts were virtually run by international actors from Dili. This has severely limited access to the courts by those living outside the capitol. Many domestic judges, prosecutors and public defenders maintain their primary residences in Dili. International judges and other consultants are consistently based in Dili. While travel is encouraged, the lack of housing, security, and adequate transportation has prevented both international and domestic actors from regularly visiting to some of the regions.

As a result, a disparity exists in access to justice among Timorese, with those living in or near Dili more likely to have their cases heard and processed through the system. In Suai and other regions, there may be significant pressure to have conflicts resolved through extra-judicial measures, including ADR, mediation, and traditional/informal judicial processes.

The lack of activity in courts creates a strong perception of the unavailability of the formal court systems for those living in certain regions. People reported a lack of trust in the judiciary being directly related to their perception that nothing happens in some of the district courts as, at least in Suai and Oecusse, they remain vacated and locked for the majority of the month.

ii. Structural Functioning

The effective application of the law has been hampered by the lack of proper budgeting, human resource management and strategic planning. Judicial actors are selected based on their experience and background in law, but they then find themselves in the dual position of judicial actor and court administrator. While the Legal Training Center has focused on improving their knowledge of the law and their language skills, insufficient effort has been spent improving their ability to functionally manage the courts and train the necessary support staff.

Certain agencies, such as the OP, have managed to develop strategic plans. Similarly, the Ministry of Interior has spent considerable time developing a plan for future activities. However, many of the plans are developed with the aid and influence of international experts. The Provedor’s office was seen by some as unique because the assistance they received focused less on material support (although they were provided with a significant amount of equipment) and more on administrative training such as on budgeting. Therefore a more sustainable skill base has been created within the office, so long as current staff stay in the office (which is not always the case due to low salaries). In general, the courts and judicial actors, with a few exceptions, would be strengthened considerably by a clear set of goals and strategic plans to further develop the human resources and management structures within their offices.

⁹² USAID, Draft USAID Rule of Law Strategic Framework 2007.

While funding for the judiciary exists in the national budget, judicial agencies have difficulty accessing sufficient amounts of such funding in order to properly implement their activities. Commercial petroleum extraction efforts from the Timor Sea are benefiting from historically high oil prices and Timor-Leste can now fully finance an annual budget at a sustainable level of income. Domestic revenues have also increased as a result of much-improved tax and customs administration. These revenues do provide adequate resources for the judicial sector of Timor-Leste. However, judicial actors reported delays in obtaining funds for their operations and activities, which, in turn, results in investigations not being carried out, communications delayed,⁹³ transportation issues impeding the ability of judicial actors and parties to travel to the regions, and inadequate housing. These issues all add to existing operational deficiencies and security concerns as well.

General problems with budgeting, tracking and basic accounting skills were reported in the Ministry of Justice and the Office of Budget and Planning. As a result in the delays and bureaucratic difficulties in obtaining funds, some judicial actors have requested that donors supply resources that have been promised in the national budget, but remain inaccessible. Donors should exercise caution in ensuring that its programs not provide funds for basic operational costs associated with the functioning of a judicial system (physical structures, salaries, equipment etc) that the government should otherwise be responsible for providing.

iii. Skills

The legal skill deficiencies identified herein are not being addressed through the current training programs and university level programs. Historically, legal education includes a strong theoretical approach to law, but it does not include a clinical or practical element before one assumes a professional position. The one exception to this is the mandated “probationary period” for graduates of the LTC. However, the National University of Timor-Leste has started offering a seemingly stringent course of legal studies, however there is not significant “outreach” efforts by judicial actors/MoJ, or recruitment activities encouraging youth to pursue studies in law. In addition, the university does not offer a post bachelor’s degree course in law. Graduates with legal degrees were reported to be pursuing graduate degree work in other educational areas as a result of this gap in education. While the LTC is providing exceptional professional training to some court actors, continued ongoing training is necessary to ensure a functioning, up-to-date judiciary. Professional training needs to be expanded to administrative staff and private lawyers.

The criminal procedure code even provides for the option of appointing inexperienced law graduates for the accused, which could negatively impact the competence of that representation.⁹⁴ The Code reads, “[s]hould there be no public defender available, the defender shall preferably be appointed from among lawyers or law graduates.” While a pragmatic approach is needed in order to provide for actual representation for defendants, the highest level of expertise available helps to ensure that the due process rights of the accused are protected.

iv. Limited human resources

In addition to a dearth of skills among existing personnel, there are not sufficient numbers of individuals trained to adequately support a functioning judicial system. In addition to the lack of competent judges, prosecutors and public defenders, the lack of support personnel, particularly in the regions, impedes the effective application of law.

Of particular concern is the lack of more senior actors within the judiciary participating in policy discussion, decision making and oversight, resulting in “executive multi-tasking.” The President of the

⁹³ This would in turn lead to problems with implementing the 72 hour holding rule. *See supra* p.21.

⁹⁴ Criminal Procedure Code of Timor-Leste, Chapter VII Article 66 (3): “Should there be no public defender available, the defender shall preferably be appointed from among lawyers or law graduates”.

Court of Appeals directs or participates in many if not all oversight bodies for the judiciary in the absence of the establishment of the Supreme Court and the appointment of the Chief Justice of Timor-Leste.

Moreover, newly hired staff do not receive sufficient training and support to perform their duties. One court clerk reported never being provided a job description nor trained regarding his duties. He therefore devotes his time to securing and cleaning the court. Lack of trained and knowledgeable court staff can lead to misinformation of the public regarding how to file a petition as well as impeding the ability of judges to adequately manage their cases. The recent contribution by the government of Brazil of some of the courts clerks may alleviate some of these problems, but will only succeed if sufficient mentoring and training of domestic staff is prioritized.

E. RECOMMENDATIONS

1. **Is a concentration on Rule of Law warranted?**
2. **Priority recommendations**
3. **Existing programs**
4. **Policy recommendations**

1) IS A CONCENTRATION ON RULE OF LAW WARRANTED?

With overwhelming security and economic concerns pervading every aspect of life, the daily experience of justice can only be a remote and theoretical discussion for many Timorese. Given the challenges and instability of what is essentially a new judicial system, international support for the sector is essential and will remain necessary for at least the next five 5 years.

Foreign assistance provided by the United States for advancing the Rule of Law in Timor-Leste has had a vital impact. The USAID Timor-Leste Mission has been especially adept at adopting creative approaches to provide targeted, foundational, and cost-efficient assistance to strategic formal and informal justice actors and ministries and agencies through its existing implementers.

Rule of Law programming should remain a priority for USG funding. Withdrawing this financial and programmatic support could have a detrimental effect on the economic development of the country, on security and order, as well as democratic development and protection of basic human rights for the people of Timor-Leste.

2) PRIORITY RECOMMENDATIONS

Given the amount of limited funding available from the United States, and the amount of financial support already being channeled to the formal judicial sector channeled by other donors, the assessment team focused on identifying priority, under-funded program areas vital for the functioning of an effective judicial system (several of which are currently being addressed through existing USAID funded programming):

i. Increasing access by individuals to informal/traditional justice systems: The inability of Timorese (especially those living outside of Dili) to access justice mechanisms was identified by many respondents as a key impediment to Rule of Law reform. One analyst suggested that nearly 95% of all disputes were settled through local mediation, not necessarily because that forum was the most appropriate, but because it was the only recourse available to individuals. Increasing access to justice by expanding and strengthening programming to support village-level, informal methods of mediation and dispute resolution that respect human rights is of the highest priority.

The traditional or informal justice sector is capable of effectively resolving many disputes, especially when it is employed as a mechanism for dealing with simpler, local-level community issues. Given the challenges implicit in accessing the formal system, it is not surprising that most Timorese choose local mechanisms to resolve the majority of their disputes. The President of the Court of Appeals has expressed concern regarding the ability of the formal sector to resolve all the disputes that would be presented to them if the Timorese were to fully avail themselves of the courts. While concerns have been expressed regarding the compatibility of some of the local or traditional forms of mediation and arbitration to human rights standards, these mechanisms remain the sole experience of dispute resolution for Timor-Leste's rural poor (who represent the majority of the Timorese population). It is therefore recommended that donors:

- a) Support the training of traditional or local actors by building mediation skills and basic legal knowledge, and by increasing the compatibility of their actions with human rights standards and national law.
- b) Support the regular monitoring and evaluation of the informal system, especially while the formal system matures, and work with both with government and local leaders to address issues of concern regarding the needs of both systems.
- c) Continue to train the local mediators to help women receive more equitable treatment under the traditional system of justice.

ii. Capacity building: The difficulty in finding, placing and keeping qualified staff in the justice sector reflects the challenges facing the country. UNDP support has focused on training the most prominent judicial actors including judges, prosecutors and public defenders. However this training needs to be expanded. The target groups should include private lawyers, administrative and clerical support personnel, and it should focus on building interest and skills of youth for the “next generation” of judicial actors. In addition, the training of the formal actors must continue in order to ensure that the legal community keeps up with advances in the law and their own development.

Capacity building also entails enhancing the technical skills and professional status of justice actors and support staff. The following is an examination of the needs of specific types of judicial sector personnel:

- a) Judges: Since the judiciary often is the “face” of the judicial system, and therefore bears the brunt of much of the criticism against it, technical support for judges is vital. Donors should:
 - Support the founding of a formal Judges Association to: advocate on behalf of judges vis-à-vis the Government, the international community, and the justice sector institutions; to encourage the acceptance of a professional philosophy of continuing education and learning; to initiate appropriate legislative and regulatory drafting efforts; to engage in public information and education efforts; to explore “working abroad” type opportunities or mentoring with experienced judges from respected jurisdictions in the region; , to coordinate the ongoing development of substantive judicial education curricula (especially that which incorporates international conventions and standards ratified by Timor-Leste, such as the ICCPR); and the training of public outreach and media spokespersons.
 - Support the operation of the Superior Council for the Judiciary, particularly in the implementation of judicial entrance and competency examinations; the drafting and implementation of a professional ethics code.
- b) Public Defenders: For all intents and purposes, public defenders in Timor-Leste also serve as the de facto defenders of the civil and political rights and liberties of their communities. These functions, along with the actual legal representations of their clients, are therefore critical to the development of the Rule of Law. These efforts would be greatly enhanced by efforts to:
 - Support the formation and operation of the Superior Council for the Public Defender (once enabling legislation is in place), particularly regarding such a Council’s efforts to draft and implement a professional ethics code;

- Sponsor vigorous trial advocacy skills trainings; and
- Sponsor substantive trainings regarding the incorporation of relevant sections of the ICCPR into the daily practice of the public defenders, especially when addressing pre-trial detention issues and fair trial standards.

c) The National Law School: due to a shortage of lawyers and the public perception that the legal system is not responsive to its needs, it is critical that National Law School receive vigorous technical support. It is therefore recommended that:

- A legal clinic be started, to assist real clients and to help students gain the practical skills needed to become effective practitioners. Under the supervision of professors, students would be trained on: client interviewing; problem solving; legal analysis and research; client counseling and communication; and legal theory and strategy. Students could assist (when appropriate) TAF's legal aid partners and/or public defenders in actual representations, and assist the JSMP in its monitoring efforts. The students could then be channeled into post-graduate internships with the same agencies/actors/NGOs.
- Trial Advocacy Skills training be included in the core curriculum, as it is very important that legal actors understand basic concepts of communication and advocacy to become effective judicial advocates.
- A Professional Ethics course be included in the core curriculum, to emphasize and incorporate the highest levels of professional conduct from the beginning of students' legal careers.
- A partnership with an established "sister" law faculty abroad be initiated to enhance the stature of the National Law Faculty, and to promote best practices in curriculum design and teaching methodology. This partnership would also provide an opportunity for the Law Faculty to identify "study and/or work abroad" type placements for Timorese law students and new practitioners.

iii. Supporting a comprehensive approach to land reform and the creation of conditions necessary for IDPs to the peacefully return to their homes: Land reform continues to be one of the most visible manifestations of the short comings in the Rule of Law in Timor-Leste. IDPs are a daily reminder of the country's instability, and they represent a potential security threat. Lack of investment in land and the subsequent retardation in economic development can also be traced to the fear that land can be taken away even when ownership is duly recognized. Addressing the land issue is a necessary pre-condition for the restoration of faith and confidence in the courts, and reform efforts would contribute to Timorese confidence in their government's ability to protect their rights and interests.

Many of the current disputes involving land are mediated through the informal system of justice with mixed success, and thus, the security situation needs to be addressed within this context. USAID is planning to a fund multi-million U.S. dollar project to strengthen property rights; develop a registration and titling system; create dispute resolution mechanisms; and promote public awareness of rights and responsibilities regarding land ownership. However, it will be difficult to quickly change existing attitudes regarding land rights, since more than 10% of the Timorese population currently lives in IDP camps, and the practice of "squatting" is common. Timorese need to feel that they can reclaim their homes, and support their neighbors in reclaiming their homes, without fear of retaliation. A significant step forward for Timor-Leste would be the creation of an environment where individuals would feel safe to publicly identify the rightful owner of a home, or a squatter in the neighborhood or in temporary housing. So far, gangs have further complicated the situation. In some

neighborhoods, gangs are impeding the return of IDPs and have so far not been constructively and effectively engaged as potential stakeholders in efforts to resolve land disputes.

While trying to address this fear of retaliation, it is also important to garner support by educating the public about the importance of land law reform. The World Bank report advises that a land policy exercise must begin with extensive public consultation in order to build consensus, before efforts are made to draft a new land law.⁹⁵ Public outreach and education could be one of the ways for the USAID democracy office to complement the efforts of the economic growth office in Timor-Leste.

Any proposed intervention by the legislature will be extremely complicated. Timorese politicians may resist the establishment of conflict resolution mechanisms for housing, land, and property disputes because these politicians personally gain from the lack of clarity in this area, as they have their own property interests.⁹⁶ Nevertheless, the legislature needs to address these issues and in particular establish parameters regarding the admittance of evidence in land rights cases.

iv. Empowering and supporting civil society, human rights organizations and individual human rights defenders: USAID should take advantage of current opportunities to empower and support human rights organizations and individual human rights defenders. Support should be targeted to short-term campaigns that pressure the government to provide an adequate legal framework for the country, as well as long-term monitoring and watchdog activities. Human rights protections are a priority that should be addressed in all programming, especially that which targets women, children, and individual human rights defenders. The specific support activities listed below were identified as particular concerns, based on gaps in funding and needs analysis:

- Support should be provided to civil society initiatives to monitor and engage in education addressing human rights violations by police. As noted above, the majority of documented human rights abuses involve members of the PNTL. While the MoI appears to be taking effective action against some members, both police officers and the public need to better understand their rights and responsibilities *vis a vis* international human rights standards. In Central and Eastern Europe, public outreach campaigns, NGO watchdog groups, and investigative journalists have been found to be effective deterrents of abuse by police. The high impact work of JSMP is an example of this model, and its use by other organizations could have positive results in Timor-Leste.
- Explore mechanisms that can be used to increase advocacy and support for juvenile justice initiatives. The founding of a Children's Commission would be very beneficial in guiding a variety of advocacy efforts involving juveniles. Such a commission could be charged with ensuring compliance with the Convention on the Rights of the Child (CRC), and it could also advocate generally on behalf on children's rights, and serve as an oversight committee regarding juvenile justice. It could also have an expanded mandate to include public education, and advocacy for the passage of legislation which would establish a minimum age for criminality, and provide for alternative sentencing for juveniles. Such measures would enable the prosecution of juvenile offenders and would provide a mechanism for rehabilitative sentences based on the defendant's age and the context of the crime. Both the ICCPR and the CRC mandate the segregation of juvenile offenders from adults in detention and/or prison facilities. The Commission could advocate for the improvement of judicial capacity to try juvenile offenders, for increased access to legal representation, and support for projects which address gang violence. In

⁹⁵ World Bank, Strengthening the Institutions of Governance in Timor-Leste (2006).

⁹⁶ Harrington, Andrew: Ethnicity, Violence and Land and Property Disputes in Timor-Leste, University of Ottawa, East Timor Law Journal at p. 30, 2007.

addition, restorative justice models could be initiated, such as the victim/offender mediation/ or dialogue (VOD), family group conferencing (FGC) or community accountability boards (CAB).

- Explore mechanisms to provide that domestic violence cases to be processed within the formal court system. This is especially necessary for those cases which involve severe incidents of assault. It would also help to identify occasions during the traditional mediation process when the “right of referral” should be granted. Additionally, support should be provided for NGO involvement in the mandated State reporting requirements for CEDAW.
- Support should be provided for initiatives which focus the efforts of private lawyers on the rights of women and children. For instance, one of the TAF legal aid partners in Baucau has utilized her growing expertise to handle sexual violence and domestic violence cases and related cases affecting women. The situation will not change overnight, but instead a long-term, multi-dimensional approach will be needed.⁹⁷
- Initiate ICCPR training for formal and informal justice sector actors. This would encourage the protection of ICCPR rights throughout the judicial process.
- Increase the advocacy capacity of civil society to push for promulgation of key legislation and to monitor its implementation: Currently the NGO community is active and is meeting some needs that are not met by the formal sector. However, neither the community as a whole, nor individual organizations, have successfully identified advocacy strategies that have resulted in the passage of key legislation. Human rights groups and others self-identified the need to re-examine advocacy strategies and to better utilize media and public outreach as advocacy tools. In addition, the Bar Association and other professional associations could play a more pro-active role in advocating for the passage of important legislation. Initiating and supporting advocacy campaigns would not only result in a strengthened judicial framework, but would also increase the public participation in and knowledge about the justice sector.

v. Public Information, Increasing Knowledge about Law: While quantitative data on public perceptions of the justice system was not available, it was clear from the qualitative data collected by the assessment team that there was not sufficient public dialogue about justice. This lack of ongoing and inclusive dialogue may be contributing to a lack of understanding about the positive side-effects a functioning rule of law system could produce - security and economic development.

Significant obstacles complicate efforts to educate the inhabitants of Timor-Leste about their judicial options and the mechanisms available to access them, including:

- The historical underdevelopment of media infrastructure and the effects of poverty in terms of limiting access to information;
- the absence of a legal framework to regulate the media
- the lack of efforts to train and professionalize media outlets regarding reporting on judicial mechanisms
- the lack of alternative information sharing options;
- the geographic isolation of many communities;
- the variety of spoken languages; and
- high rates of illiteracy.⁹⁸

⁹⁷ HRI/CORE/TLS/2007. 16 July 2007. United Nations P. 58. When conducting regional consultations concerning human rights in the country, the government in this report found that individual complaint mechanisms were rarely mentioned in the context of ways to seek remedies for alleged violations.

⁹⁸ HRI/CORE/TLS/2007. 16 July 2007. United Nations P. 62.

Recommendations for supporting public education and increasing knowledge about the law in Timor-Leste include:

- Exploring how public education regarding developments in the justice sector, as well as information on how to access the courts and better information on cases could increase public trust and use of the judicial system. Civic education, human rights camps and street law programs have been shown to increase the participation of citizens in the formal justice sector, especially when such programs target youth. Support for public information officers within government agencies is a positive step in increasing information about the sector; however, parallel support for media and journalists will be necessary to take full advantage of this development.
- Public Service Announcements (PSAs) and the media projects have been shown to be valuable tools for increasing knowledge of and trust in the courts. Due to the level of illiteracy and economic development in the country, radio was identified as a useful tool that is currently underutilized by NGOs, Human Rights Defenders and government actors.
- An evaluation of methodology for training and information programs is necessary to ensure that the most efficient mechanism for information dissemination is used in USAID supported programs. A formal evaluation of existing techniques should be undertaken. The assessment team noted that non-traditional mechanisms such as dramas, role-playing and graphic posters, developed by the non-governmental sector of the country, appeared to have greater impact in rural areas.
- Access to legislation needs to be improved. USAID and other donors should support translations of new legislation and dissemination of those translations. There is also a need for texts, reference guides and case books to be developed.

3) CONTINUED FUNDING FOR EXISTING PROGRAMS

It is necessary that MSD and TAF continue implementing their programs. The United States enjoys a relatively positive image in Timor-Leste and is for the most part considered a neutral actor working on behalf of the people of the country in support of its independence. The U.S.'s favorable position situates it well for continuing to build effective partnerships with local actors. The comparatively small amount of funding dedicated by USAID to Rule of Law work *vis-a-vis* other donors has led the United States to fund "niche" projects which address key concerns identified in this analysis, such as working with the informal justice sector and building the administrative skills of judicial actors. In addition, USAID-funded work with the OP is key to supporting a truly independent check on government abuse and the protection of human rights. While these projects have enjoyed moderate success, their impact must be measured against the baseline snapshot of the judiciary at independence, when organic formal structures were nearly non-existent. Given the amount of work required to build a functioning judicial system essentially from scratch, the TAF and MSD programs should be commended and expanded as described below, and in the general recommendations which follow:

i. Specific recommendations for the Asia Foundation (TAF):

- Continue efforts to provide legal assistance to minorities and inhabitants of IDP camps.
- Despite committed work by the legal aid partners, Timorese levels of legal knowledge needs to continue to be enhanced – especially regarding new laws and legislation (i.e. criminal and civil procedure codes). To address this, consider advocating the use of

training at LTC for the legal aid defenders and the private bar, to increase their skills with standardized, developed curriculum, and to provide the option for the legal aid partners to become public defenders if they so desire.

- Increase the ability of Legal Aid Partners to observe and monitor mediations at the *Suco* level to provide an additional check, to be a resource for ideas, and to share best practices with this important traditional system.
- The assessment team strongly recommends that the internship program continue, as it has provided vital “gap-filling” in communications with clients, their families and village level actors, and has also served to spark interest in a legal career among the interns.

ii. Specific recommendations for Management Sciences for Development, Inc. (“MSD”):

- Long-term institutional support from the international community for the administrative functioning of the Office of the Provedor is needed to ensure its continued strengthening and independence, and to foster a deeper understanding of its important monitoring role. This is necessary because the OP remains a young institution, operating without the complete trust and respect of other government agencies or the people of Timor-Leste. Institutional and operational strategic planning is ongoing and deserves continued international support and assistance (including an articulated exit strategy and continued full disclosure by the Provedor of other sources of international assistance).
- Priority to functions being carried on outside of Dili (especially outreach and public information).
- As needed, encourage continued liaising by the OP with other governmental partners (Indonesia, Malaysia, Thailand, etc.), especially those with geographic proximity, on operational levels, and in providing mentoring opportunities.
- While financial training should continue, administrative and human resource training should be prioritized as well, including a focus on document security, court administration and human resource management.
- The effective use of public information strategies and media outlets, such as radio programming, is vital and addressing this need is one of the key priorities identified in this report.

APPENDIX

I. Donor Activity in the Justice Sector

A Summary of Donor Activity by Institution

Ministry of Justice

- Portugal: legal advisors
- USAID: financial management training and mentoring
- AusAID budget execution advisor

Office of the Prosecutor-General

- AusAID: a senior management advisor and two technical support advisers through PSMCDP, and financial support for major district infrastructure
- USAID: financial management training and mentoring
- UNDP: prosecutors and registration clerks
- UNMIT: as yet undetermined support to assist with proceeding forward with investigating and adjudicating the serious crimes cases of 1999. May also receive some support for investigations from UNPOL

Public Defenders Office

- UNDP: a number of international defenders through SJSP
- USAID: financial management training and mentoring

Office of the Provedor

- UNMIT: two long term legal advisors, who were previously funded by UNOTIL
- The World Bank: US \$1 million grant (of which US \$300 000 has so far been provided) to develop anti-corruption legislation and to support the anti-corruption and good governance functions of the Provedor.
- USAID: administrative support for preparation of budgets, improved handling procedures and developing administrative procedures. The office also participated in financial management training delivered through MSD.
- NZAID: new office facilities
- UNDP: has designed a human rights capacity development program, although this has not commenced due to a lack of funding.

Office of the Inspector General

- World Bank: information technology support and the development of an internet portal, as well as translation services
- UNDP: long-term advisor support
- JICA: long-term advisor support
- Singapore: a technical assistance program, due to commence in mid-2007

Courts

- UNDP: wide-ranging support to the courts with funding and in-kind contributions from donors. This includes the provision of international judges, including the Head of the Court of Appeal, and the provision of various clerks and administrators

Land and Property Office

- USAID are currently tendering a multi-year program of support for land titling/ registration.

Prison Services

- UNDP: planned \$1.2 million prison strengthening program (Funded by GoA)
- UNFPA: prison guard training program
- AusAID
- UNICEF: provides advice and advocacy
- UNDP: through the SJSP (with AusAID funding), UNDP is providing advisory support and undertaking minor infrastructure works

A Summary of Activities by Sector-Wide Programs

UNDP Strengthening the Justice System Project

This multi-donor, broad ranging project commenced in July 2003 to strengthen policy, legislation, human resource, and system development across the three pillars of the Justice System.⁹⁹ Donors include Australia, Brazil, Belgium, Denmark, Ireland, Norway, Portugal, Sweden, the United States of America and the UN Office of the High Commissioner for Human Rights.

Given the limited resources available, the program currently focuses on the three key areas:

- International Judicial Placements: The core function of the SJSP to date has been the placement of international court actors in Timorese courts to allow the continued functioning of the courts, the public defenders office, and the OPG. This aspect of the program is strongly supported through the provision of in-kind support¹⁰⁰ by Portugal and Brazil.
- Legal Training Centre: The establishment of the Legal Training Centre (LTC) has been a significant achievement. The LTC provides a standardized post-graduate professional training program for judges, prosecutors and public defenders. The first 27 students completed the program in June 2007.
- Case Management IT System: The development of a computer-based management system to allow case tracking across the key institutions in the justice sector.

United Nations Mission in Timor-Leste

The United Nations Mission in Timor-Leste (UNMIT) has a large and growing contribution to the justice sector, although it is unclear how these will work in the mechanisms and structures currently in place.

- UNPOL: The UN has a large international police (UNPOL) presence of approximately 1600 officers. This force is responsible for executive policing and the reconstitution/ capacity building of the PNTL.
- The Administration of Justice Unit: The AJU will have around 6 international posts, headed by a Senior Judicial Affairs Officer. It will take a lead role in coordinating development initiatives in the justice sector. It will include legal affairs officers for strategic planning, gender mainstreaming and public information.
- Human Rights and Transitional Justice Unit: this unit will provide support for strengthening the Timorese institutional and societal capacity for the monitoring, promotion and protection of human rights. The unit will establish a Serious Crimes Unit within the Office of the Prosecutor-General to respond to the Commission of Inquiry report; and will strengthen mechanisms for

⁹⁹ The three pillars are: the Ministry of Justice (including the Legal Training Centre, Public Defenders Office and the Prison sector), the Courts, and the Office of the Prosecutor-General.

¹⁰⁰ E.g. judges, prosecutors and defenders.

human rights including the Office of Provedor and other human rights based NGOs. There are currently 48 international posts designated for this unit.

- Other relevant functions of UNMIT include:
 - Political Affairs Unit to progress community and political reconciliation through political good offices;
 - Public Information and Outreach Unit to implement a strategic communications campaign, build capacity of local media, support voter education, promote reconciliation and counter misinformation;
 - Senior Gender Advisor informing the mission on gender-related issues of concern to the population;
 - Economic Development Support Unit advising UNMIT on support for the Government's efforts to reduce poverty and stimulate economic growth policies and strategies, in order to promote the goals of the National Development Plan; and
 - HIV/AIDS advisor assisting with the mainstreaming of HIV/AIDS programming throughout all of UNMIT's policies and programs.

AusAID

In late 2007 AusAID will implement a \$28.5 million 5 year assistance program for the justice sector. This program will address gaps in access to justice that are not currently being addressed by other donors or multilateral agencies. The program will focus on priority corporate functions including budget execution, agency based procurement processes, strategic planning, and human resource management. The program will also address corruption by strengthening public oversight institutions, and will assist civil society organizations in building the demand for justice.

Other multi-lateral agency initiatives

Agencies such as UNICEF, UNIFEM and UNFPA are implementing programs which specifically support children's and women's rights.

Sectoral Coordination Mechanism

The Council of Coordination (CoC), consisting of the Minister of Justice, the President of the Superior Council of the Judiciary, and the Prosecutor-General is the Project Steering Committee for the UNDP Program. The UNDP SJSP Chief Technical Advisor provides secretariat services to this body. The Sector Investment Plan, under the National Development Plan, calls for the establishment of a Sector Working Group. This body was established shortly before the crisis but has met only once.

Civil Society

- Advocates sans Frontiers: provides support to the Bar Association and disseminates legal information (with EC funding support).
- Asia Foundation: the Asia Foundation is funded largely by USAID. It provides support to strengthen the accountability and transparency of judicial system and programs to support broad-based access to justice. It works closely with local groups to build capacity and provide direct operational support, partnering with civil society organizations to provide services and engage with key authorities. It has a strong focus on the legal empowerment of women and other vulnerable groups.
- A large number of justice sector related programs are run by local and international NGOs with varying degrees of external support. These groups undertake a range of activities, but can broadly be summarized as:
 - NGOS/ASSOCIATIONS AND COMMUNITY-BASED ORGANIZATIONS
 - Religious Institutions/Formations
 - Academia/ Research groups
 - Professional Associations/Clubs
 - Media Organizations

- Cultural and Social Clubs
- International NGOs (INGO's)

II. LIST OF ORGANIZATIONS INTERVIEWED

USAID Timor-Leste
United States Embassy
The Asia Foundation (TAF)
IFES
Justice and Peace Commission (JPC) Baucau, National Commission Elections (CNE)
USAID Timor-Leste
International Crisis Group (ICG)
Judicial System Monitoring Program (JSMP)
International Republican Institute (IRI)
Office of the Prosecutor General
Office of the Public Defender
Ministry of Interior (MOI)
National University of Timor-Leste (UNTL)
Lalenok ba Ema Hotu (LABEH)
European Union (EU)
Public Prosecution
Land and Property Department, Ministry of Justice
Office of the Inspector General
Office of the Prime Minister
Land-Law Consultant
Timor-Post
National Parliament
Ministry of Justice
Provedor for Human Rights and Justice (PDHJ)
Baucau Public Defender
Baucau District Court
ECM

Advocates Sans Frontiers (ASF)
PNTL Baucau
Baucau District Administration
Justice and Peace Commission (JPC) Dili
Forum Tau Matan
Bahu Village, Baucau
United Nations Development Programme (UNDP) Judicial Sector
Portuguese Embassy
Y-HAK (HAK Association)
CAVR (Commission for Reception, Truth, and Reconciliation in TL)
Suai District Court Clerk
Border (Frontier) Police - Immigration Police Commander
Suai Chefe De Suco
UNICEF
ICMC
Dili District Prosecutor
Dili District Court
PRADET
Rede Feto
United Nations Integrated Mission in Timor-Leste (UNMIT)
Management Science for Development (MSD)
Court of Appeals (COA)
Australian Embassy, AusAID
Rede Feto
Associação Advogado Timor-Leste (AATL)
Baucau Suco - Chief

III. A Summary of the Draft USAID Rule of Law Strategic Framework

The assessment included a secondary source review of existing reports on the rule of law sector and background on the current situation in East Timor. The assessment also incorporated the application of USAID’s *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*.¹⁰¹ The following is a basic summary of the framework.

Framework of Laws	Justice Sector Institutions
Constitution	Ministry of Justice Judiciary Legislature Prosecutors’ Office Public Defenders Ombudsman’s office
Organic Laws	Law Enforcement Agencies Prisons
Rules	Regulatory Bodies Law Schools and Bar Associations
Regulations	Human Rights Organizations Public Interest Law Groups Legal Assistance NGOs Legal Advocacy Organizations Alternative Dispute Resolution NGOs

A. Essential Elements of the Rule of Law

- Order and security: Rule of law cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety. The executive branch has immediate responsibility for order and security, whereas the justice sector has an important role as well in protecting rights and providing for the peaceful resolution of disputes.
- Legitimacy: Laws are legitimate when they represent societal consensus. Legitimacy addresses both the substance of the law and the process by which it is developed. This process must be open and democratic.
- Checks and balances: Rule of law depends on a separation of governmental powers, among both branches and levels of government. An independent judiciary is seen as an important “check.” At the same time, checks and balances make the judiciary accountable to other branches of government. Like all branches, the judiciary is also accountable to the public.
- Fairness: Fairness consists of four sub-elements: (1) equal application of the law, (2) procedural fairness, (3) protection of basic human rights and civil liberties, and (4) access to justice. The justice sector bears primary responsibility for ensuring that these sub-elements are in place and implemented.
- Effective application: This element pertains to enforcing and applying laws. Without consistent enforcement and application, there can be no rule of law. The judiciary is an important element of the enforcement process.

¹⁰¹ USAID, Draft USAID Rule of Law Strategic Framework, 2007.

B. Conducting a Rule of Law Assessment

The objective of this assessment process is to focus first on identifying the key problems that undermine the rule of law and only then on the programming solutions, rather than using potential programming solutions as the starting point for program design. The four steps are:

Step 1. Take into account the political and historical context: This step helps identify events that shape the environment, such as a recent conflict or the creation of a new state. It also develops information on the country's legal traditions and the origins of its current laws.

Step 2. Understand the roles of major players and political will: This step helps identify the roles, resources, and interests of those who might potentially support reform as well as those who stand to benefit from retaining the *status quo*. It also guides an assessment of the strength of political will for reform and options for capitalizing on it, strengthening it, or working around its absence (or opposition).

Step 3. Examine program options beyond the justice sector: This step broadens the assessment beyond the justice sector to the overall state of the polity and its legitimacy. It helps determine whether conditions are ripe for direct rule of law programming, or whether programming should support precursors to the rule of law, such as political party development or legislative strengthening.

Step 4. Assess the justice sector: This step provides for a structured assessment of each essential element in terms of the two components of the justice sector, the legal framework and justice institutions.

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V. Illustrative List of Policy and Programming Recommendations from the Assessment Local Team Group Meeting

Public Information, increasing knowledge about Law

- Public education/legal education /civic education/street law
- Public information officers
- Public Service Announcements/ media
- Cultural embedding of the concepts of the justice system
- Evaluation of methodology for training and information programs (dramas, role-playing, graphic posters)

Court Administration

- Court administration (court Management, administration, training, human resource management, and recruitment policy)

Security sector reform

- Improving training of staff in prisons and increasing the geographic spread of and number of pre-detention facilities
- Police training and monitoring
- Strengthen the Vulnerable Persons Unit in the PNTL
- Neighborhood crime watch

Capacity Building

- Capacity building of legal actors (court actors and private lawyers)
- Bar associations and increasing professional development
- Law School Support:
 - Youth engagement – increasing interest in legal sector
 - Accreditation of law courses
 - National Law School clinical programming and district-based internships
 - Ethics and professional responsibility
 - Interdisciplinary/holistic approach to legal education, as well as reaching out to other disciplines, such as social work, anthropology, political science, journalism, and history.
- Work with formation/support with the public defenders superior council – ethics code for public defenders and perhaps prosecutors as well
- General focus on developing the superior councils
- Judicial Superior Council – judges association to increase professional association
- Support for the office of legislative drafting in MoJ to prevent inconsistencies in legislative process
- Legislative reform process – i.e. standardizing and rationalizing the current patchwork of legislation
- Support for UNDP programming

Human Rights issues

- Formal and informal trainings on the International Covenant on Civil and Political Rights
- Human rights and the police
- Juvenile based violence
 - Gangs
 - Social boredom, delinquency, and neglect

- Enforcing compulsory education requirements
- Targeting at-risk youth and regions
- Voucher system to compensate for lost income
- Gender-based violence
- National Reconciliation Process and national dialogue
- Child Labor

Access to Justice

- Increasing number of public defenders and legal aid providers
- Monitoring Suco level
- Mediation/ ADR
- Supporting the traditional justice mechanisms and ADR
- Increasing advocacy capacity of civil society, bar association, and judges groups to enable passage of key legislation, public advocacy campaigns. Getting the public involved.
- Improving accessibility of the legislation (translation/texts/reference guides/case books etc.)

Land Reform

- Advocacy support the promulgation and implementation of all necessary land reform legislation
- Exploring the role of gangs and violence in land reform
- Supporting ADR/mediation efforts at the local level to resolve land disputes

Policy Recommendations

- Long-term programming is needed, as well as long-term experts
- Support mentoring and twinning projects in the judicial system
- Joint Government/Donor/ UN vision for the justice sector.
- Addressing cultural sensitivity in all programming
- Developing and strengthening the use of Tetun and other local languages in the judicial sector.
- Embassy should encourage impartiality and independence in the justice sector
- Establish an international Deputy Prosecutor for serious crimes under the Prosecutor-General
- (Re)vetting of the police officers (PNTL)
- Use government systems and funding for recurrent costs to avoid donor substitution and donor shopping
- Support ROL programming as a necessary step in economic development

VI. A Summary of Recommendations from the 2006 USAID *Conflict Vulnerability Assessment*¹⁰²

In 2006, USAID released its *Conflict Vulnerability Assessment* of Timor-Leste. During the 2007 Rule of Law Assessment, the team was asked to consider recommendations put forth in that report. The following is a summary of key assumption in the *Conflict Vulnerability Assessment related to rule of law*. Basic assumptions in the report included that “The formal Justice Sector is not functioning properly.”¹⁰³

Justice Sector

- Shift to community-level access to justice efforts.
- Put greater emphasis on access to justice.
- Expand support for Track 2 and 3 justice initiatives with a focus on community level programs.
- Coordinate across existing activities within the sector to increase accountability on the whole.
- Curtail support for the Office of the Provedor and Office of the Inspector General.
- Facilitate a dialogue with the public on the issue of how best to manage justice in respect of the current constraints within the justice sector.

High Priority Recommendations

- Contingency planning and crisis response.
- Support land tenure and property rights.
- Rapidly develop strategies and programs for conflict-prone and transformational youth.

Second Tier Priorities

- Strategic information and communication.
- Address the East Timor-West Timor divide.
- Address youth employment and education.

Illustrative Programmatic Responses to Address Key Drivers of Conflict in Timor-Leste¹⁰⁴

Driver 1: Unresolved Divisions and Rivalries....

Short Term:

- Support processes that clarify and promote agreement on key institutional checks and balances and lines of authority.

Long term:

- Strengthen non-governmental checks on leaders including strengthening media (especially investigative journalism) and conducting regular public opinion surveys.
- Support political party development programs that include training on constitutional, governance and development issues.

Driver 2: Functioning and Representative State

Short term:

- Support processes that clarify and promote agreement on the roles and authorities of key government institutions.

¹⁰² The Crisis in Timor-Leste, Causes, Consequences and Options for Conflict Management and Mitigation. USAID. November 2006, p. 30.

¹⁰³ Ibid p.40.

¹⁰⁴ Ibid p. 45.

- Clarify and strengthen mandates and authorities of accountability bodies (e.g. *Provedor*, OIG, auditing entities).
- Ensure clarity on roles and authorities of municipalities and Suco councils.
- Undertake a joint government/donor assessment of the performance of Suco councils.

Medium- to Long-Term Programs

- Support legislative strengthening (especially budget and oversight capacities).

Additional Recommendations for Key Sectors

Security Sector Program Options:

- Effective community policing has a positive impact on reducing neighborhood crime, reducing the fear of crime, and enhancing the quality of life in the community. It accomplishes these things by combining the efforts and resources of the police, local government, and community members. It is founded on close, mutually beneficial ties between police and community members and therefore may not be feasible in Dili until PNTL has been reconstituted, retrained, and accepted by the public as a legitimate security force.
- Support radio station broadcasts through RTTL and community radio concerning community policing, especially directed at communities where fear and mistrust have been generated as a result of the crisis. This program helps to build trust between citizens and police.
- Provide grants to civil society organizations and universities to work with representatives of community organizations, civil society organizations, the media and other stakeholders in order to strengthen the capacity of civil society to monitor and improve police behavior, governance practices, and sensitivity to international human rights norms.

Driver 3: Severe Inadequacies in the Justice System

Short Term Programs:

- Increase access to justice, including civic education, regarding the legal processes and court capacities.
- Support quick and credible resolution of key court cases.
- Support public information distribution regarding the status of pending cases.
- Support passage of land laws and anti-corruption laws.
- Survey public attitudes towards justice and the justice sector.

Medium-Long term Programs:

- Build capacity of both governmental and non-governmental justice sector actors.
- Improve language and location accessibility.
- Improve physical capacity (i.e. the number and location of courts, and equipment support).

Driver 4: Reliable information and Communication

Short-medium Term Programs

- Promote and strengthen dialogue regarding key issues and key actors on important initiatives, such as:

- Dialogue between the main actors involved in the justice sector (judges; the Government, and especially the Ministry of Justice; the Prosecutors; and the Public Defenders).
- Facilitate and encourage participatory communication. Link public communication to citizen participation.

Driver 6: Land and Property Rights

Short term:

- Facilitate passage of the new land law.
- Support public education campaigns (in Timor-Leste; in relation to the Timorese Diaspora; and in relation to Indonesians with Timorese land-holdings.)
- Support for ADR and legal aid.
- Provide assistance regarding land claim registration.
- Ensure sensitivity to and management of the East Timor-West Timor dimensions of land and property disputes, especially in Dili. For example, pay particular attention to post-conflict resettlement issues as they relate to former Indonesian civil service accommodation.

Medium-long term programming:

- Support the MoJ National Directorate of Land and Property.

Driver 7: Easterners and Westerners continue to mistrust each other and are increasingly segregated

VII. Legislative Priorities

The Timor-Leste parliament has passed key pieces of legislation to create a strong legal framework for the protection of important procedural guarantees and substantive rights. Additional pieces of legislation have been submitted to parliament and others are still in the drafting phase. Some legislation, such as the land law and the penal code, must be passed in the short term future because the implementation of other forthcoming laws depends on the existence of those basic laws. Examples of this are laws on domestic violence, juvenile justice, and alternative sentencing.¹⁰⁵

The Government and Parliament elected in 2007 are not required to vote on legislation that was submitted or was under review by the previous parliament. Passage of these key laws in a participatory and transparent process will be a significant step in building the judicial system as a whole. However, it is duly recognized that following passage of these and other critical laws, the challenge will be to ensure effective implementation. Among the critical international conventions and domestic laws that have yet to be promulgated are:

- The Penal Code
- Witness security/witness protection law: this is necessary to better protect witnesses from retaliation.
- Land law: resolving the conflicts and uncertainty surrounding land issues will require both a solid legal framework as well as strong political will.
- Law on advocates: currently there is no law regulating the activities of the private advocates.
- Comprehensive anti-corruption legislation: such legislation is required, especially as it addresses public procurement, nepotism, and financial disclosure by public officials. The legislation should include criminal sanctions. In addition, the United Nations Convention against Corruption should be ratified in order to better address corruption issues.
- A comprehensive legislative framework should be enacted to address Trafficking in Persons, and the United Nations Convention against Transnational Organized Crime and Protocols thereto should be signed and ratified.
- Children's commission law/comprehensive juvenile justice legislation.
- Comprehensive domestic violence legislation: domestic violence is a serious problem in Timor-Leste. Such legislation would provide *lex specialis* for one of Timor's gravest challenges.
- First Optional Protocol to the International Covenant on Civil and Political Rights: This will enable Timorese people to file individual communications with the UN Human Rights Committee when domestic remedies are unsatisfactory.
- Organic law for the Office on the Promotion of Equality: this legislation should be promulgated, to ensure adequate support and authority is given to the office in order to follow its mandate.

¹⁰⁵ HRI/CORE/TLS/2007. 16 July 2007. United Nations. P. 41.

VIII. Observations on Current USAID Rule of Law Implementers

Management Sciences for Development, Inc. (“MSD”)

1. Technical Support to Provedor:

- To provide technical assistance to effectively and efficiently manage donor relationships/funding
- Technical Support (and a dedicated staff member) to Chief Human Resources Officer
- Institutional Strategic Planning
- Development of complaints registration system for the Public Assistance Unit
- Historic Involvement in the formation of the Legal Affairs Division and Administrative and Finance Division

2. Financial Management TS

- Technical Assistance to Chief Administrator of Court of Appeals and Dili District Courts: In depth comprehensive financial management skills for the Chief administrators and staff of Court of Appeals and Dili District Courts, including basic math skills.

Observations: The strength of MSD programs is due primarily to its targeting of two intertwined but systemic issues in Timor-Leste: an enduring lack of responsiveness of government actors/bodies to issues/complaints of the people of Timor-Leste, and the lack of administrative capacity for government actors/bodies to function effectively (and therefore respond to these complaints and issues raised).

- The Office of the Provedor represents a vital point for people to access their government (specifically regarding A/C and human rights issues). It is the only impartial body tasked with investigating complaints, making corrective recommendations, and most uniquely, is authorized to impose sanctions for violations. Since there is no inherent power provided to the Provedor to actually execute or implement its recommendations or findings, it remains vitally important that its functions in receiving and investigating complaints be continuously evaluated and improved upon, all with an eye toward completely nationalizing all of the Provedor’s functions. MSD has effectively trended away from providing staffing and equipment support (except that necessitated by the Crisis events of 2006)
- While donor support has flooded the judicial sector, the administrative side related to the functioning of government bodies has largely been ignored. Judicial actors and related ministries clearly did not have basic administrative skills to devise, solicit funding for and implement budgets and effectively manage their units.

The Asia Foundation

Brief Description of Current Programming

- A. Provide people of Timor-Leste access to village level/traditional and formal systems of justice on country wide basis through the formation and operational/technical support for six “legal aid partners” in both civil and criminal matters (especially through the use of mobile units). These efforts include a concerted focus on providing women and children with such access, and a pro-active monitoring of the actions of judicial and police actors (in partnership with JSMP), with public dissemination of findings and observations.
- B. Strengthening the capacity of Suco Councils to promote gender equality and address gender based violence, especially through monitoring and public information efforts
- C. Legal Aid partners also engage in community education efforts to educate the Timor-Leste population in their rights and operations of traditional and formal justice options all with an eye toward gender sensitivity and inclusion of women actors in the resolution process, including the publication/dissemination of newsletters and other forms of public education tools.
- D. Provide an important coordinating function between legal aid partners to share best organizational practices, identify common challenges and strategies, and ensure compliance with high ethical standards; and provide an important coordinating function between the legal aid partners and domestic NGOs and relevant judicial/government actors, including the Office of the Provedor which is especially important given its lack of a regional presence outside of Dili.
- E. Mediation training for Legal Aid partners (with eye toward Timor-Leste context and international standards); promulgation of guidelines to ensure consistency in approach by all Foundation partners especially mandatory referral of all domestic violence and sexual violence cases be referred to court.
- F. General technical support to the Legal Research Unit (LRU) and the Victim Support Unit (VSS) of the Judicial Systems Monitoring Program (JSMP).
- G. Outreach efforts with MOJ (improving citizen access to legal information).
- H. Strengthen the role of the legislature in legal reform efforts by providing technical support to the Parliament through the placement of a legislative advisor and through the formation of a library and progressive information and research services.

Observations: Geographic and individual organizational characteristics notwithstanding, the Legal Aid partners program provides people all over Timor-Leste one of the few points of access to justice—even in more remote areas. The assessment team felt strongly that the very existence of the Legal Aid partners doubles the potential availability of access to counsel for an accused. Legal Aid partners participate effectively in traditional mediation efforts to ensure an effective local system of addressing complaints/issues in some areas. The Legal Aid partners were extremely effective at ensuring that their vital services were available during and immediately following the Crisis events of 2006, especially to displaced minorities and vulnerable women and children. The lack of current capacity of the office of the Public Defender has necessitated the handling of criminal cases, and therefore allowed some Legal Aid partners to be better able to “monitor” detention facilities and report that information to the appropriate contact (especially the Office of the Provedor). The legal aid partners cited their main challenges as language issues, training, transportation and resources including equipment. The team also noted regional disparities in the actual services the legal aid partners are able to provide, much related to the functioning of the existing traditional and formal systems.

