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Mission to Rwanda**

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Title: Institutional Development to the Rwandan Ministry of Justice  
Strategic Objective #01: Increased Rule of Law and Transparency in  
Government**

***FOR AN  
OFFICE OF LEGAL COUNSEL  
TO MINIJUST***

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# Introduction

This report has been prepared for the Minister of Justice of Rwanda, the Attorney-General, the Secretary-General of the Ministry of Justice, the Director of the D.L.S.C., USAID Rwanda and MSD Washington, pursuant to the Terms of Reference describing the mandate of the MSD International Consultant.<sup>1</sup>

This report covers Mission No. 3 entrusted to the Consultant within the said Terms of Reference, and embodies 6 tasks in total<sup>2</sup>.

## 1. Purpose of this Report.

The purpose of this report is not only to present to the readers the advantages and disadvantages of establishing an American-style Office of Legal Counsel (OLC) within the Ministry of Justice of Rwanda, and naturally within the Rwandan context of things, but also to propose practical solutions with respect to its establishment.

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1 The Contract made between MSD and the International Consultant is dated June 26, 2002, and covers a period of sixty non-consecutive days.

2 **Presentation of the tasks other than those forming the subject matter of this report:**

**Task #1:** To finalize the MSD study with respect to the logistical, personnel and financing aspects for purposes of translation, standardization and compilation of an official criminal code for Rwanda; to review the *Gacaca* law and all laws falling within the criminal code and the criminal procedure code that have been translated into English, and to assemble them into a complete document. The study will comprise a work plan, the number and types of personnel required, the number of work days, and the approximate budget covering labor and publication costs.

**Task #2:** To provide recommendations for conforming all three official versions (English, French, Kinyirwanda) of any law. These recommendations will focus on simplicity of language and application of the law, as well as on accuracy and precision. These recommendations will be part of the report called for in point #1.

**Task #4:** To support the Legal Reform Commission within the scope of its mandate.

**Task #5:** To identify regional seminars or other instructional sessions that are capable of providing training in comparative law to the staffs of the aforementioned agencies and recommend participants.

**Task #6:** Any other tasks connected to the tasks indicated above must be approved by MSD and the International Consultant, following consultation with the Minister.

In order to achieve this, after having presented the contents of Mission No. 3 in this Introduction, and more particularly the manner in which the Consultant will act, this report presents a description of the Office of Legal Counsel in the American context.

It will then compare the American and Rwandan legal systems so far as concerns the functioning of this Office of Legal Counsel so that one can get some idea of how a Rwandan Office of Legal Counsel might exist. The report will then discuss the training of the staffs of the DLSC and the SCAJE in the duties and functions that would be involved in an Office of Legal Counsel. The report ends with the International Consultant's conclusions and recommendations on this subject.

## **2. Mission No. 3 relative to the Office of Legal Counsel.**

The manner in which the Mission entrusted to the International Consultant relative to an Office of Legal Counsel has been structured, leaves one to believe that the establishment comes BEFORE the Minister has made this choice. It would be more judicious and more consonant with reality to proceed inversely, but not without having a thorough understanding of the Mission as it has been structured.

### **2.1 Presentation of the mission.**

Mission No. 3 entrusted to the International Consultant reads as follows:

"To train and assist the staff of the SLSC and the SCAJE so that these agencies can serve as an office of legal counsel to MINIJUST with respect to legal interpretation of decrees and laws, legal review/revision of decrees and their conformance with the Constitution, in accordance with a view or perspective that takes into account domestic and international customs and traditions, and to issue legal opinions on the administration of justice.

- "a. Within a period of ten (10) business days, to formulate and submit to the agencies in question and MSD, a description of the American office of legal counsel, including its historical background, its current function and comments about the influence of its opinions.
- "b. Within the following ten (10) days, the consultant will undertake an examination of Rwandan laws, and most of all basic law. The consultant will compare the two legal systems (American and Rwandan), and will describe both the differences and similarities, particularly as regards the functioning of the office of legal counsel. This will also form the subject matter of a presentation to be made to the subject agencies and MSD.

- "c. Following a discussion on the advantages and disadvantages of implementing an American-style office of legal counsel within the Rwandan context, to train the personnel of the SCAJE and DLSC in tasks that can help them to serve as offices of legal counsel".

## **2.2 Redefinition of the task.**

For purposes of a better presentation and a logical approach, it would be more appropriate to start with a presentation to the various agencies in question and to MSD of a description of the American Office of Legal Counsel, which would include a comparison of the American and Rwanda legal systems, followed by a discussion of the advantages and disadvantages of establishing such an Office within the Rwandan context. This will allow the Minister of Justice to make appropriate decisions respecting the establishment of an Office of Legal Counsel and decide whether such an Office should indeed be established.

Following these presentations and the decision to be made by the Minister, the training of the staffs of the DLSC and the SCAJE could be undertaken, as proposed by the International Consultant.

## **3. Chronology of Events.**

This report follows a series of meetings between the International Consultant and key persons involved in the decision to establish an American-type Office of Legal Counsel within the Rwanda context of things. Those key persons are:

- The Minister of Justice<sup>3</sup>;
- The Special Assistant to the Minister of Justice<sup>4</sup>;
- The Secretary-General of the Ministry of Justice<sup>5</sup>;

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3 The International Consultant was received by the Minister of Justice in October 2002 at the Ministerial offices in Kacyiru, Kigali.

4. The International Consultant met with Mr. Mbaga in October 2002 at the offices of MSD, and later on in January and February 2003 at the Ministry of Justice in Kacyiru, Kigali.

- The Attorney-General, Director of the SCAJE<sup>6</sup>;
- The Director of the DLSC<sup>7</sup>;
- The Director of Legal Affairs<sup>8</sup>.

The International Consultant also made a presentation to the Attorney-General and the representative of the DLSC on the American-style Office of Legal Counsel, as well as the advantages and disadvantages of establishing one within the Rwandan legal context.<sup>9</sup>

The International Consultant also prepared a memorandum for the Minister of Justice in October 2002<sup>10</sup>, followed by another memorandum addressed to the Minister of Justice and the Directors of the DLSC and the SCAJE on the subject of training<sup>11</sup> the staffs of the said DLSC and SCAJE in the duties and functions associated with an Office of Legal Counsel.

#### **4. STRUCTURE OF THIS REPORT.**

This report first of all provides a presentation of the Office of Legal Counsel within the American legal context (the constitutional framework, description of the Department of Justice, description of the Office of Legal Counsel, i.e., history, description, functioning and strength and influence of its opinions).

Following that, the report makes a comparison between the American and Rwandan legal systems so far as concerns the functioning of an Office of Legal Counsel.

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- 5 The International Consultant met with Mme Edda Mukabagwiz, Secretary-General of the Ministry on August 23, 2002, at the offices of the Ministry of Justice in Kacyiru, Kigali.
  - 6 The International Consultant met with Mr. Alberto Basomengera on July 5 and August 21, 2002, at the offices of the Ministry of Justice in Kacyiru, Kigali.
  - 7 The International Consultant met with Mr. Jean-Marie Rusaku on July 5 and August 21, 2002, as well as in November 2002 at the offices of the Ministry of Justice in Kacyiru, Kigali.
  - 8 The International Consultant met with Mr. Augustin Hayifayi (Government Legal Affairs) on July 5, 2002, at the offices of the Ministry of Justice in Kacyira, Kigali.
  - 9 This working session took place at the MSD offices in Kigali in September 2002.
  - 10 "An Office of Legal Counsel to MiniJust", memorandum to the Minister of Justice, dated October 2002.
  - 11 "Training of the Staff of the Office of Legal Counsel to MiniJust", memorandum to the Minister of Justice, the Director of the DLSC and the Director of the SCAJE, dated November 2002.

After that presentation, this report describes what an Office of Legal Counsel might be within the Rwandan legal context (name, structure, jurisdiction, establishment, allied questions, advantages and disadvantages).

And finally, this report summarizes how the staffs of the DLSC and the SCAJE could be trained in the duties and functions associated with an Office of Legal Counsel.

# **1 Description of the Office of Legal Counsel within the American Legal Context.**

It is best to try to understand the principle and role of the American Office of Legal Counsel in the context of the country where it was [originally] established. This context encompasses constitutional sources, the principle of separation of powers, the type of constitutional system, and the United States Department of Justice, the latter being the equivalent of the Rwanda Ministry of Justice.

## **1.1 The Constitutional Context.**

The American Constitution is historically centered around the rule of law. The opening words<sup>12</sup> of the Constitution talk about the government being totally subject to the principle of justice, in other words, to the principle of a government by law. The fact that the word "justice" is at the very beginning of that country's most important document, shows the significance attached to the rule of law in the United States in general.

What this means is that every government activity must adhere to the rule of law. That is the reason why very early on<sup>13</sup>, the government's representative entrusted with matters of justice, who is called the Attorney-General, and heads the Department of Justice, was also entrusted with the duty of advising the Executive Branch on the rule of law and interpreting its application to it.

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12 "We, the people of the United States, in order to form a more perfect Union, establish Justice..." (author's emphasis).

13 See below, the history of the Office of Legal Counsel.

The fact that the American Constitution is that of a Federal state is of no concern to the purpose of the present report, which rather deals with the description and establishment of an office that could be part of one of the branches of government, the Executive Branch.

The concept of separation of powers, as derived from the theory of the philosopher Montesquieu in the book "On the Spirit of Law", was adopted by the First Continental Congress in 1787, and viewed as a basic principle of free government. It is all centered around law: the power to enact laws belongs to the legislature; the power to implement and apply the law belongs to the executive, and the power to interpret the law belongs to the judiciary.

Even if there have been adjustments to the principle of strict separation of these powers<sup>14</sup>, it remains that this separation, albeit real, is also translated by a system of reciprocal controls over the powers exercised by each of the branches [of the government]. For example:

- ❑ The President appoints judges and can veto proposed laws;
- ❑ Congress, which can change the judiciary by law, approves or rejects the judicial nominations made by the President, establishes the budget for the Executive Branch and can also impeach the President or any other member of the Executive Branch;
- ❑ The courts have the power of judicial review, namely the power to determine the legality of the acts and actions of the Executive (executive orders or regulations), as well as the power to determine their constitutionality;
- ❑ Finally, the Federal courts can declare laws unconstitutional, and in those very instances, the law will be deemed to be unenforceable throughout the country.

Within the Executive Branch there are "Departments". These are the equivalent of Ministries. The Departments are headed by "Secretaries", the equivalent of Ministers in a parliamentary system, and these Secretaries are appointed by the President, to whom they report.

The only Department head - a member of the President's cabinet - who is not called a Secretary, is the Attorney-General (the equivalent of the Minister of Justice), whose role revolves around five major duties or functions:

1. He or she is the chief legal counsel of the Federal government, in other words, not only legal counsel to the President, but also all of the agencies and dependencies of the government;

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14 For example, the policies initiated by the President, if they are voted on favorably by a majority of Congress, etc.

2. As chief public prosecutor, the Attorney-General investigates and prosecutes violations of Federal law and crimes falling under Federal law;
3. He or she represents the United States in all matters coming before the Supreme Court;
4. He or she supervises the Federal prison system;
5. He or she administers the immigration and naturalization laws.

## **1.2 The Department of Justice.**

The U.S. Department of Justice is the equivalent of the Rwanda Ministry of Justice. The term "Department" is used in American constitutional law because involved here are not Ministries represented by a member-Minister of the government, but rather departments that operate within the administration of a President where the Federal chief executive is the President of the United States, and his so-called executive team is composed of Secretaries (such as for example the Secretary of State) or attorneys (the Attorney-General), etc.

The Department of Justice has a pyramid-like structure, with the Attorney-General being at the top, followed by the Deputy Attorney-General, then the Associate Attorney-General, then the Solicitor-General, and so on.

### **1.2.1 The Attorney-General**

The Attorney-General as head of the United States Department of Justice, is the nation's chief legal officer; he or she also represents the United States in legal affairs in general and provides opinions to the President and the heads of the government's executive departments upon their request.

The Attorney-General appears in person before the United States Supreme Court to represent the government in major legal cases or cases having special gravity.

### **1.2.2 The Deputy Attorney-General.**

The Deputy Attorney-General advises and assists the Attorney-General by formulating and implementing the Department's policies and programs, and by undertaking general supervision and management of all of the Department's organizational units.

The Deputy Attorney-General is authorized to exercise all of the power and authority of the Attorney-General, except whenever prohibited by law or if such delegation of power is entrusted to another government authority.

The Deputy Attorney-General acts for the Attorney-General in the event of the latter's absence.

### **1.2.3 The Associate Attorney-General.**

The Associate Attorney-General advises and assists the Attorney-General and the Deputy Attorney-General by formulating and implementing the Department's policies and programs in such diverse areas as for example civil law, Federal and local laws, and public safety.

The Associate Attorney-General supervises several components of the Justice Department<sup>15</sup>.

### **1.2.4 The Solicitor-General,**

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15 Antitrust Division, Civil Division, Civil Rights Division, Environment & Natural Resources Division, Tax Division, Office of Justice Programs, Community-Oriented Policing Services (COPS), Community Relations Service, Office of Dispute Resolution, Violence Against Women Office, Office of Information and Privacy, Executive Office of U.S. Trustees, Foreign Claims Settlement Commission.

The principal function of the Office of the Solicitor-General is to supervise and conduct litigation on behalf of the government before the United States Supreme Court. Virtually all such litigation is directed and conducted by this Office.

The United States government is involved in around two-thirds of all of the business conducted annually before the Supreme Court.

The Office of the Solicitor-General decides what cases the government will seek review before the Supreme Court, and also chooses the positions that the government will defend before that court.

The Solicitor-General's attorneys participate in the preparation of petitions, pleadings and other papers and documents filed by the government with the court in connection with those cases.

It is the Solicitor-General personally who pleads on behalf of the government before the Supreme Court.

Those cases in which the Solicitor-General does not plead personally are assigned either to a staff attorney of the Solicitor-General's Office or to another government attorney. The great majority of cases involving the government are pleaded by the Solicitor-General or else by a staff attorney.

Another function of the Office of the Solicitor-General is to review all cases in which the government has lost in the lower courts, with a view to deciding whether or not the government should appeal the lower court decision, and if so, what position should be adopted.

The Solicitor-General also determines whether the government should or should not intervene in this or that case brought before any appeals courts.

### **1.2.5 General Table of Organization of the Department of Justice.**

The general table of organization of the Department of Justice<sup>16</sup> is shown below:

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<sup>16</sup> See attachment... below is a detailed table of organization showing in particular the place of the Office of Legal Counsel within the Department of Justice, and also clearly showing its power and authority.

Attorney-General

Deputy Attorney-General

Solicitor-General

Associate Attorney-General

Office of Legal Counsel

## **1.3 The Office of Legal Counsel.**

The Assistant Attorney-General<sup>17</sup> in charge of the Office of Legal Counsel assists the Attorney-General in his or her duties as legal counsel to the President of the United States and all agencies and offices falling under the Executive Branch.

### **1.3.1 History.**

In one of its first legal acts, the American Congress created the position of Attorney-General of the United States. The Judiciary Act of 1789 stipulated that the Attorney-General should be a person well-educated in law, capable of acting as the Attorney-General of the United States, and vested with two principal functions:

- To handle and prosecute all cases before the Supreme Court in which the United States has an interest;
- To give his opinions and counsel on questions of law whenever requested by the President of the United States or upon request of Department heads.

At the beginning of the 20<sup>th</sup> century, the Attorney-General was at the head of an agency that was in constant growth. Although the Attorney-General's role in litigation was consolidated, his role as counsel to the Executive Branch was diluted through the expansion of administrative agencies and their staffs. Around 1928, Attorney-General John Sargent expressed his frustration upon noting that less than 15% of the agency attorneys were under his control. With the proliferation of new Federal government agencies, President Franklin D. Roosevelt ordered the Solicitor-General to centralize and unify within his Office the job of providing legal interpretations for the Executive Branch, most significantly at the time when the New Deal brought in its wake a major increase in the number of laws and regulations.

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<sup>17</sup> A post created in 1950, after abolishing the position of Assistant Solicitor-General; it was then that the responsibilities of the Office of Legal Counsel were handed over to the Assistant Attorney-General; previously, they belonged to the Solicitor-General, who delegated them to his Assistant.

The predecessor of the Office of Legal Counsel (OLC) was born in July 1933, when the American Congress created the new position of Assistant Solicitor-General, who had to be appointed by the President and confirmed by the United States Senate. The Attorney-General entrusted the Assistant Solicitor-General with the task of preparing legal opinions, and generally speaking, providing legal counsel to all administrative agencies falling under the Executive Branch.

The name of the Office of Legal Counsel has changed twice, but its functions are still anchored in the Judiciary Act of 1789.

The initial description of the OLC remains applicable today. In his first annual report, the Assistant Solicitor-General, Angus D. MacLean, explained that this new office was charged “exclusively” with the preparation of all legal opinions to be rendered by the Attorney-General to the President and to the heads of the various Departments of the Executive Branch.

During its first year of operation, the American Office of Legal Counsel rendered 83 opinions, in addition to those relating to executive orders.

In 1933, President Roosevelt issued Executive Order No. 6247, whereby all drafts of executive orders and proclamations would first be submitted to the Attorney-General for purposes of monitoring their substance and form.

Just in its first year, the American Office of Legal Counsel reviewed close to 385 draft executive orders and proclamations, of which 70 called for opinions respecting their legality, and certain others called for extensive study.

At the start of its role as legal advisor to the Attorney-General, the Office of Legal Counsel rendered 35 opinions regarding the management of the Justice Department.

In 1950, the job of Assistant Solicitor-General was abolished and the responsibilities of the Office of Legal Counsel were transferred to the newly-created position of Assistant Attorney-General. It was in 1953 that the name “Office of Legal Counsel” was adopted. The Attorney-General continues to provide legal opinions to the President and to the Executive Branch Departments, which constitutes, as we have seen, one of the Attorney-General’s oldest and most basic functions.

The Attorney-General has delegated to the OLC the responsibility of preparing his or her formal opinions and rendering legal opinions to the various agencies and offices falling under the Executive Branch, as well as to assist the Attorney-General in his or her duties as legal counsel to the President.

The Office of Legal Counsel has made a major contribution to the decision-making processes and to the legal analysis of major events in the history of the American government's executive branch<sup>18</sup>.

### **1.3.2 Description.**

The American Office of Legal Counsel employs highly-qualified attorneys to act as legal counsels, since the main function of the Office of Legal Counsel is to assist the Attorney-General so that the latter can assume the role of legal advisor to the President and the numerous agencies that are part of the Executive Branch.

The OLC is composed of 24 attorneys and it handles the most difficult and the largest cases concerning the Executive Branch of the American government.

The OLC is extremely selective in its recruiting. Candidates must have at least a J.D. (Juris Doctor) in law (an undergraduate degree plus 3 years in Law School) in order to qualify as active members of at least one (American) bar association, and have at least one year of experience.

The ideal candidate must have outstanding academic grades, clerkship experience at the highest level, solid education in constitutional law, outstanding writing qualifications, as well as outstanding skills in research.

The turnover in the OLC staff is episodic and often difficult to project, and thus there is no pre-established recruitment program.

There are summer internship programs<sup>19</sup> from which the OLC recruits three or four students, who generally speaking are in the third year of law school.

### **1.3.3 Functions.**

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18 See below: the functions of the OLC.

19 This is not official.

The matters dealt with by the American Office of Legal Counsel concern real and concrete matters, which moreover reflect the complete spectrum of problems normally faced by the Executive Branch in general and the President of the United States in particular.

These concern internal affairs or international relations, administrative regulations, directives and laws relating to government policy or procedures, as well as the power and authority of the different Departments and agencies falling under the Executive Branch; furthermore, the Office of Legal Counsel provides counsel on actions to be undertaken as well as all sorts and manner of current matters.

On the one hand, the President may ask for legal counsel regarding the use of his powers, above all if such use is controversial<sup>20</sup>. On the other hand, the President may also ask for legal advice on how to enforce a law.

The Office of Legal Counsel prepares the formal opinions of the Attorney-General and renders informal opinions and advice on questions of law to the various Federal agencies of the Executive Branch and other components of the Department of Justice.

More specifically, the responsibilities of the Office of Legal Counsel include:

- ❑ Advising the Attorney-General, the White House counsel, all Departments and agencies of the Executive Branch and the different components of the Justice Department on constitutional, legislative and regulatory matters;
- ❑ Resolving legal conflicts within the Executive Branch through formulation of legal opinions that are similar to arbitration awards;
- ❑ Reviewing the constitutionality of laws proposed by Congress;
- ❑ Reviewing the form and legality of all executive orders, proclamations and memoranda that may be issued by the President;
- ❑ Reviewing the form and legality of all orders and regulations that may be issued by the Attorney-General.

The Office of Legal Counsel also provides its own written and oral legal opinions in response to requests made by the President's legal counsel.

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<sup>20</sup> Numerous opinions issued by the American Office of Legal Counsel have accompanied some historical decisions of American presidents, such as for example, military assistance by the United States to Great Britain in 1941, or financial aid to Mexico in 1995.

Most of the requests that are addressed to the Office of Legal Counsel relate to legal questions of a certain complexity and having major importance, or else they may concern two or more agencies that have disagreements among themselves on a particular matter.

The legal counsel given to Federal agencies<sup>21</sup> relates above all to contradictions or vagueness in certain clauses of the agency's charter, more particularly those which involve constitutional questions<sup>22</sup>.

The Office of Legal Counsel also is responsible for providing legal counsel to any executive regarding any constitutional question; it also reviews texts and documents during the preparation phase to see that there is abidance by the Constitution.

The OLC provides counsel for example on the executive's position in matters that may concern or relate to the Constitution or laws or regulations, such as the Administrative Procedure Act, or will provide legal advice where there are conflicts of interest.

The OLC also resolves conflicts that might arise within the Executive Branch so far as concerns the interpretation of the laws that created a particular agency or agencies.

All of the President's executive orders are reviewed by the OLC so far as concerns their form and legality; it also reviews any other decisions and acts that call for the formal approval of the President of the United States.

In addition, the OLC acts also as general legal counsel to the Attorney-General. It reviews draft or proposed regulations issued by the Attorney-General or his or her individual decisions, as well as any text or document that necessitates the Attorney-General's approval.

The Office of Legal Counsel also has a loud voice in the matter of ethics or sensitive subjects implying the interpretation of rules of ethics.

Moreover, in addition to serving as outside legal counsel to the other agencies of the Executive Branch, the Office of Legal Counsel likewise functions as the general counsel to the Department of Justice itself.

It is also responsible for handling a variety of special missions that are entrusted to it by the Attorney-General or the Deputy Attorney-General.

The OLC is not permitted to provide legal counsel to private individuals.

The Attorney-General allows the OLC to publish opinions for the benefit of the Executive, Legislative and Judicial Branches, as well as for the bar associations and the public in general.

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21 Such as for example ...

22 The Federal agencies constitute what is called in the United States the "Fourth Branch", i.e., the branch next to the other branches of the government (executive, legislative and judicial); involved here are autonomous entities which, even if they are formally part of the Executive Branch, have quasi-legislative and quasi-judicial roles.

Not all of the OLC's opinions are published. But from those which are published, one can get a good idea of the scope of its mandate. Volumes 1 to 18 of the published *Opinions of the Office of Legal Counsel* contain the official version of its opinions covering the period 1977 to 1994. Since this Office was created<sup>23</sup>, it has issued major opinions, notably those which have allowed the Attorney-General to counsel the President of the United States at critical times or when major constitutional questions have arisen<sup>24</sup>.

Furthermore, the different memoranda and opinions issued during the year 2000, afford a good idea of the scope and variety of questions posed to the Office of Legal Counsel during that period<sup>25</sup>.

### **1.3.4 Force and Influence of its Opinions.**

The authority of the Office of Legal Counsel to render its legal opinions is derived from the authority of the Attorney-General.

Under the Judiciary Act of 1789, the Attorney-General was authorized to render opinions on questions of law whenever requested by the President or the heads of Executive Branch Departments.

This authority is codified in 28 U.S.C., paragraphs 511 to 513. In application of 28 U.S.C., paragraph 510, the Attorney-General has delegated to the Office of Legal Counsel the responsibility of:

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23 It was explained that the Office of Legal Counsel in its current appellation goes back to 1953 (see text above); thus, taking into account that this Office has existed for a long time, the opinions issued prior to 1953 are presented here as being the opinions issued by the OLC.

24 Such as, for example, the opinion rendered in 1940 which allowed President Roosevelt to transfer 50 destroyers to the United Kingdom to help that nation in its anti-submarine warfare against the Germans, or else the opinion rendered in 1941 concerning the balance of powers between President and the Congress, or even further, the opinions rendered in 1957 that helped President Eisenhower to send in the [Army] National Guard at Little Rock, Arkansas, or even further still, the opinions rendered by the OLC in 1962 in connection with the Cuban missile crisis, or in 1970 in connection with the Vietnam War, or the 25 opinions rendered during the 1979-80 hostage crisis in Iran; and finally, there are the examples of the opinions rendered by the American Office of Legal Counsel regarding the implementation of the twenty-fifth amendment to the Constitution following the attempted assassination of President Reagan on March 30, 1981, and the opinions rendered on the issue of veto.

25 The authorization to continue hostilities in Kosovo, the defining of a candidate in the eyes of the law, the analysis of a legal provision governing immigration and nationality, the possibility of prosecuting a President in office, the applicability of the law respecting private life in the White House, the possibility of prosecuting a former President of the United States for the same offenses for which he was impeached by the House of Representatives, but acquitted by the Senate, the applicability of the law governing vacancies in Federal posts as well as positions in the International Monetary Fund and the World Bank, the legal value of a presidential directive, as compared to an executive order, etc.

- Preparing the formal opinions of the Attorney-General;
- Rendering opinions to the various Federal agencies;
- Assisting the Attorney-General in the performance of his duties as the President's legal counsel;
- Providing opinions to the Attorney-General;
- Providing opinions to the heads of the different organizational units of the Department of Justice (28 C.F.R., paragraph 0.25).

The OLC itself hasn't any authority: **This is an Office whose decisions are not binding nor executory.**

In fact, the Office of Legal Counsel draws its power or authority only if the Attorney-General chooses to follow its opinions, with the same thing applying to the different components of the Executive Branch and even the President; the reality is that this is more often the case than not<sup>26</sup>. Moreover, the opinions rendered by the Attorney-General concern only the Executive Branch.

The force and/or influence of the opinions of the Office of Legal Counsel does not in any way alter the powers of the legislature nor those of the judiciary.

As proof thereof, so far as concerns the Legislative Branch, it is very clear that the opinions of the OLC have no legal or regulatory value, and that they are not at the top of the hierarchy of laws.

So far as concerns the Judicial Branch, one might even conceive that judges could be opposed on technical grounds to an opinion of the OLC, and therefore overturn on grounds of illegality a decision made by the President based upon the opinion of the Office of Legal Counsel.

In other words, the separation of powers is in no way altered by the importance given to the OLC.

Thus the concept of a government by law is reinforced by the fact that every decision made not only by the Executive Branch, but also by the President of the United States, is subject to the rule of law.

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26 There are few cases in which the President has not agreed with the Office of Legal Counsel.

## **2. COMPARISON OF THE AMERICAN AND RWANDAN LEGISLATIVE SYSTEMS INsofar AS CONCERNS THE OPERATION OF AN OFFICE OF LEGAL COUNSEL.**

In order to get a better idea of the feasibility of establishing a Rwandan Office of Legal Counsel within the Ministry of Justice, it is first essential to compare the American and Rwandan constitutional and institutional systems as they would affect or be of concern to the Ministry of Justice.

Thus, it is absolutely necessary to have an accurate view of the mechanisms existing today in Rwanda, whether this involves principles embodied in the Rwandan constitution or in the role of the Ministry of Justice, including the agencies falling under the Ministry of Justice that would be affected by the establishment of an Office of Legal Counsel, namely the State Legal Affairs & Litigation Department (SCAJE) and the Office of Legislation and Community Affairs (DLSC).

It should be understood that this presentation is by no means exhaustive, but rather that it serves solely to emphasize what is pertinent to the study that forms the subject matter of this report.

### **2.1 As regards the Constitutional Context.**

Rwanda, a former Belgian colony, gained its independence in 1962. Prior to that, its law was composed of laws borrowed from the Congo, i.e., Belgian-inspired, but with specific provisions<sup>27</sup>.

The first constitution of the Republic of Rwanda was enacted on November 24, 1962, and decreed the abolition of the monarchy. It was followed by another constitution adopted in October 1978 and enacted into law on December 20<sup>th</sup> of that year. On May 30, 1991, a third constitution was adopted, and this one became effective on June 10, 1991.

The Arusha Peace Accords dated August 4, 1993, composed of seven different documents, called for the creation of a broad-based transitional government, a transition National Assembly and a transition period of 22 months that would end with the adoption of a new constitution.

Following the civil war and its attendant genocide, the Rwandan Patriotic Front (FPR) reaffirmed its intent to abide by the Arusha Peace Accords and the primacy of law, all while recognizing the 1991 constitution. This declaration by the FPR dated July 17, 1994, resulted in the Protocol of Agreement signed on November 24, 1994. This document provided for another distribution of seats in the transitional National Assembly, which adopted the Basic Law of the Rwandan Republic, and in turn that law would later be proclaimed by the President of the Republic and the Prime Minister.

The Basic Law, currently in force, stipulates that the Constitution of the Rwandan Republic is composed of the constitution of June 10, 1991, the Arusha Peace Accords of August 4, 1993, the FPR declaration of July 17, 1994, and the Protocol of November 23, 1994.<sup>28</sup>

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27 It was in 1940 that the Belgian government made the Congo Criminal Code applicable to the territories of Ruanda-Urundi.(\*). The Congo Criminal Code was made mandatory in Ruanda-Urundi by the ordinance of 1927, 1936 and 1951 (see *Introduction au Droit Rwandais* [Introduction to Rwandan Law] by Martin Imbleau and William A. Schabas, Editions Yvon Blais, Inc., 1999, page 5).

28 Today, Rwanda is governed constitutionally by various documents, the constitution of May 30, 1991 and the Arusha Peace Accords being two of them. The latter is actually seven distinct documents signed between the government of the Republic and the Rwanda Patriotic Front. In addition to the provisions relating to the transition period, these accords have contributed several modifications to the different Rwandan institutions and replace several provisions of the 1991 constitution (Article 3 [1], Arusha I), and the amendments required by the Accords were later implemented by Law 18/93 of August 3, 1993. Later, and for reasons that are well-known, the Declaration of July 17, 1994, of the Rwandan Patriotic Front was approved by eight other political forces of the country, which allowed for the signing of a Protocol of Agreement on November 24, 1994. It was then that the Basic Law of the Rwandan Republic was enacted, a law that is still in effect today, stating that the constitution of the Republic of Rwanda will henceforth be composed of several documents, i.e., the constitution of June 10, 1991, the Arusha Peace Accords of August 4, 1993 (Article 3, Arusha I), the Declaration of July 17, 1994, of the FPR, and the Protocol of November 24, 1994. Since the time that the Basic Law came into effect, two minor amendments have been made to the document: one dated January 18, 1996, and another dated August 22, 1996. It is moreover stipulated that in the event of a conflict between the different legal texts, the Arusha Peace Accords will take precedence over the 1991 constitution (Article 3 [2], Arusha I), and that the FPR Declaration of July 17, 1994, will take precedence over the Peace Accords and the Protocol of November 24, 1994 (Article 2 L.F.).

(\*) **Translator's Note: The spelling of modern-day Rwanda and Burundi prior to independence from Belgium.**

At the present time, a new constitution is being prepared. It will have to be voted on by the transitional National Assembly in March 2003, since the transition period is scheduled to end in July 2003.

It furthermore appears that a number of Rwandan statute law texts have become either obsolete because they date back to the colonial period, or because they are unsuited to the new socio-cultural and economic context of modern-day Rwanda.

Without it being necessary to go into a detailed analysis of the Rwandan constitution, it should nonetheless be remembered that this document established, for the transition period and for the current drafting of the new constitution, a strong executive, a pronounced separation of powers and the affirmation of the rule of law. The Basic Law is founded on several general principles, one of which is the primacy of the law (reference), with a separation of powers between the government's executive, legislative and judicial branches.

Involved here is without any doubt a context that brings together all of the conditions for establishing an American-style Office of Legal Counsel in Rwanda:

- a) The Office of Legal Counsel must not impede the operation of judicial power, which ultimately rests with the Supreme Court;
- b) The President and the agencies of the Executive Branch should have available to them an effective Office of Legal Counsel to assist in the making of decisions and in matters with which they are confronted;
- c) The President and the agencies of the Executive Branch must respect the law, both international and domestic law, and it is therefore of importance that they have the kind of Office of Legal Counsel that will be capable to advising them ahead of time what the implications of their actions might be with respect to the concept of a government by law.

## **2.2 Regarding Structure and Functions**

It might have been of interest to study everything that might be relevant to the duties and functions of an Office of Legal Counsel within the Rwandan Executive Branch. Having said this, the purpose of the Terms of Reference given to the International Consultant led him rather to focus his analysis and observations on what [currently] exists within the Ministry of Justice.

At the present time, there is nothing formal which states that within the power and authority of the Minister of Justice is the role of legal counsel to the Executive Branch (i.e., the government and the President). Certain legal advisory duties are presently assigned for example to the Council of State, which moreover constitutes a kind of violation of the principle of separation of powers.

It is obvious that at a time in the history of the country when doctrine and reforms agree on the need to establish institutions that will allow one to contest the administrative legality of certain administrative acts falling under the supreme control of the Supreme Court, it is not healthy to continue having a system in which the Supreme Court, as a component of the Council of State, can be judge and party at the same time. For example, can one imagine the Court confirming the adverse ruling by a lower court or an appeals court against a law or legal text that the Supreme Court had previously, as counsel to the Executive Branch, said was proper?

What is certain is that this confusion of powers, inherited from colonial times, must be replaced by a better system of separation: the Executive Branch acts in abidance with law, the Legislative Branch makes the law under the impetus of the Executive Branch, and the Judicial Branch independently rules on failure to abide by the law.

In such respect, the reforms proposed by the Legal Reform Commission with respect to the Supreme Court<sup>29</sup> are perfectly consonant with this desire to end the double role of the Council of State, which as already stated, violates the principle of separation of powers.

Seeing things from this perspective, it is obvious that the emphasis must be placed on the Ministry of Justice and its Minister in the sense of centralizing within the Rwandan Executive Branch any question dealing with legality (preparation of a law, execution or enforcement of a law, interpretation and opinions given solely to the bodies that constitute the government's Executive Branch).

There are two agencies within the Ministry of Justice that might have the scope of their duties and functions expanded and modified in the case of establishing a Rwandan Office of Legal Counsel: the SCAJE and the DLSC.

### **2.2.1 The S.C.A.J.E.<sup>30</sup>**

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29 Vide infra.

30 The information given in this section of the report was drawn by the International Consultant from documents consulted and interviews conducted with the Attorney-General and Director of the SCAJE, Mr. Alberto Basomengera. More specifically, so far as concerns the legal affairs section, the Consultant met with the director of that section, Mr. Augustin Hayifayi.

The SCAJE is an essential agency within the Ministry of Justice, created by Decree No. 01/03 of the Prime Minister, dated February 24, 2000. This Decree deals with "the establishment and authority of an agency entrusted with government legal affairs and litigation".

This agency, headed by the Attorney-General having the rank of Secretary-General, falls directly under the authority of the Minister. It comprises two sections, one dealing with government-related litigation<sup>31</sup> and the other with government legal affairs.

### **2.2.1.1 The Attorney-General.**

Article 6 of the aforementioned Decree stipulates that the role of the Attorney-General is:

- a) To ensure the management and coordination of the agency's activities connected with litigation and government legal affairs;
- b) To coordinate any litigation involving government agencies;
- c) To supervise the distribution of cases among the agency's staff involved in government litigation and legal affairs, and to assign to some of them, in the event necessary, private practice attorneys;
- d) To provide oversight of litigation involving the government for those cases assigned to the agency and its attorneys;
- e) **To provide the government with legal counsel with respect to any agreements made or to be made with third parties, and with respect to any other question or matter submitted to it for advice.**
- f) To maintain contact with judicial bodies;

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31 The litigation section deals with around 800 to 900 cases daily, running the gamut from traffic accidents (usually settled), ordinary public sales (post-sale disputes), doubly-allocated parcels of lands (highly current), appeals for annulment before the Council of State (around a dozen, most of all against regulatory rulings), appeals before the lower administrative courts, disputes over government acts, expropriation, etc. (litigation respecting government contracts is still not developed). The litigation section also serves as litigation support for decentralized agencies, for example in town or village disputes, refusal to enforce judgments, trespassing cases, permits to extract or remove salt, etc.

- g) **To propose to the government any measure entailing the improvement of the agency's activities.**

### **2.2.1.2 The Legal Affairs Section.**

The functions of the government legal affairs section are:

- a) To participate in the formulation of bi-lateral or multi-lateral agreements to be made by the government;
- b) To participate in the formulation of financing agreements;
- c) To give legal opinions on any agreement made or to be made by the government;
- d) To prepare private seal instruments for the government;
- e) To give legal opinions upon request<sup>32</sup>.

Within the SCAJE, the staff assigned to one section may be called upon to work in another section, if needed.

Nearly all of the SCAJE staff are lawyers. As has been seen, the SCAJE also serves as a law agency for rendering legal opinions and more notably for formulating laws.

In its two sections - litigation and government legal affairs - the SCAJE comprises close to ten Ministry-level attorneys.

There are around ten other attorneys who are based with such government agencies as the BNR, the Prime Minister's Office, the Civil Service, etc.

So far as concerns institutional relations, the SCAJE is also involved in decentralization matters, in disputes between Ministries, in the preparation of a Minister's opinions, etc. However, it appears that its actions in these areas are a thing of the past.

Moreover, the Consultant was told that the SCAJE legal affairs section has still not defined its own methodology within the framework of its mandate.

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32 Article 8 of the aforementioned Decree and Table of Organization of the Ministry of Justice.

Up until now, the legal affairs section has been most concerned with the preparation and legal review of loan agreements, for example with the World Bank or the African Development Bank (qualification of signatories). It is also responsible for verifying that a treaty accords with Rwandan law before such treaty can be signed. It also provides legal opinions when involved in a jurisdictional question between Ministries or a question of relations between Ministerial offices.

It appears that certain Ministries ask the SCAJE for legal opinions, even though they may have their own legal departments (for example, the Civil Service Administration).

### **2.2.2 The D.L.S.C.<sup>33</sup>**

Contrary to the SCAJE, the DLSC is not governed by a Decree. Its structure and its functions derive rather from a document entitled "Organic Framework of the Ministry", which indicates the following elements so far as concerns the DLSC:

- a) Coordination of the country's legislative activities;
- b) Certificate *[sic]* of law and custom;
- c) Relations with domestic, foreign and international law agencies;
- d) Opinions on demands for extradition;
- e) Assistance with oversight of agency staff members;
- f) Preparation of the annual reports of the agency management.

So far as concerns the Legislative and Jurisprudence Division, the functions of that unit are as follows:

- g) Preparation of legislative bills, decrees and regulations;
- h) Coordination of legislative work initiated by the legal departments of the various Ministries;

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<sup>33</sup> The information given in this section of the report was drawn by the International Consultant from pertinent documents and interviews conducted with the Mr. Jean-Marie Rusaku, Director of the DLSC.

- i) Legal opinions upon request;
- j) Examination of cases involving Presidential pardons and conditional release from imprisonment.

The role of the DLSC (Legislative Division) is most of all to coordinate legislative activities at the national level. For such purpose, its staff prepares the language for proposed laws, decrees and other legal texts, or else provides opinions on legal texts prepared by other Ministries.

The opinions of the DLSC may be requested in connection with government contracts, and the agency may be consulted for its opinion on any other problem.

According to what was told the Consultant, up to now there has not been any cooperation between the SCAJE and the DLSC, and the Consultant was even told that "such a thing could not happen".

If a case appears to be headed towards litigation, it is routed to the SCAJE staff attorneys, because the DLSC "operates at the theoretical and policy levels".

In the area of treaties, the DLSC examines each draft and determines whether or not there is any conflict between the proposed (international) treaty and the Basic Law.

The DLSC prepares legislative bills and Presidential decrees for ratification, while the SCAJE is more involved with the negotiation of treaties.

The DLSC is also involved with conforming domestic law to international law, providing technical and logistical services, but without intervening in any step along the way that would encroach on the jurisdiction of the SCAJE or the Ministry of Foreign Affairs.

Finally, the DLSC has another branch, the Communities Division, but that has no connection to the subject matter of this report<sup>34</sup>.

## **2.3 Comments.**

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34 This Division deals with vital statistics and registry matters (e.g., certificates of nationality, name changes, marriage licenses), and also registration of not-for-profit associations (the Ministry of Local Affairs is the Ministry responsible for oversight of these associations); in addition, this Division is responsible for legal documentation.

The analysis given below indicates the operating and jurisdictional functions of what could become the Rwandan Office of Legal Counsel of the Ministry of Justice, which functions are today dispersed among several agencies within MiniJust.

Moreover, there is overlapping of jurisdictions and functions, and at the same time there is an absence of cooperation that can only act as a burden on the quality of legal counsel services provided by the Ministry of Justice.

The following table shows the concurrent activities of the SCAJE and the DLSC in the light of their potential roles as an Office of Legal Counsel.

<b>SCAJE</b>	<b>DLSC</b>
<p><b>a) To provide legal counsel to the government on all agreements made or to be made with third-parties and on any other question submitted to it for its expertise.</b></p> <p><b>b) To maintain relations with judicial bodies.</b></p> <p><b>c) To propose to the government any measure looking towards the improvement of the agency's activities.</b></p> <p><b>f) To participate in the preparation of bi-lateral or multi-lateral agreements to be made by the government.</b></p> <p>g) To participate in the preparation of financing agreements.</p> <p>h) <b>To provide its legal opinions</b> on any agreement made or to be made by the government.</p> <p><b>i) To prepare private seal instruments for the government.</b></p> <p><b>j) To give legal opinions upon request.</b></p>	<p>a) Coordination of the country's legislative activities.</p> <p><b>b) Relations with domestic, foreign and international law agencies.</b></p> <p>c) <b>Opinions</b> on demands for extradition.</p> <p>d) Assistance with oversight of agency staff members.</p> <p><b>e) Preparation of legislative bills, decrees and regulations.</b></p> <p>f) Coordination of legislative work initiated by the legal departments of the various Ministries.</p> <p><b>i) Legal opinions upon request.</b></p> <p>h) Its staff prepares the language for proposed laws, decrees and other legal texts, <b>or else provides opinions on legal texts prepared by other Ministries.</b></p> <p><b>i) The opinions of the DLSC may be requested</b> in connection with government contracts.</p> <p><b>j) The DLSC may also be consulted for its opinion on any other problem.</b></p>

<b>SCAJE</b>	<b>DLSC</b>
<p>k) So far as concerns institutional relations, the SCAJE is also involved in</p>	<p><b>k) In the area of treaties, the DLSC examines each draft and determines</b></p>

<p>decentralization matters, in disputes between Ministries, etc.</p> <p>l) It prepares the Minister's opinions. However, it appears that its actions in these areas are a thing of the past.</p> <p>m) <b>The Legal Affairs Section is also responsible for verifying that a treaty accords with Rwandan law before such treaty can be signed.</b></p> <p>n) <b>It also provides legal opinions when involved in a jurisdictional question between Ministries or a question of relations between Ministerial offices.</b></p> <p>o) It appears that certain Ministries ask the SCAJE for legal opinions, even though they may have their own legal departments (for example, the Civil Service Administration).</p>	<p><b>whether or not there is any conflict between the proposed (international) treaty and the Basic Law.</b></p> <p>l) <b>The DLSC prepares legislative bills and Presidential decrees for ratification, while the SCAJE is more involved with the negotiation of treaties.</b></p> <p>m) The DLSC is also involved with conforming domestic law to international law, providing technical and logistical services, but without intervening in any step along the way that would encroach on the jurisdiction of the SCAJE or the Ministry of Foreign Affairs.</p>
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The rationalization of the legal advisory service within the Ministry of Justice has at the same time an effect on the quality of its legal counsel, on the amount of counsel it provides and also on the credibility of the Ministry itself.

This is not merely a question of choice, but rather one of the credibility of the government's will and desire to establish a TRUE state of law within the country at a critical time in its history<sup>35</sup>.

In the mind of the Consultant, it is of capital importance to give the Ministry of Justice and its sitting Minister the authority and capacity to respond to the growing number of requests from the Executive Branch for its legal opinions, which in the 21<sup>st</sup> century deals with reforming laws and institutions, and even their mental outlook and behavior. It would be useless to proceed without respect for the rule of law and without the concept of a government by law being applied daily.

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35 Particularly at the end of the transition period, which will occur on July 18, 2003.

Furthermore, there is a correlation between abidance by the concept of government by law and the importance that is attached to the Ministry of Justice in the government, and more particularly, the importance that is attached to its counsel in legal affairs<sup>36</sup>.

The establishment of an Office of Legal Counsel within the Ministry of Justice is therefore essential. It in no way impedes the concept of separation of powers, but on the contrary fosters and promotes it.

In addition, involved here is a major reform which, if it is not implemented quickly, risks seeing the disorderly establishment of legal departments in each Ministry or government agency, something that would not only be inadequate, but also dangerous, since legally-speaking, the Executive Branch would not end up speaking with the same voice.

Finally, it is obvious that the institution known as the Office of Legal Counsel, like other institutions created in Rwanda since 1994, finds its roots in the desire of the government and the President to establish institutions in this country that are inspired by various legal systems (common law, Roman-Germanic legal systems or systems that combine Roman-German legal roots), and taking the very best that those systems have to offer.

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36 In such respect, the most democratic countries with arguably the best governance are those which have attached significance to the office of Minister (or Secretary) of Justice. As an example, in Canada, the Canadian Minister of Justice works to ensure that the Canadian system of justice is fair, accessible and as effective as possible. The Minister assists the Federal government in formulating and developing policies and instituting reforms to the extent required. At the same time, the Minister acts as the government's attorney, providing legal counsel, prosecuting cases falling under Federal law and representing the government of Canada in the courts. By acting as a law office of the Executive Branch of the Canadian government, the Minister of Justice has become highly influential, and also indirectly serves all Canadians. Around half of the Minister's staff is composed of lawyers, with the remainder being composed of experts and specialists in such fields as research, the social sciences, communications, etc.; some are law clerks and members of support teams. One of the duties of the Ministry of Justice is to examine all legislative bills and ensure that they are legally valid as well as succinct in the official languages of the nation. The Ministry performs this task by providing legal opinions or examining the legal opinions submitted by another department, and also providing legal counsel and services upon request. The mission of the Ministry of Justice is to support the Minister of Justice by working to keep Canada a fair and just nation in an environment that is marked by an equitable, effective and accessible justice system with universal respect for law. The Ministry also provides high-quality legal services and counsel to the government and its various departments and agencies; it also safeguards the rights and liberties of the people, the law and the constitution.

### **3. A RWANDAN OFFICE OF LEGAL COUNSEL.**

The idea of establishing an Office of Legal Counsel must be in accord with the specifics of the Rwandan legal culture, and naturally in accord with the balance of powers embodied in the Rwandan constitution, which of course includes the powers vested in the Ministry of Justice and its incumbent Minister.

The comments made below take this into due consideration. Having so stated, it would be opportune to re-state that the very notion of an Office of Legal Counsel is - as has been stated previously - in no way an impediment on the broad principles found in the Rwandan constitution nor on the concept of a balance and separation of powers. Indeed on the contrary, the idea of an Office of Legal Counsel provides a new vigor to the aforementioned concept of balance and separation of powers at this most propitious time.

#### **3.1 Advantages and Disadvantages of the Establishment of an American-style Office of Legal Counsel within the Rwandan Legal Context.**

The first question that is posed in such respect is that of knowing whether the establishment of this Office of Legal Counsel would or would not be advantageous both for the Ministry of Justice and the Executive Branch in its entirety and also for the nation as a whole.

The International Consultant has seen no disadvantage in establishing such an Office of Legal Counsel. On the contrary, some of the advantages in establishing such an institution are given below:

- 1) It would implement the idea of a single office within the Ministry of Justice and more generally within the Rwandan Executive Branch; it would allow for developing the idea and custom that every time a major question of law arises within the Executive Branch, that question would be posed to the Office of Legal Counsel, and every time a major decision is to be made by the Executive Branch (the government and the Presidency), it would be first studied from the legal angle by the Office of Legal Counsel;

- 2) The creation of an Office of Legal Counsel would allow for better standardization of procedures: the same staff, trained to handle the questions and matters posed to it, could develop its own methodology, and therefore itself design the broad outlines of its functions, contingent upon its experience;
- 3) The establishment of such an office would promote the idea that every major decision to be made by the Executive Branch (government and Presidency), irrespective of its nature, i.e., domestic or international, political or non-political, would first and systematically be prepared for study as to its legal feasibility and consequences;
- 4) The establishment of an Office of Legal Counsel would constitute a rationalization of legal services within the Rwandan Executive Branch. Instead of having separate legal departments in each Ministry, all of these legal departments could be combined under one roof to the total benefit of the nation;
- 5) The creation of this Office of Legal Counsel would empower the Minister of Justice not only from the point of view of becoming the guarantor of a government by law, but also as the focal point of daily access by Rwandans;
- 6) The establishment of this Office would meet the desire for an effective Executive Branch that would be better prepared to prepare, formulate and execute its decisions;
- 7) The establishment of this Office would allow for a useful and practical implementation of decisions made by the Council of Ministers that are in accord with any law or legal text that first had to pass muster by the Ministry of Justice<sup>37</sup>.
- 8) The creation of an Office of Legal Counsel would develop the concept of a "lawyer-client" relationship between the different components of the Executive Branch (Presidency, government, Ministry of Justice, government entities and agencies, etc.), which in turn would constitute an improvement in the hierarchical-style relationship.

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<sup>37</sup> Which is currently not the case. This constitutes an anomaly in the legal system presently used by the Rwandan government.

### **3.2 Name.**

In the mind of the International Consultant, the name of this Office, which is an internal department, is not of paramount importance. Having said this, this Office could be given one of the following names:

- 1) Executive Branch Legal Counsel;
- 2) Office of Legal Counsel
- 3) Office of Legal Counsel to the Executive Branch;
- 4) Division of Legal Counsel;
- 5) Executive Branch Legal Counsel Agency.

It is obvious that these names are mere sampling and therefore are only suggestions.

### **3.3 Structure**

In the first place, it is realistic to believe that the establishment and implementation of an Office of Legal Counsel would not deprive the other Ministries of the Executive Branch or the Office of the President from having their own legal departments. The establishment of an Office of Legal Counsel would solely constitute a rationalization of the desire to have better accuracy and efficiency in providing legal services within the Executive Branch.

Thus it is entirely conceivable that each Ministry would maintain its own lawyers for daily business, and even the President would keep his staff of lawyers<sup>38</sup>.

In other words, the establishment of such an Office would in no way affect the structure of the Executive Branch in general, because it would concern - at least initially - only the Ministry of Justice and depend solely on the will of the Minister to proceed therewith.

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<sup>38</sup> Since the comments of the International Consultant are centered around his Terms of Reference, which concern only the Ministry of Justice, this proposal does not in any way constitute an attempt to go beyond his mandate by discussing the structure of other Ministries or that of the Presidency.

Under these conditions, the Consultant proposes that the Rwandan Office of Legal Counsel be an autonomous bureau of the Ministry of Justice, under the direction of the Attorney-General, and have a structure inspired by the American Office of Legal Counsel.

This Office would have available to itself all of the necessary material (education, training, internship, documentation, access to Internet law-related data banks) and human resources

required for the accomplishment of its tasks. It would be composed principally of experienced lawyers trained mainly in public law, but also having solid knowledge of private law.

The advantage of such a structure is three-fold:

- 1) First, it would provide for a kind of standardization of procedures and objectives through the establishment of a staff that could very quickly formulate its own doctrine and own methodology, far better than what could be done by isolated lawyers sitting in other Ministries, even if they were the best;
- 2) Secondly, it would constitute a powerful tool for promoting and defending the concept of a government by law;
- 3) Thirdly and finally, it would allow all considerations to be taken into account in the government's decision-making process, namely financial, technical, political, etc.

Thus, the first step would be to harness the lawyers of the SCAJE and the DLSC, and then ask other lawyers from the other Ministries to join the team; after that, there might be also be outside recruitment for the purpose - at least at the outset - of training a staff of ten to fifteen lawyers.

Another question connected to that of staff quality is the question of compensation of these attorneys, because the aspects of the quality and prestige of the Office of Legal Counsel must seriously consider the question of adequate compensation. If not, there is a great risk that once the Office is established and after these lawyers gain one, two or three years of experience, they will become the targets of other organizations and consequently look to go into private practice in the hope of attaining a better career.

Therefore, it is essential that the structure in terms of quality and resources meet these desires, unless one prefers to manage the turnover of the attorneys of the Office of Legal Counsel by engaging in on-going recruitment of lawyers in private practice and/or students from, for example, the School of Law<sup>39</sup>.

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<sup>39</sup> Involved here is a traditional practice within the American Office of Legal Counsel, which not only benefits the idea of reasonably-priced legal services, but also makes some excellent lawyers right from the very time or immediately after they graduate from law school.

### **3.4 Scope of Duties and Functions.**

The scope of the Office of Legal Counsel's duties and functions will naturally depend on the will of the Ministry of Justice to give it as much importance as possible.

In the mind of the Consultant, this Office might be entrusted with the following tasks:

- 1) Legal interpretation of administrative regulations upon request of the Ministry of Justice, the Office of the President, the government or a government Ministry;
- 2) Legal review of the form and substance of regulatory enactments and study and analysis of their conformity with the constitution.
- 3) For legislative bills: preparation, formulation, legal review and verification of conformity with the constitution and international treaties;
- 4) Preparation of the technical basis of laws and regulations;
- 5) Support of the government so far as concerns the authentication and legality of laws and regulations.
- 6) Legal counsel to the President, the government, each Ministry and any other department or agency of the Executive Branch regarding any legal matter of importance or one that is complex, or for undertaking a legal study and analysis of the legal environment. In addition, such legal counsel would include an analysis of the legal feasibility and consequences of any major decision made by the government or the President.
- 7) Legal counsel to the Executive Branch respecting any constitutional question.
- 8) Arbitration in the event of a dispute between Ministries or departments or agencies of the Executive Branch regarding the interpretation of one of the constitutional documents, or a law or regulation, or a matter dealing with such Ministries', departments' or agencies' jurisdictions.
- 9) General legal counsel to the Ministry of Justice on any question relevant to its jurisdiction.

- 10) Preparation of special reports and legal opinions on any question raised by the Ministry of Justice or the Minister of Justice within the scope their jurisdictions.
- 11) In the area of international treaties, examination of the consequences of the treaty on Rwandan law and any consequent legislative or regulatory amendments; preparation of legislative bills for ratifying treaties or Presidential decrees having the same purpose;
- 12) Preparation of legal opinions on the administration of justice;
- 13) Legal opinions on legislative and regulatory reforms;
- 14) Formulation of administrative directives to be issued by Ministries and the Executive Branch

Because of the scope of its functions, the Office of Legal Counsel might very quickly Accumulate specialized knowledge and expertise, which in turn can be immediate and permanently placed at the disposal of a government living by the rule of law.

This Office would also work to promote respect of law and personal liberty.

It might also serve as legal support for agencies outside the [various] Ministries and decentralized autonomous agencies, becoming very quickly the sole arm of the Executive Branch for all legal questions arising from the government's activities.

These duties and functions of an Office of Legal Counsel brings under one roof the current duties and functions of the SCAJE and the DLSC, but above all it increases the framework or scope of those duties and functions, since as said, they can be carried out under one roof.

### **3.5 Implementation.**

As already stated, involved here is not merely copying a foreign model and implementing it; on the contrary, it entails taking the best of what exists and trying to adapt it to the current situation in Rwanda.

The reforms outlined here will not prevent other Ministries from retaining their own attorneys so that they can meet their daily legal requirements, both routine and urgent.

The implementation of the notion of an Office of Legal Counsel could begin immediately with a PILOT PROGRAM, during which this Office would be temporarily established through a restructuring of the tasks currently in the hands of the SCAJE and the DLSC, and a temporary assignment of personnel. This would allow training to begin for those who will be responsible for the execution of those tasks, and that training aspect is certainly part of the International Consultant's Terms of Reference.

For such purpose, a forum of thought and discussion might be set up as soon as possible to address the advantages and disadvantages of establishing an American-style Office of Legal Counsel within the Rwandan Ministry of Justice, at the end of which forum the participants may ultimately decide on the scope of the Office's functions and duties, the actual name to be given to it, and the means for making it a reality. This could be done by MSD without delay.

The participants of this forum might naturally be the Minister of Justice, the Attorney-General, the Secretary-General, Mr. Mbagu Tuzinde Mbonyimbuga (the personal assistant of the Minister), the Directors of the DLSC, and any other persons who are interested readers of this report.

Another purpose of this forum might be that of deciding what kind of training or education program would be most appropriate for the staffs of the SCAJE and DLSC to prepare them for tasks that are associated with an Office of Legal Counsel, with the program proposed below by the International Consultant<sup>40</sup> being one example of a training or education program.

After that, the Minister of Justice might decide on the question of changing the table of the organization of the Ministry in order to include the Office of Legal Counsel, after having restructured the functions and duties of the SCAJE and the DLSC.

### **3.6 Related Question: Relations between the American-style Office of Legal Counsel and the Reform Commission.**

Within the framework of the constitutional, legislative and regulatory context that has given rise to the Legal Reform Commission<sup>41</sup>, an indefinite mandate has been given to that Commission<sup>42</sup>. The Commission's mandate was initially six months, it having to expire on June 30, 2002.

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40 See section 4 of this report.

41 In particular, the Basic Law, notably Articles 16-6, 18-5 and 19 thereof, as well as Decree No. 53/03 issued by the Prime Minister on July 27, 2001, creating the Commission.

42 Article 2 of Decree No. 53/03 issued by the Prime Minister on July 27, 2001, creating the Commission.

However, it was renewed once with an expiration date of December 31, 2002, and later renewed again, this time with an expiration of June 30, 2003.

The content of the Commission's mandate derives from Article 3 of the Decree: To formulate legislative bills and review existing laws which are no longer up-to-date<sup>43</sup>. This is long and exacting work, but as of this writing, the Commission has already identified about 30 laws and legal texts which are either obsolete or require work to bring them into harmony with today's realities and thereby attain the objectives of reform<sup>44</sup>.

Among these laws and legal texts, the Commission has identified 11 that are in urgent need of [revision] work<sup>45</sup>, and has already prepared drafts in the three official languages. Quantitatively, the work already completed by the Commission is considerable.

In order to undertake this major project, the Commission studied, analyzed and documented the legal systems and legal experiences of numerous other countries to which the Commission sent its members (Canada, South Africa, Mauritius, Tanzania, Ethiopia, Holland, Denmark, Sweden, Norway). The Commission also shared the legal experiences of representatives from other countries (Cameroon, Senegal, Argentina, Spain, Belgium, France, Kenya, Uganda, United States, Burundi, Germany and Italy) at a seminar held in March 2002.

Despite the immensity of the efforts made by the Commission members in the small amount of time allotted them, it was still able to complete the following work:

- a) Revision of some laws and other legal texts, followed by comments made by persons and institutions to whom the revisions were sent;
- b) Harmonization of the French and English translations with the original text in Kinyarwanda;

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43 Article 4 of the Decree details and spells out this mandate: to undertake an inventory of all laws and regulations that are no longer suitable to or in line with the country's realities; to identify those areas calling for the formulation of new laws; to prepare new decrees and legislative bills for review and submit same to the Minister of Justice; to respond to the requests by the Minister for opinions on different laws and regulations.

44 Among these legal texts are more notably: The Code governing Judicial Organization and Jurisdiction; the Supreme Court Act; the Public Prosecutor's Act; the Law governing Counsel to the Magistrature; the Government Agencies Act; the Criminal Procedure Code; the Civil Procedure Code; the Code of Conduct; the Law governing Evidence; the Magistrates' Status Act; the Gaming Law; the Criminal Code; the Real-Estate Registration Act; the Corporation Law, etc.

45 Among these legal texts are more notably: The Code governing Judicial Organization and Jurisdiction; the Supreme Court Act; the Public Prosecutor's Act; the Law governing Counsel to the Magistrature; the Government Agencies Act; the Criminal Procedure Code; the Civil Procedure Code; the Code of Conduct; the Law governing Evidence; the Magistrates' Status Act; and the Gaming Law.

- c) Preparation of new laws and legal texts and supervision of their final versions (revision and translation).

The Consultant was struck by the fact that the Commission was able to:

- a) Integrate mechanisms into the new law that derived from various legal origins and cultures (for example, the civil law and common law systems, as well as combinations thereof).
- b) Innovate by creating original mechanisms and institutions for the purpose of meeting the specifics of Rwandan social and legal culture<sup>46</sup>.
- c) Considerably simplify the existing mechanics of Rwandan statute law in order to create new law that is closer to the needs of the people, and law that can be more quickly and effectively administered and interpreted by the courts.

The Reform Commission is an essential vehicle within the Ministry of Justice of Rwanda, not only because it is composed of eminent jurists having both international experience and experience in comparative law, but also because it is operating at a crucial moment in Rwanda's history (end of the transition period, a new constitution, the Gacaca courts, legal reforms, etc.).

At a time when Rwandan officials are on the way to finalizing the proposed constitution, it would appear absolutely essential that the country continue to put forth every possible effort to build a new legal model, taking the best principles and mechanisms from the great legal traditions of the world while always keeping the original culture of the country in sight.

This can only be done by an Office of Legal Counsel, whose mandate is closely linked to current affairs.

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<sup>46</sup> For example, the prior mandatory mediation in the case of certain criminal infractions: see below.

#### **4. TRAINING OF AND ASSISTANCE FOR THE STAFFS OF THE DLSC AND THE SCAJE IN FUNCTIONS THAT THEY ARE EXPECTED TO PERFORM AS PART OF AN OFFICE OF LEGAL COUNSEL.**

Following his interviews, his findings and analyses, the Consultant proposed<sup>47</sup> that the Rwandan-style Office of Legal Counsel be an autonomous agency of the Ministry of Justice, under the direction of the Attorney-General, with a structure inspired by that of the American Office of Legal Counsel, but with a broader range of functions and duties.

The general purpose of the training would be to improve the knowledge and skills of the Ministry's attorneys, who have already been selected for their expertise, and who already have demonstrated their experience.

##### **4.1 General Objectives of the Training.**

The general objectives of the proposed training could be the following:

- a) To improve the knowledge, expertise and already-acquired experience of MinJust's attorneys, who would be the immediate beneficiaries of such training;

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<sup>47</sup> See the memorandum sent by the Consultant to the Minister of Justice in October 2002, entitled "AN OFFICE OF LEGAL COUNSEL TO MINIJUST".

- b) To allow MiniJust's attorneys to become immediately ready to take on the tasks that will be entrusted to the Office of Legal Counsel;
- c) To allow MiniJust's attorneys to develop their so-called legal reflexes quickly, which will enable them to act as sponsors and promoters of the concept of a government by law, as well as of democracy and sound governance.

## **4.2 Specific Objectives of the Training.**

The specific objectives of the proposed training might be the following:

- a) **To develop** a mind for analysis and summary; to develop writing and presentation skills; to develop skills in presenting oral arguments, as well as a good understanding of the mechanisms of analysis in comparative law;
- b) **To improve** knowledge already acquired in both public and private law;
- c) **To bring out** a sense of active participation in the process of democratization, decentralization and good governance within the concept of a government by law;
- d) **To foster** promotion and respect for law and personal liberty;
- e) **To standardize** procedures and desired objectives so as to provide legal support for agencies outside the Ministries and for the decentralized agencies, while establishing a single office within the Executive Branch for all legal questions that may be generated by the Executive Branch.

## **4.3 Training Method.**

The training method builds on the skills and experience already acquired by the Ministry's attorneys. Thus, it is interactive and prospective:

- a) **Interactive:** Allows the staff of attorneys to formulate its own methodology.

- b) **Prospective:** Allows the attorneys to blend legal considerations with other considerations such as financial, technical, political or others that are at the foundation of government decisions.

#### **4.4 Content of the Training.**

The content of the training would be directed both to the scope of the Office's duties and functions and to the objectives that relate to the future tasks of the attorneys.

Thus, the following content is proposed:

- a) Preparation of legal opinions and special reports (analysis, summary, language, presentation);
- b) Analysis of legalities (techniques for achieving conformity contingent upon the hierarchy of laws and the grounds for annulment in substance and form of administrative acts);
- c) Arbitration techniques (analysis of facts, positions of the parties, de facto and de jure aspects of the problem, solutions drawn from statute law, reasoning for solutions to be applied);
- d) Analysis techniques respecting international treaties (analysis of the impact of the treaty on domestic law; analysis of the substance and form of the treaty; monitoring of negotiations and preparation for ratification);
- e) Formulation of Ministerial and Executive Branch administrative directives (constitutional, legislative and regulatory contexts, specifications, legal scope).

#### **4.5 Organizing the Training.**

The training may be organized as a seminar that could be fitted in during the workday of the attendees.

- a) **Duration of the training:** two weeks for 5 days a week, consecutive or non-consecutive, depending on the availability of the participants; the distribution of the training could be split for each group (for example, the DLSC in the morning and the SCAJE in the afternoon, or vice-versa) in 4-hour sessions.
- b) **Candidates for the training:** The attorneys of the DLSC, the SCAJE and any other department or division of the Ministry of Justice (maximum 10 persons each time).
- c) **Selection of candidates for training:** The selection of candidates for training can/must take into consideration experience, education, [professional] profile, desire or ambition, and the interests of the agency or department or division.
- d) **Format of sessions:** Each session (4 hours) covers one theme or issue, as described above (see "Content of the Training"), and will include:
  - i) Analysis of experience already acquired;
  - ii) Theoretical approach;
  - iii) Practical exercises and written and oral presentations;
  - iv) Questions and discussions;
  - v) Evaluation.

At the Ministry's convenience and as an alternative, a seminar may also be organized at a site to be determined, which seminar will be specially designed for training. In such case, the duration of the seminar will be one week.

## CONCLUSIONS AND RECOMMENDATIONS

The International Consultant has undertaken a study of the American-style Office of Legal Counsel and made a presentation thereof to the Attorney-General as well as to the DLSC. The purpose of this presentation was to describe the Office of Legal Counsel within the American legal context, and to see how an institution of this kind could be established *mutatis mutandis* in the Rwandan legal context.

The International Consultant has also undertaken an analysis of the Rwandan legal context from the constitutional aspect to the table of organization of the Ministry of Justice, while analyzing the respective duties and functions of the DLSC and the SCAJE.

Following that, the International Consultant studied the factors and elements that would go into establishing a Rwandan Office of Legal Counsel, notably with respect to its advantages in the light of the current structure of the Ministry of Justice.

Thus, the International Consultant recommends:

- a) That an Office of Legal Counsel be established within the Ministry of Justice of Rwanda;
- b) That this Office of Legal Counsel be vested with all of the legal advisory functions currently assumed by the SCAJE and the DLSC.
- c) That this major reform be implemented through a pilot program within the Ministry of Justice;
- d) To commence without delay the training of the Office of Legal Counsel's staff.

## ACRONYM LIST

ACRONYM	DEFINITION
BNR	National Bank of Rwanda
	<i>Banque Nationale du Rwanda</i>
CFR	Code of Federal Regulations
DLSC	Office of Legislation and Community Affairs
	<i>Direction de la Législation et des Services à la Communauté</i>
FPR	Rwandan Patriotic Front
J.D.	Juris Doctor
MINIJUST	Ministry of Justice
MSD	Management Sciences for Development, Inc.
OLC	Office of Legal Counsel
FPR	Rwandan Patriotic Front
SCAJE	State Legal Affairs & Litigation Department
	<i>Service du Contentieux et des Affaires Juridiques de l'État</i>
SLSC	Section for Languages and Conference Services
	<i>Section des Langues et des Services de Conférence</i>

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**Dr. Denis Roumestan, MSD Consultant**